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THE  
SOUTHERN REPORTER,

VOLUME 13,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF ALABAMA, LOUISIANA,  
FLORIDA, MISSISSIPPI.

PERMANENT EDITION.

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JUNE 14—DECEMBER 20, 1893.

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ST. PAUL:  
WEST PUBLISHING CO.  
1894.

KF  
135.54  
56

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SOUTHERN REPORTER, VOLUME 13.

**JUDGES**

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

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**ALABAMA—Supreme Court.**

GEORGE W. STONE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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THOS. W. COLEMAN.	JONATHAN HARALSON.

**FLORIDA—Supreme Court.**

GEORGE P. RANEY, CHIEF JUSTICE.

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**MISSISSIPPI—Supreme Court.**

J. A. P. CAMPBELL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

TIM E. COOPER.	THOMAS H. WOODS.
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# COURT RULES.

## SUPREME COURT OF FLORIDA.

### Rule No. 33.

The party or parties appellant to any appeal or writ of error may dismiss the appeal or writ of error during vacation by filing with the clerk of this court a praecipe signed by his or their attorney of record in this court, dismissing the same, and paying the costs of the appeal or writ of error; and upon an appeal or writ of error having been thus dismissed, it shall be the duty of the clerk to certify the fact of such dismissal to the lower court. The clerk shall keep a docket of causes so dismissed, upon which he shall enter the date of the filing of the praecipe, and of the payment of the costs, and of such certificate.

Adopted August 15, 1893.

Rule No. 2 of the Rules of Practice of the supreme court is amended so as to read:

2. All motions relating to causes before

the court shall be entered on the motion docket, and the affidavits or papers upon which the same are based shall be filed before the hearing thereof. The second Tuesday in each month shall be motion day, and no motion in any appellate cause, other than a criminal or habeas corpus case, will be heard on any other day. Written notice of all motions must be given and be returnable to one of such days, and served at least ten days before the return day. Where any fact not shown by the appeal transcript or processes is relied on in support of or in opposition to a motion, a copy of the evidence of such fact to be used on the hearing must be furnished to the opposite party in due time to permit the same to be met by counter evidence. In case any such Tuesday shall be a legal holiday the motion will not be heard till the following day.

Adopted December 13, 1893.

## SUPREME COURT OF MISSISSIPPI.

### 1.

#### Transcript—When Filed.

In all cases brought to this court by appeal, the transcript of the record shall be filed in the clerk's office on or before the first day of the term, or time appointed for taking up the district to which the case may belong; and no transcript not filed by that day shall be received by the clerk unless ordered by the court, upon affidavit showing good cause for such failure.

### 2.

#### Transcript—How Prepared.

Every transcript of a record brought to this court shall be distinctly and plainly written or typewritten, on paper not less than eight nor more than eight and one-half inches wide, and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, in the left-hand corner, or at or near the center, and there shall be a blank margin at the top of not less than one inch, and on the left of not less than one-half inch, the paper to weigh not less than fourteen pounds to the ream. Tran-

scripts may be typewritten, on linen paper, to weigh not less than eight pounds to one thousand sheets. No carbon or other duplicates will be received, nor will transcripts written or typewritten with copying ink be filed. Such transcripts, whether written or typewritten, shall be prefaced by a suitable index, and shall be securely bound in non-flexible pasteboard covers, with marbled sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding the appellant will be allowed sixty cents per volume, to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit, with the clerk of the court from which the appeal is taken, a binding fee of sixty cents per volume of two hundred and fifty pages. In such case the clerk shall transmit the unbound transcript, with the binding fee, to the clerk of this court. Transcripts shall not be folded, but may be rolled for transmission, if not bound as required; and, if not bound, the sheets shall not be fastened together. No transcript shall be taken from the clerk's

office by any party or counsel until the same shall have been bound.

## 3.

**Transcript—What to Contain.**

A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions, and the order, judgment, or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such commission, shall be inserted in any transcript, except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides those matters required to be embraced in the transcript.

## 4.

**Agreed Transcript.**

By agreement of parties or their attorneys, made in writing, and attested by the clerk of the court in which any cause may be pending or record existing, (which agreement shall be filed, and made a part of the transcript of such record,) such parts of the record and proceedings as shall be so agreed shall constitute the transcript of the record to be brought to this court, and shall be certified as such, and be considered a full transcript in this court for the consideration and final adjudication of the cause here.

## 5.

**Suggestion of Diminution.**

If a record be imperfect, diminution may be suggested by either party, and certiorari awarded; provided it be done in the first week of the term, or within four days after the assignment of errors is filed.

## 6.

**Records and Papers—How Filed.**

No record or other paper shall be considered as filed until so marked by the clerk,—“Process of this court excepted,”—and the clerk shall indorse the date of filing.

## 7.

**Assignment of Errors.**

The appellant shall file on a separate sheet of paper a written or printed statement of

the grounds or points of error relied on, before the call of the docket, on the first day for it to be called, in all cases where the transcript of the record is filed one week before that day, and within the first three days of the time for calling the docket where the transcript is filed within a week of the return day for the appeal, or the case shall be dismissed; and no error not so distinctly assigned shall be argued by counsel or considered by the court.

In appeals returnable at any time, the assignment of errors shall be filed two days before the hearing of the case, unless otherwise ordered by the court; and, where the transcript is filed by order of the court after the return day for the appeal, the assignment of errors shall be filed within two days after the transcript is filed.

## 8.

**Abstracts and Briefs.**

Before any cause will be taken upon submission or heard, the counsel shall furnish the court with a full abstract of all the material matters involved in the consideration of the cause, as they appear in the record, printed, or written in a plain and legible hand; and the counsel on each side shall also, at the time of the submission, file copies of their briefs, printed or written as aforesaid, containing the points and authorities relied on; and no case will be taken on submission, or considered by the court, unless the foregoing requisites be complied with.

## 9.

**Argument.**

Not more than two counsel on the same side, nor a longer time for argument than two hours on a side, will be allowed in any case unless by special leave of the court. Where there are two counsel on the same side, they may divide the time allowed for argument between themselves.

## 10.

**Petition for Reargument—Suggestion of Error.**

Applications for reargument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no reargument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper.

## 11.

**Petition for Reargument—Effect of Adjournment.**

Where an adjournment of the court shall preclude the required presentation of the petition for reargument in open court, its presentation to the clerk, and his filing it within the time prescribed for presenting such petition to the court, shall stay all proceedings under the judgment until the next meeting of the court, when it shall be acted on by the court as if it had been presented to it when it was presented to the clerk, unless a majority of the judges of the court shall certify, in writing, to the clerk, prior to the next meeting of the court, that they have considered the application for a reargument, and have determined to refuse it; and, on receipt of such certificate, such proceedings shall be had as if a petition for reargument had not been presented.

## 12.

**Petition for Reargument—How Prepared.**

Petitions for reargument must be signed by at least three members of the bar, who shall certify that they have carefully read and examined the record and the briefs of counsel, and have read the opinion of the court and the authorities cited, and are satisfied, from such examination and investigation, that such opinion is erroneous.

## 13.

**Reargument—When Heard.**

When a reargument is ordered, the cause shall be placed at the end of the docket of its district, and heard at the same term.

## 14.

**Papers Out of Office.**

When a cause is regularly called on the docket for hearing, if the transcript of the record be not in court, the counsel to whom it is charged by the clerk shall pay a fine of twenty-five dollars.

## 15.

**Motions.**

Every Saturday shall be motion day; and, if counsel be not present and have no brief filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of or dismissed shall be again heard.

## 16.

**Motions Docketed—Reasons Filed.**

No motion shall be heard unless it has been entered on the docket, and the reasons in support thereof filed with the papers on at least a half sheet of paper, one entire day before it is called.

## 17.

**Motion to Dismiss—When Waived.**

When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

## 18.

**Dismissed Cause—How Reinstated.**

No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

## 19.

**Docket—How Called—Delay Cases.**

At each term of the court the docket of each district shall be taken up in its order. But on regular motion day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and, if satisfied of the truth of such suggestion, the court will take up such causes first of their district, and make proper disposition of them.

## 20.

**Failure to Prosecute—Cause Dismissed.**

When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

## 21.

**Calculations.**

When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the court, in writing and figures, with a certificate by some counselor not interested in the cause that the calculation is correct; and no such error will be noticed unless so presented to the court.

## 22.

**Agreement of Counsel.**

No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

## 23.

**Authority of Counsel—When Required.**

On motion supported by affidavit, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this court; and, on failing to produce such authority or furnish such evidence, the appeal may be dismissed.

## 24.

**State Cases—When Heard—Assignment of Errors.**

The docket of criminal cases shall be taken up on the third Monday of the time for call-

ing the docket of each district, and be proceeded with in order; and in such cases the assignment of error shall be filed at least one week prior to said time. Only cases in which transcripts of the record on appeal shall have been filed in this court shall be called, unless sixty days since the date of the certificate provided for by section 69 of the Code of 1892 shall have expired, in which case they shall be called.

The attorney general may at any time bring to the notice of the court any case in which the time for filing a transcript has expired, and move for affirmance of the judgment; and nothing herein contained shall extend the time when, under the law, transcripts should be filed in this court.

## 25.

**When Appellee may not Waive Time.**

After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

## 26.

**Attorneys must be Admitted to Practice.**

Attorneys at law who have not been admitted to practice in this court shall not be permitted to argue orally, or file briefs or any paper, in any cause in this court.

## 27.

**Papers not Filed after Submission.**

The clerk of this court shall not file with the papers of any cause in this court any paper, after the cause has been argued or submitted, except when permission has been given by the court; provided that briefs

may be filed during the day of the submission of the cause.

## 28.

**Original Papers—When Considered.**

Whenever it shall, in the opinion of the judge or chancellor, be necessary or proper that original papers of any kind should be inspected in the supreme court, such judge or chancellor may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

## 29.

**When Record Filed—Continuance.**

If the transcript of the record of any case in which the judgment or decree appealed from is rendered thirty days before the return day in this court shall not be filed before the return day, the case shall be continued, unless, before the expiration of three days after the filing, the appellee shall file with the clerk a written request for the case to be heard at that term.

## 30.

**Bill of Exceptions—How Prepared.**

The court will not accept as the bill of exceptions, in any case, a copy of the record of evidence made by the stenographer; but that record must be used merely as the basis for making up the bill of exceptions, as provided by law, and every bill of exceptions must be prepared according to the form of such bills before stenographers were provided for. Any case presented in disregard of this rule will be dealt with as if there was no bill of exceptions.

In force October 9, 1893.

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THE  
SOUTHERN REPORTER.  
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(45 La. Ann. 770)

**HEINE et al. v. MECHANICS' & TRADERS' INS. CO.** (No. 11,187.)

(Supreme Court of Louisiana. May 8, 1893.)

**VENDOR AND PURCHASER — DOTAL PROPERTY — RIGHTS OF PURCHASER — MARRIAGE CONTRACT — CONFLICT OF LAWS.**

1. The purchaser of dotal property legally alienated has nothing to do with the reinvestment of its value.

2. The husband alone has the administration of the dowry.

3. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation of the dowry. The proceeds of sale stand in lieu of the property itself, and become dotal. If the husband fails to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables for their restitution.

4. A marriage contract executed abroad by persons who have a domicile in the place where it is executed, the parts of the contract relating to the sale of immovable property in Louisiana, must be construed according to the laws of Louisiana.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Michel Heine and others against the Mechanics' & Traders' Insurance Company to compel an acceptance of the title to land pursuant to a contract of purchase. Plaintiffs had judgment, and defendant appeals. Affirmed.

Percy Roberts, for appellant. Charles J. Theard, for appellees.

**McENERY, J.** The Mechanics' & Traders' Insurance Company bought from plaintiffs property situated in New Orleans at the northwest corner of Carondelet and Common streets, and deposited 10 per cent. of the price, \$8,000, in the hands of the real-estate agent through whom the sale was effected. Claire Blanche Marie Louise Heine, wife of Charles Achille Fould, owned one-sixth of said property. On the presentation of the power of attorney of the vendors to execute the sale it was discovered by defendants that Fould and his wife had entered into a marriage contract in France, where they resided, in which it was stated that the property in question shall be alienated only upon the condition that Madame Fould shall reinvest, in accordance with the stipulations of the marriage contract, her share of the proceeds of the sale of said

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property. The marriage contract was demanded by the defendants, which was produced, and a duly-certified copy of the same is in the record. That part of the marriage contract which it will be necessary to consider is as follows: "Article 1. Regime. The future spouses adopt as the basis of their union the dotal regime, as established by the Civil Code, under the modifications hereinafter expressed. \* \* \* Article 5. Alienation of the Dotal Property. Notwithstanding the adoption of the dotal regime, as above stated, Miss Heine, the future wife, shall always have the right, with the authorization of her husband, and without being obliged to fulfill any judicial formality, to alienate, exchange, or transfer by private sale or by public auction all her property, present or future, movable or immovable, \* \* \* shares or undivided portions of property held in common with others. The proceeds of said sales, exchanges, or transfers \* \* \* shall, when received, be invested in the manner hereinafter prescribed." The contract then goes on to enumerate every species of property in which said proceeds may be invested. The list is too lengthy to transcribe it here. It includes every security considered by the spouses available and safe. Among others, it naturally specifies immovables, whether situated in France or in the United States of America, and bonds of any denomination of the United States of America. After this contract had been submitted to the purchaser, he refused to accept title, on the ground that under article 2360, Civil Code, the dotal property of the wife cannot be alienated during marriage, unless its value is contemporaneously reinvested in other immovables situated in this state, and that the obligation of reinvesting the value of such immovable in other immovable property is imposed jointly on the husband of the vendor, and on the vendee. The plaintiffs brought suit to compel defendant to accept title. There was judgment in their favor, and the defendant appealed.

The marriage contract was made in France, where the husband and wife resided and had their permanent domicile. That part of the contract which relates to the ability of the party to transfer the property situated in Louisiana must be governed by the law of Louisiana. *Saul v. His Creditors*, 5 Mart. (N. S.) 569; *Story, Conf. Law*, § 431 et seq.; *Glenn v.*

*Thistle*, 23 Miss. 42; *Depas v. Mayo*, 11 Mo. 314. Article 2360, Civil Code, is a restraint upon the alienation of immovable property, and all restraints on the alienation of land are governed by the *lex loci rei sitae*. *Waterhouse v. Stansfield*, 12 Eng. Law & Eq. 206. Article 2360, Civil Code, is as follows: "Immovables settled as dowry may be alienated with the wife's consent when the alienation of the same has been allowed by the marriage contract; but their value must be reinvested in other immovables." In commenting on this article of the Code, in the case of *Montfort v. Her Husband*, 4 Rob. (La.) 453, this court said: "It has been urged, however, that it was the duty of the purchaser to see that the funds proceeding from the sale were reinvested or laid out as dotal funds for the benefit of the wife. \* \* \* We have been unable to find anything in our law that would favor any such pretension. Article 2341 does not say by whom the investment is to be made, and we are not prepared to say that the purchaser of the dotal property thus legally alienated had any right to interfere in the investment of the wife's funds and in the administration of her dotal effects. This properly belongs to the husband, who alone has the administration of the dowry, (Civil Code, art. 2330;) and it seems to us that all that the purchaser has to do is to pay the amount of his purchase to the husband, who, according to our law, may act alone for the preservation or recovery of the dowry. The proceeds of the dotal property stand in lieu of the property itself. They become dotal, and, as such, they must be given or paid over to the husband. Id. art. 2327. Articles 2355, 3287, Id., which say that 'the wife has a legal mortgage on the immovables and a privilege on the movables of her husband for the restitution of her dowry and for the reinvestment of the dotal property sold or alienated by the husband,' corroborate the view we have taken on this subject, and show clearly that the dotal rights of the wife are so secured by the legal mortgage and privilege thus allowed her that, if the husband fails to reinvest her dotal funds, his own property will immediately become subject to the reinvestment, and will, as such, under the mortgage, stand in lieu of the property itself, to secure the replacing of her dotal effects, (pour le remploi des biens dotaux.)" The sale of the wife's dotal immovable in this case had been made to effect a partition, and the comment on article 2360 was unnecessary, and was *obiter dictum*. But the reasoning we think is conclusive, and applicable to the instant case. While the ownership of the dotal immovable remains in the wife, the husband alone has the administration of it. Civil Code, art. 2350. "Immovables settled as a dowry cannot be alienated or mortgaged during the marriage by the husband or wife, nor by both together, except as is hereinafter expressed." Id. art. 2357. "Among the exceptions is that they may be alienated with the wife's consent when it has been allowed by the marriage contract, but their value must be reinvested in other immovables." Id. art. 2360. There is no

reason why the exception granted in this article should not fall under the same rules which govern the alienation of the dotal immovable in other cases where its alienation is permitted. The condition in the article is that the alienation is allowed in the marriage contract, and the declaration in the article that their value must be reinvested in other immovables is no limitation upon the power to alienate. It would practically render the article inoperative, and would impose upon the vendee such responsibilities as no purchaser would assume. If he be compelled to see that the value of the immovable is reinvested in other immovable, the duty to investigate the title of the other immovable and its value would necessarily be an accompanying duty also. The husband has the undoubted right to receive the price of the sale as the administrator of the dowry. Article 2350, Id., declares that the wife cannot deprive him of it. The article 2360 certainly did not intend to repeal or modify said article. Article 2360, Id., intended that the husband, as administrator of the dowry, should reinvest the value of the dotal immovable, alienated in other immovable property, and until he does so article 2376, Id., gives the wife a legal mortgage on his immovable, and a privilege on his movable property. If he reinvests it in her own name, it is still dotal property. Article 2356, Id. It is claimed that the case of *Belouguet v. Lanata*, 13 La. Ann. 2, supports the views of defendants in the interpretation of the article 2360, Civil Code. But in this case the court said: "But the question here is not, what might the parties have done? but what have they done? not what the Code means, but what the marriage contract means?" The marriage contract allowed the sale of the property with the wife's consent. It was mortgaged for the avowed purpose of paying off her old debts. It was decided that under the power to sell allowed in the marriage contract she could not mortgage. The case has no bearing on the issues involved here.

Judgment affirmed.

(45 La. Ann. 833)

STATE ex rel. ABRAHAM v. JUDGES OF  
FIFTH CIRCUIT COURT OF APPEALS  
et al. (No. 11,272.)

(Supreme Court of Louisiana. May 8, 1893.)

COURTS—JURISDICTION—LOUISIANA CIRCUIT  
COURT OF APPEALS.

1. Where a defendant against whom a judgment has been rendered in the district court for an amount within the appellate jurisdiction of the court of appeals takes an appeal from the judgment, returnable to the latter court, and the appellee moves in that court to dismiss the appeal on the ground that the allegations of the petition show a "matter in dispute" within the jurisdiction of the supreme court, the court of appeals has, for the purposes of a decision on the motion, the right to examine the nature of the cause of action, the pleadings as a whole, and the evidence and cause of proceeding in the lower court, and is not restricted to the prayer of the petition.

2. When, from such an examination, reaching the conclusion that allegations were inserted in the petition solely as a pretext to have re-

course to the supreme court, where the true matter in dispute is below its constitutional jurisdiction and within its own, it overrules the motion to dismiss, and retains jurisdiction, its action will be sustained on application for writs of prohibition and certiorari where the record shows that, had the appeal been brought to the supreme court, it would have been dismissed *ex proprio motu* for want of jurisdiction.

(Syllabus by the Court.)

Original application in the name of the state on the relation of Simon Abraham for writs of certiorari and prohibition to the judges of the fifth circuit court of appeals, and others. Judgment for respondents.

Clay Knobloch and Lazarus, Moore & Lemie, for relator. Beattie & Beattie, for respondents.

NICHOLLS, C. J. Relator represents that on the 1st of June, 1892, he filed in the district court of Lafourche his suit against Arthur Gossin for the specific performance of a written proposition of sale made by him, and duly accepted by Gossin, by which agreement relator agreed to sell and Gossin agreed to buy the steamboat Alexander for the fixed price of \$1,750, whereof \$500 were to be paid cash, \$850 by Gossin's transferring to relator 10 shares of the Jackson Brewing Company of New Orleans of the face value of \$100 per share, but of a market value of \$85 per share, and the balance of the purchase price, \$400, by a note of Gossin to the order of relator, payable January 1, 1893, with 8 per cent. per annum interest from date of passing the act of sale, said act to be passed immediately after the boat had passed inspection of the United States inspectors. That in his petition he averred that by said agreement he bound himself to have the boiler of the boat inspected, at a cost of \$145, and he caused said repairs to be made. That the boat passed inspection May 7, 1892. That Gossin declined to accept the boat and complete sale as agreed on. That relator placed him in default. That in said suit for specific performance, after alleging the refusal of Gossin, without just or legal cause, for not complying with the agreement, he also alleged that the said refusal had caused relator damages in the sum of \$550,—that is, for attorneys' fees in prosecuting the suit at \$250, relator's traveling expenses at \$10, cost of notarial protest at \$15, loss of time at \$25, and exemplary damages for said Gossin's gross bad faith at \$250. That in said suit he not only prayed for specific performance, showing an amount in contestation of \$1,750, but also prayed for said damages, amounting in the aggregate to the sum of \$550; making the total amount in dispute the sum of \$2,300. That the case was tried pursuant to assignment, and resulted in a judgment on the 30th of September, 1892, in favor of relator—First, for the sum of \$500, with 8 per cent. interest from 17th May, 1892; second, transferring to relator the 10 shares of the Jackson Brewing Company's stock, which were worth \$850; third, condemning defendant to give his note to relator for \$400, with 8 per cent. per annum interest from 17th May, 1892,

until paid,—all of which was in compliance with relator's petition for specific performance; but, fourth, rejecting relator's claim for damages as in case of nonsuit, and disallowing defendant's claim in reconvention. That on the 1st October, 1892, Gossin moved for a suspensive and devolutive appeal in the alternative from said judgment returnable according to law; and later on, at his own suggestion, the same was made returnable to the fifth circuit court of appeals, which appeal was perfected by his giving bond for a suspensive appeal returnable to "the fifth circuit court of appeals," "returnable according to law." That relator, believing that said appeal had been made returnable, as it should have been, to the supreme court, on the third Monday of January, 1893, when appeals from the parish of Lafourche are returnable according to law, was present, through counsel, on that day, and there awaited until the day of filing an appeal had expired, whereupon he obtained from the clerk of the supreme court a certificate of nonfiling, dated January 20, 1893, which he annexed to his petition. That to his great astonishment he discovered, when he filed with the clerk of court of the parish of Lafourche the said certificate of nonfiling, that the appellant had made his appeal, at his own solicitation, returnable to the fifth circuit court of appeals, which, under the law, sits for the parish of Lafourche on the third Monday of February, 1893. That on the return day of said appeal in the circuit court of appeals (20th February, 1893) he filed his motion to dismiss said appeal on the grounds that the court was without jurisdiction *ratione materiae*; that the amount in dispute exceeded \$2,200, exclusive of interest, and that the appeal should have been made returnable, according to law, to the supreme court. That despite said motion to dismiss, the said circuit court and its judges have usurped jurisdiction of said appeal, and have overruled relator's motion, and have proceeded, under a rule of their court, which compels appellee to submit both his motion to dismiss and the merits of the cause, to decide the merits of the cause,—all to the great injury of relator, and in violation of his just and legal rights in the premises. That said circuit court placed relator in a position where he cannot claim (1) his attorneys' fees of \$250, to which he is entitled without proof, the court being competent to place an estimate upon such services; (2) notarial fees of protest, which courts are also competent to place value on without proof; (3) exemplary damages claimed by relator against Gossin for gross violation of the contract sued on, which damages are never proved; and that the circuit court of appeals has thus deprived relator of his claim for damages by usurping jurisdiction of a cause over which they had no jurisdiction *ratione materiae*, and which, if it had been returned to the supreme court, relator would have had an opportunity of which he was willing, ready, and anxious to avail himself, asking an amendment of judgment by increasing the amount awarded by the district court (\$1,750) by (1) attorneys' fees, \$250; (2)

notarial fees, \$15; (3) exemplary damages, \$250. In view of the premises, relator prayed for writs of certiorari and prohibition directed to the judges of the fifth circuit court of appeals, to the clerk of the district court for the parish of Lafourche, and Arthur Gossin, ordering and commanding them to proceed no further in the case of relator against Arthur Gossin, until this court shall have rendered judgment on the regularity and legality of the proceedings had in said circuit court, and that all proceedings had in said cause in the circuit court be decreed null and void, and that the judgment in said cause rendered by the eighteenth judicial district court on the 30th of September, 1892, remain undisturbed, and of full force and vitality. Alternative writs issued as prayed for. The judges of the court of appeals substantially answered that the case of *Simon Abraham v. Arthur Gossin*, No. 44 of the docket of the fifth circuit court of appeals, was passed upon by them, and was within the jurisdiction of the said court, for the reason that plaintiff's demands for damages were unreal, and only intended to afford a pretext for a recourse to the supreme court in a cause where the true matter in dispute was below the constitutional jurisdiction of that court, and actually within that of the circuit court.

When the appellee filed in the court of appeals a motion to dismiss defendant's appeal, he invoked the action of that court, and necessarily placed it on inquiry for the purposes of decision. He concedes that the court had power and authority to pass upon the question, but he denies it had the right to examine into the nature of the cause of action, the evidence in the record, or the pleadings as a whole, but maintains that it should have confined and limited itself to the prayer, and, finding that the prayer showed a demand which would take the case on appeal to this court, it was bound to assume that it legally and correctly represented "the matter in dispute;" that, even if the demand were inflated, the court of appeals could only entertain jurisdiction in the case subsequently to a decision to that effect by the supreme court declaring a portion of the demand fictitious, it being the right and the duty of this court to primarily determine that question. This we understand to be substantially relator's position and contention.

The convention of 1879, which ordained that "courts should be open, and that every person, for injury done him in his rights, lands, goods, person, or reputation, should have adequate remedy by due process of law, and that justice should be administered without denial or unreasonable delay," well aware that the costs attendant upon litigation on claims for small amounts tended to deter suitors from entering into the courts which were thus declared to be so freely open, conceived the idea of establishing for such cases an intermediate court of appeals, in which appeals would be tried more frequently than in the supreme court, and (differently from what is the case in this court) should be tried on the original record, pleadings, and evidence, and not up-

on full and complete and expensive transcripts which have to be paid for by an appellant before delivery of the same. This system, if the doctrine contended for by relator be correct, would not rest securely upon law, but would be essentially dependent for its execution upon the good faith of litigants. It would be in the power of plaintiffs in every case by the simple use of fictitious allegations to force defendants to reach the court of actual jurisdiction by a circumlocution which would absolutely destroy the object and purpose of the convention. We see no good ground upon which relator's claim can be predicated. A plaintiff's rights are in no manner prejudiced or jeopardized by action such as was taken in this case by the appellant and the court of appeals. That court understands perfectly well that it can with no sort of legality or propriety assume jurisdiction of any case which would fall under the operation of the rule announced in *Lallande v. Trezevant*, 39 La. Ann. 830, 2 South. Rep. 573, and 5 South. Rep. 862, where the seriousness and sincerity of the allegations present a fairly debatable question. We cannot presume that it would retain a case on its docket unless the fictitious character of the allegations was palpable and beyond question. Assuming, however, that it were to do so, an appellee's remedy would be plain, clear, and direct,—he could always have recourse to this court, precisely as the relator himself has done in this instance, by way of certiorari and prohibition, for the protection of his rights. It will not do for the relator to say that he has been himself forced to a circuitous course for the protection of his own right to an alteration of the judgment of the district court. Had he really felt aggrieved by that judgment, he could have had recourse to his own substantive right of appeal, and could through it have controlled at his own risk (just as the defendant has done at his own risk) the court to which that appeal should have been primarily returned. Instead of relying for the alteration of the judgment upon an appeal to which he was entitled by way of right, he has thought proper to depend for this alteration upon what is simply granted him in the nature of a faculty or privilege incidental to an appeal taken by some one else. A judgment creditor who takes such a course has to take it with its disadvantages as well as advantages. We have examined the record, and are of the opinion that the action of the circuit court of appeals, in overruling relator's motion to dismiss, and in retaining jurisdiction of the case of *Simon Abraham v. Arthur Gossin* on appeal before it from the eighteenth judicial district court for the parish of Lafourche was correct. The nature of the cause of action, the pleadings as a whole, and the absence of any attempt in the district court to prove up any claim under plaintiff's allegations of damages, all unmistakably show that those allegations were inserted in the petition solely, as was said in *Poree v. Vallache*, 15 La. Ann. 292, as a pretext for a recourse to this court, where the true matter in dispute was below our constitutional juris-



diction. In addition to this, relator's course as appellee in obtaining from the clerk a certificate of the nonfiling by defendant in this court of the transcript of appeal, is a very clear indication that he did not seriously complain of the judgment of the district court, or propose to appeal from it. The procuring of such a certificate is the step provided by the Code of Practice as that preliminary to an enforcement by a judgment creditor of the judgment as rendered below in his favor. Code Pr. art. 589.

Relator's claim that without any evidence whatever in the record upon the subject of attorneys' fees, and with no attempt on the part of the district judge to fix any value upon such services, an appellate court is authorized and justified for the first time on appeal to place an estimate upon them, is not well founded. Courts have, to a limited extent, permitted their professional knowledge of the subject-matter, when acted upon affirmatively by the lower court on evidence in the transcript, to influence them in their judgment on appeal, but they have not done so in manner and form nor to the extent advanced here. The issue presented to us by the relator is whether or not the circuit court of appeals is now entertaining jurisdiction, and will continue to entertain jurisdiction, by way of appeal, over a case in which it has no jurisdiction *ratione materiae*. We hold that it is not only not doing so, but that, were relator's case before this court on appeal, we would be constrained *ex proprio motu* to dismiss the appeal to this court for want of jurisdiction. For the reasons herein assigned it is hereby ordered, adjudged, and decreed that the provisional orders and writs heretofore granted and issued be set aside, and relator's application be rejected, at his costs.

(39 Ala. 537)

**BUXBAUM et al. v. McCARLEY.**

(Supreme Court of Alabama. April 26, 1893.)

**EJECTMENT—PLEADING—COSTS.**

1. In ejectment, defendant may withdraw a plea of not guilty, and file a demurrer to the complaint.

2. In ejectment, pleas of not guilty and disclaimer are incompatible, and cannot be pleaded together.

3. Defendant in ejectment filed a plea of not guilty, but withdrew it, and demurred to the complaint. The demurrer was sustained, and the complaint amended, whereupon defendant filed a plea of disclaimer, except as to land specifically described, and pleaded not guilty, and adverse possession as to land embraced within the boundaries set forth in the plea of disclaimer. *Held*, that the court properly denied a motion to strike out the plea of disclaimer based on the ground that the plea of not guilty to the original complaint was an admission of possession as to the lands sued for in the amended complaint.

4. It appearing that defendant had never claimed title to and ownership of the land described in the amended complaint, but that he was in possession of a small part thereof, his plea of disclaimer was not sustained, and the court in rendering judgment for plaintiff should have allowed him costs.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Ejectment by Sarah Buxbaum and another against John T. McCarley. From a judgment for plaintiffs, that they recover the land, but denying them costs, they appeal. Modified.

Emmet O'Neal, for appellants. Simpson & Jones, for appellee.

COLEMAN, J. Plaintiffs, appellants, sued in ejectment to recover a small strip of land of about three acres. To the complaint the defendant at first entered the plea of not guilty. By leave of the court, the plea was withdrawn, and defendant demurred to the complaint for indefiniteness in the description of the land. The court sustained the demurrer, and plaintiffs amended the complaint. There was no error in allowing the defendant to withdraw his plea of not guilty, and file a demurrer. The original complaint was defective in the matter to which the demurrer was directed, and the court did not err in sustaining it. To the complaint as amended the defendant filed four pleas: First, "That he disclaims as to all lands sued for, not embraced within the lands, described as follows." Here follows certain lots and parcels of lands, described with great particularity. The second plea was as follows: "And as to all lands sued for, embraced within the boundaries of the lands in the first plea particularly described, the defendant pleads not guilty." The third and fourth pleas were adverse possession of 10 and 20 years of the lands described in the first plea. The bill of exceptions states that "to his amended complaint defendant filed a plea disclaiming possession of the land sued for." A plea of disclaimer and a plea of not guilty present incompatible defenses, and cannot properly be pleaded together as a defense to the recovery of the same land in an action of ejectment. *McQueen v. Lampley*, 74 Ala. 408. The bill of exceptions states that the plaintiffs objected to the filing of the plea of disclaimer, and moved to strike it from the file, basing both motions upon the ground that the plea of not guilty to the original complaint was an admission of possession as to the lands sued for in the amended complaint. The reason assigned in support of the motion is without merit, and there was no error in overruling the motion. The case was tried by the court without the intervention of a jury. It is nowhere stated what was the issue tried, and it is somewhat difficult to determine this question from the judgment rendered. The judgment entry is: "All matters in controversy in this case being submitted to the court, and the court, after hearing the evidence and argument of counsel, upon mature consideration of the same, finds for the plaintiff for the land sued for in their amended complaint, but without cost or damages. It is therefore considered by the court that the plaintiff have and recover of the defendant the said land sued for in said amended complaint, to wit," etc., "and judgment is hereby rendered against the plaintiff for cost," etc. If we consider this judgment as rendered upon issue joined upon the plea of disclaimer

er, or upon "not guilty," or both pleas, the finding of the court for the plaintiff, "and that he recover of the defendant the land sued for," entitled the plaintiff to recover his cost. On the other hand, if issue was joined upon the plea of disclaimer, and the evidence sustained the plea, then the court should have found the issue for the defendant, and not for the plaintiff, as stated in the judgment entry. On such finding for the defendant, the plaintiff may have judgment for his land, but without cost. It seems clear from all the evidence that the defendant has never claimed title to and ownership of the lands described in the amended complaint. The dispute seems to have arisen as to the exact boundaries of the parcel of land sued for, and as to whether they included a certain spring of water, all of which might have been ascertained and adjusted by a careful survey, without recourse to litigation. The proof satisfactorily shows that defendant was in the actual possession and cultivation of a small, fractional part of the three acres sued for at the time suit was brought, but not under a claim of ownership. To this extent his plea of disclaimer was not sustained by the proof, and the plaintiff was entitled to his verdict for this portion of the land at least, and his cost. No damages were proven. This should have been the judgment of the court, and a judgment to this effect will be here rendered, giving the plaintiff his cost. Corrected and affirmed.

(98 Ala. 543)

**HOLLINGSWORTH et al. v. WALKER.**

(Supreme Court of Alabama. April 26, 1893.)

DEED — EFFECT OF SURRENDER TO GRANTOR — EJECTMENT — TITLE TO SUPPORT — ADVERSE POSSESSION.

1. The surrender of a deed does not revert title in the grantor.

2. An equitable title is not available to plaintiff in ejectment.

3. Title by adverse possession is established by evidence of the taking of adverse possession, and the continuation thereof, after the lapse of one or two years, for what would have been the statutory period, had possession been held during such one or two years, since, adverse possession having once been taken, it will be presumed to continue, in the absence of proof to the contrary.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Fannie Hollingsworth and others against L. K. Walker. From a judgment for defendant, plaintiffs appeal. Affirmed.

Geo. D. Motley, for appellants. J. A. Bilbro, for appellee.

**STONE, C. J.** This is a statutory action for the recovery of lands under section 2696 of the Code of 1886. The lands sued for were originally the property of Jesse C. Leek, under whom both plaintiffs and defendant assert title. The plaintiffs are the heirs at law of Joshua R. Walker, deceased. On the 29th day of May, 1877, Jesse C. Leek and wife executed a deed by which they conveyed the land sued for to Joshua R. Walker. On the 28th day of

September, 1880, Joshua R. Walker and John F. Walker together carried the said deed, and surrendered it, to said Leek. On that day, at their joint request, Leek and wife conveyed the same lands to John F. Walker; and he, the said John F. Walker, then and there paid to Leek \$1,200, the agreed purchase price of the land. Early in the year 1881 one Patrick went into possession of the land, and occupied and cultivated it during that year. He entered under a contract of letting from John F. Walker, cultivated as his tenant, and paid him rent. Up to this time, neither Joshua R. nor John F. Walker had ever resided on the land. The proof is not very specific whether any one actually occupied the lands during the years 1882 and 1883. John F. Walker testified that, to the best of his recollection, he resided on the lands during those years. There was some testimony that John F. Walker did not actually live on the lands until 1884. He testified for himself that he had been in full possession of the lands, living on them, and claiming them as his own, for more than 10 years before the commencement of this suit, — November 3, 1891, — and had rented the lands, and collected the rents, and that Patrick, tenant for the year 1881, went into possession of the lands under him. He testified further that in 1888 or 1889 he moved his father, Joshua R. Walker, on the place, and that he, said Joshua R., lived in the yard with the witness until he died, in June, 1890. There was no testimony, other than what is here stated, that Joshua R. Walker ever lived on, or exercised any acts of ownership, or asserted any claim to, the lands, after the deed was made to John F. Walker, in September, 1880, or that during that time he had any tenant in possession of said lands, or any part of them. The surrender back of the deed of May 29, 1877, to Leek, did not have the effect of revesting title in the latter. The legal title still remained in Joshua Walker. *Brady v. Huff*, 75 Ala. 80; *Smith v. Cockrell*, 66 Ala. 64; *Reavis v. Reavis*, 60 Ala. 60; *Gimon v. Davis*, 38 Ala. 589; *King v. Crocheron*, 14 Ala. 822. It follows, that in the execution of the deed of September, 1880, the legal title was not conveyed to John F. Walker, but remained in Joshua R. Walker. We say nothing of the equitable rights which would vest in John F. Walker by virtue of this transaction, as testified to. That can avail nothing in this action at law. So the sole question in this case is whether John F. Walker has acquired a title to the property by 10 years' adverse holding. We hold that a fair interpretation of the testimony shows that John F. Walker took actual possession and control of the lands as early as the first of the year 1881, and that he continued to exercise actual dominion over the lands up to the time of the bringing of this suit, — more than 10 years afterwards. We do not think any unfavorable interpretation can be placed on the absence or uncertainty of proof as to who actually occupied the lands during the years 1882 and 1883. The natural inference from the testimony is that, whether the said John F.

Walker was actually on the lands during those years or not, they were occupied by some person in his right. Proof of the existence at a given time of a status that is continuous in its nature raises the presumption that it continues, unless there is some testimony showing the contrary. This prevents any gap in the continuity of possession; and the said Joshua R. Walker's subsequent actual occupancy of the premises, under the extremest view we can take of the testimony, would not interfere with the continued independent possession of the said John F. Walker. We concur with the city court in holding the defendant's plea of 10 years' adverse possession was made good. Affirmed.

(97 Ala. 530)

**BLUTHENTHAL et al. v. MAGNUS.**

(Supreme Court of Alabama. Feb. 2, 1893.)

**FRAUDULENT CONVEYANCES — BILL OF SALE — RETENTION OF POSSESSION BY SELLER — BENEFIT RESERVED — EVIDENCE.**

1. Where a debtor makes a bill of sale to a creditor, and takes from him a power of attorney authorizing him to retain possession and sell the same for the latter, and deposit the proceeds, less the expense of selling, in a bank, to the credit of such purchaser, the transaction is not fraudulent on the ground that there is an implication that the seller was to be paid for his services, and therefore a benefit was reserved to him, especially where the evidence shows there was no express agreement to pay for such services.

2. Though the evidence of a debt which a bill of sale was given to pay lacks the clearness usually required where a sale is attacked as fraudulent, a finding that the sale was not fraudulent is proper, in the absence of evidence of a general intent to defraud, or that the indebtedness to creditors assailing it was pre-existing.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Action in attachment by Bluthenthal & Beckart against David Wurtzburger, on an account, in which Joe Magnus, on giving a claim bond, instituted a claim to the attached property, and the statutory action was commenced. From a judgment for claimant, plaintiff's appeal. Affirmed.

The testimony for the plaintiffs tended to show that at the time of the levying of the attachment the defendant, Wurtzburger, was in the storehouse formerly occupied by him in conducting a retail liquor business, but, when the deputy sheriff attempted to levy the attachment, Wurtzburger said that the goods were not his, but were the goods of Mr. Magnus. The plaintiffs introduced the two following papers, which were executed on the same day:

"This agreement, made and entered into this 30th day of April, A. D. 1891, by and between David Wurtzburger, party of the first part, and J. A. Magnus, party of the second part, witnesseth, that party of the second part has this day consigned and delivered to the party of the first part the goods, wares, and merchandise, fixtures, and glassware in the storehouse heretofore occupied by party of the first part, and numbered 103 Tenth street, in the city of Anniston, Ala., to be sold by party of the first part under his license as a retail

dealer, for and on account of party of the second part, and the proceeds of such sales to be deposited each day in the bank of Anniston Loan & Trust Company, to the credit of the party of the second part; the party of the first part reserving to himself a sufficient amount to cover necessary expenses of said business, a statement of which said expenses shall be rendered to party of the second part, from time to time, as requested. In witness whereof, the parties hereto have hereunto set their hands and seals on this, the day and year first above written."

"This indenture, made and entered into this 30th day of April, A. D. 1891, by and between David Wurtzburger, party of the first part, and J. A. Magnus, party of the second part, witnesseth, that, whereas the party of the first part is justly indebted unto the party of the second part, in the sum of nineteen hundred and thirty-one and forty-eight one-hundredths dollars, (\$1,931.48,) which is now due: Now, therefore, in full payment and satisfaction of said indebtedness, the party of the first part has this day bargained and sold, and does by these presents hereby grant, bargain, sell, and convey, unto the party of the second part, all the goods, wares, merchandise, fixtures, and glasswares now owned by party of the first part in the storehouse No. 103 Tenth street, in the city of Anniston, Ala., a full list of which is hereto attached, marked 'Exhibit A,' and made a part hereof. Said goods have been this day delivered by party of the first part to the party of the second part in full satisfaction of said indebtedness, as above stated. In witness whereof, the party of the first part has hereunto set his hand and seal on this, the day and year first above written."

There were several exceptions reserved to some of the rulings of the court upon the evidence introduced by the claimant, but the decision of this court renders it unnecessary to notice them in detail. Upon the introduction of all the evidence the court, without the intervention of a jury, rendered judgment in favor of the claimant, and the rendition of said judgment is assigned as error.

McLeod & Tunstall, for appellants.  
Knox, Bowie & Pelham, for appellee.

HEAD, J. It is clear that the bill of sale of David Wurtzburger to appellee, Magnus, and the power of attorney of Magnus to him to sell the goods for the account and benefit of Magnus, were executed simultaneously, as parts of one transaction, and must be read together as one instrument. *Jenkins v. Harrison*, 66 Ala. 345. Thus read, their effect is that Wurtzburger sold the goods to Magnus, and agreed to retain and sell the same for him, and pay to him, or deposit in the designated bank to his credit, the proceeds, less the necessary expenses to be incurred in making the sales; and, in consideration thereof, Magnus discharged the indebtedness owing him by Wurtzburger. In such a transaction there is no implication that Wurtzburger was to be paid for his services to be rendered in disposing of the goods, and in this case

there is no evidence of any express agreement that he should be paid for the same. The evidence is to the contrary. The argument, therefore, that there was a benefit reserved to Wurtzburger, in the form of an implied agreement to pay him for selling the goods, fails.

We find no evidence that the sale to Magnus was infected with an actually fraudulent intent on the part of either seller or buyer. It is true the evidence going to establish the debt which the goods were sold to pay is not given with that clearness and fullness of detail usually required when such sales are attacked by existing creditors of the seller as fraudulent, but plaintiffs are not shown to have been existing creditors of Wurtzburger at the time of the sale in question. There is no evidence when their debt was created, and we cannot ascribe to it an earlier creation than the day the attachment was sued out. There being no evidence of a general intent to defraud creditors, plaintiffs, being regarded as subsequent creditors, are not in a position to object to the general and indefinite nature of the proof of the consideration of the sale. Indeed, in such case, the burden is not upon the purchaser to prove the consideration at all. We concur in the finding of the trial court, and its judgment is affirmed.

(99 Ala. 359)

**BIRMINGHAM RAILWAY & ELECTRIC CO. v. ALLEN.**

(Supreme Court of Alabama. Nov. 22, 1892.)

**RAILROAD COMPANIES—PERSONAL INJURIES—ACTION BY EMPLOYE—CONTRIBUTORY NEGLIGENCE—CONTINUING IN SERVICE AFTER KNOWLEDGE OF DEFECTS—COMPLAINT—SUFFICIENCY—AMENDMENTS.**

1. There is no statute inhibiting amendments by reference to and adoption of specified portions of counts, and by adding thereto averments so as to constitute another and separate count.

2. Where a demurrer has been sustained to a complaint consisting of a single count, amendments by the addition of several counts by reference to and adoption of portions of the original complaint is objectionable, since, by sustaining the demurrer, such complaint is annulled.

3. In an action by a conductor against a dummy railway company for personal injuries caused by the train running into an open switch, and throwing him from a car, a count of the complaint which alleges that the switch from the main line into the siding on which the train ran was negligently allowed to be and remain without a lock, or other proper and sufficient means of fastening, and was not kept sufficiently locked or fastened, states a cause of action.

4. A count of such complaint which alleges that such switch "was negligently allowed to be open," without alleging other grounds of negligence, is insufficient, since it fails to show a defect in the ways, works, and machinery of defendant.

5. Where plaintiff had been in the employ of defendant, as conductor, for a year prior to receiving his injuries, and knew there had never been a lock or other means of fastening such switch during that time, he is guilty of such contributory negligence as precludes a recovery.

6. Code, § 2590, known as the employers' liability act, and providing, *inter alia*, that the employer is not liable if the employee knew of

the defect causing the injury, and failed within a reasonable time to give information thereof to his superior, "unless he was aware that the master or employer, or such superior already knew of such defect," does not change the doctrine of *volenti non fit injuria*. *Railroad Co. v. Holborn*, 4 South. Rep. 146, 84 Ala. 133, and *Railroad Co. v. Walters*, 8 South. Rep. 357, 91 Ala. 436, overruled.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by W. L. Allen against the Birmingham Railway & Electric Company to recover damages for personal injuries caused by defendant's negligence. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed. Application for rehearing denied.

The complaint, as originally filed, contained but one count, which was in the following language: "The plaintiff claims of the defendant fifteen thousand dollars, for that heretofore, on, to wit, 1st day of July, 1891, defendant was operating, running, managing, and controlling a certain railway known as the East Lake Dummy Line, running from Birmingham, in an easterly direction, to and by Fritchman's Garden, to East Lake, Ala.; that on said day plaintiff was in the service or employment of defendant in the capacity of conductor on a certain train, composed of a steam locomotive engine and certain cars, which was then and there being run over and along said railway by defendant; that when said train reached a point on said railway at or near said Fritchman's Garden it ran from the main line onto a switch or siding, and plaintiff, by reason thereof, was thrown from one of said cars, on which car plaintiff then and there was in the performance of his duty as conductor as aforesaid, and plaintiff's leg was fractured, his hip, shoulder, and head, and various other parts of his body, bruised and lacerated, and plaintiff was otherwise seriously and permanently injured. By reason of his said injuries, plaintiff suffered, and continues to suffer, great mental and physical pain, and loss of time, and plaintiff was rendered less able to work and to earn money, and was put to great expense for medicine, medical attention, care, and nursing, and plaintiff avers that his said injuries are permanent. Plaintiff avers that defendant negligently caused or allowed the track of said railway at or near said switch, or said switch, to be in a defective condition, and the said accident, and plaintiff's said injuries, resulted therefrom. Plaintiff further avers that said accident, and plaintiff's said injuries, were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with or used in said business of defendant, viz.: Said switch was in a defective condition. Said track at or near said switch was in a defective condition. Said switch was negligently allowed to be open. Said switch was allowed to be and remain without a lock, or other proper and sufficient means for fastening the same. Said switch was negligently allowed to be and remain without a light, or other proper and sufficient means by which it could be told by

the engineer or fireman on said train which way said switch was set. The said defects arose from, or had not been discovered or remedied owing to, the negligence of defendant, or of some person in the service of defendant, and intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition. Plaintiff further avers that said accident and his said injuries were caused by reason of the negligence of a person in the service or employment of defendant, who had the charge or control of said switch, viz. said person negligently caused or allowed said switch to be then and there open. Plaintiff further avers that said accident and his said injuries were caused by reason of the negligence of a person in the service or employment of defendant, who then and there had the charge or control of said engine, viz. said person negligently caused or allowed said engine pulling said train to run upon or through said switch. All to plaintiff's damage fifteen thousand dollars. Hence this suit."

The defendant filed several demurrers to this count of the complaint, which were confessed by the plaintiff. Thereupon the plaintiff amended the original complaint as follows: "Comes the plaintiff in the above-styled cause, and, by leave of the court first had and obtained, amends his complaint by adding thereto the following additional counts: Second count. Plaintiff refers to and adopts as a part of this second count all that part of the first count, from the beginning thereof down to and including the words, 'that his said injuries are permanent,' where they first occur in said count; and plaintiff further avers that said accident, and plaintiff's said injuries, were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with or used in said business of defendant, viz. the switch from the main line into the siding into which said train ran as aforesaid was in a defective condition. The said defects arose from, or had not been discovered or remedied owing to, the negligence of defendant or of some person in the service of defendant, and intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition. Third count. Plaintiff refers to and adopts as a part of this third count all of the second count of this complaint, except the following sentence thereof: 'The switch from the main line into the siding onto which said train ran as aforesaid was in a defective condition.' And plaintiff inserts as a part of this third count, in lieu of said sentence, and in the corresponding position of said sentence, the following words, viz.: 'The switch from the main line into the siding onto which said train ran as aforesaid was negligently allowed to be and remain without a lock, or other proper and sufficient means of fastening the same, and the same was not kept sufficiently locked or fastened.' Fourth count. Plaintiff refers to and adopts as a part of this fourth count of his complaint all of the second count of this complaint, except the following sentence thereof, viz.: 'The switch from the main line into the siding onto

which said train ran as aforesaid was in a defective condition;' and plaintiff inserts as a part of this fourth count, in lieu of said sentence, and in the corresponding position of said sentence, the following words, viz.: 'The switch from the main line into the siding onto which said train ran as aforesaid was negligently allowed to be open.' Fifth count. Plaintiff refers to and adopts as a part of this, the fifth count of his complaint, all of the second count of his complaint except the following sentence thereof, viz.: 'The switch from the main line into the siding onto which said train ran as aforesaid was in a defective condition;' and plaintiff inserts as a part of this fifth count, in lieu of said sentence, and in the corresponding position of said sentence, the following words, viz.: 'The switch from the main line into the siding onto which said train ran as aforesaid was negligently allowed to be and remain without a light, target, or other proper and sufficient means by which it could be told by the engineer or fireman on said train which way said switch was set.' Sixth. Plaintiff refers to and adopts as a part of this, the sixth count of his complaint, all that part of the first count of the complaint, from the beginning thereof down to and including the words, 'That his said injuries are permanent;' and plaintiff further avers that said accident, and his said injuries, were caused by reason of the negligence of a person in the service or employment of defendant, who had the charge or control of said switch and siding, and of the switch leading from the main line into said siding, viz. said person negligently caused or allowed same to be so set that said train ran into said siding as aforesaid."

Defendant demurred to the second count of the complaint, and assigned the following grounds of demurrer thereto, viz.: "(1) There are no facts averred in said count of said complaint which show that plaintiff was in such relationship to defendant at the time of his injury that defendant owed him the duty to keep its switch in proper condition. (2) There are no facts averred in said count of said complaint which show in what the alleged defect consisted. (3) Said count is incomplete, indefinite, and uncertain." Defendant demurred to the third count of the complaint on the same grounds as to the second of the complaint, and, in addition thereto, the following: "(4) There is no averment of any facts which show with sufficient certainty that it was the duty of defendant to keep a lock on its switch, and to keep its switch locked. Defendant demurs to the fourth count of the complaint for the same reasons as to the second count thereof, and, in addition thereto, the following: (4) There is no averment of any facts which show that an open switch was a defect in the ways, works, machinery, or plant of defendant. (5) There is no averment of any facts which show that it was the duty of defendant to keep its switch closed." Defendant demurred to the fifth count of the complaint, and assigns the same causes of demurrer as are assigned to the second count, and, in addition thereto, the fol-

lowing, viz.: "(4) There are no facts averred which show with sufficient certainty that it was the duty of defendant to keep its switch lighted, or to have a target or other appliance by which the engineer and fireman could see how the switch was turned." Defendant demurred to the sixth count of the complaint, and assigns the same causes of demurrer as are assigned to the second count, and, in addition thereto, the following, viz.: "(4) It is not averred in said count of said complaint, with sufficient certainty, who the person was who, it is alleged, was in the service and employment of defendant, who had charge of said switch, and who negligently caused or allowed said switch to be open." These demurrers were all overruled by the court, and issue was thereupon joined on the pleas of the general issue and contributory negligence.

The facts, as disclosed by the bill of exceptions, were that the plaintiff was a conductor on a dummy train of defendant which was on its way from East Lake to Birmingham about 7:15 o'clock on the evening of the 1st of July, 1891; that the train, as it was passing a side track at Fritchman's Garden,—a station on the line between East Lake and Birmingham,—ran into an open switch onto the side track. The appellee was standing on the front platform of the front coach next to the engine, where, according to the testimony of defendant, he was standing without holding to anything, and where he had gone, according to his statement, to collect the fare of a passenger he thought was on the platform, and that as the train was diverted from a straight line the lurch occasioned thereby caused him to be thrown off of the platform, and he received the injuries complained of. The negligence complained of was that there was no lock on the switch, nor was there a target or light thereon. As is stated in the opinion, the undisputed evidence was that the plaintiff was in the employment of the defendant for 12 months, and that during that time there had never been a lock on the switch, nor light nor target thereon, and that this was known to the plaintiff. There were several exceptions reserved by the defendant to the rulings of the court upon the testimony, but the opinion of the court renders it unnecessary to notice these rulings in detail. Among the written charges which were requested by the defendant, and to the refusal to give each of which the defendant duly excepted, were the following: (8) "That if the jury believe from the evidence that it was dangerous to use the switch without a lock, and that the plaintiff had been running over the road for a year with full knowledge that there was no lock on said switch, then I charge you that it would be negligence for him to stand upon the front platform without holding." (9) "If the jury believe that the plaintiff knew that the defendant did not have a switch lock on the switch through which the train ran for twelve months prior to the accident, and did not communicate such fact to any one in the service of the defendant superior to him, they must find for defendant." (17) "That if the jury believe

from the evidence that it was dangerous to operate defendant's railroad without a lock on the switch mentioned in the complaint, and that plaintiff had been running on said road, as conductor or otherwise, for near one year or more before the alleged injury, with full knowledge that said switch had no lock on the same, and if you further believe that plaintiff went out, and stood upon the platform of one of defendant's cars, without holding to something, if he could have held to something, then I charge you that plaintiff was guilty of negligence; and if you believe, if he had held onto something which he could have held onto, while on the platform, he would not have fallen off, and been injured,—then I charge you that your verdict must be for defendant." There were many other charges asked by the defendant, and refused by the court, and to the refusal to give each of which the defendant separately excepted, but it is not deemed necessary to set them out in this statement.

Hewitt, Walker & Porter, for appellant.  
Bowman & Harsh, for appellee.

COLEMAN, J. The action is to recover damages for personal injuries. It is much the better practice, when a complaint is amended, to set out in full the complaint or count as amended, unless the amendment is of such a character that it may be readily made by a mere interlineation. We have, however, never construed the statute allowing amendments so strictly as to hold that the pleader may not by reference to one count in the complaint adopt a certain specified portion of another, and add to it averments so as to constitute another and separate count. The complaint is subject to another objection. As originally found, there was but a single count. The court sustained a demurrer to the complaint. The effect of the judgment sustaining the demurrer was to annul and hold for naught the complaint in its then condition. Until amended, or a new complaint filed, there was no 1st count before the court. The complaint was amended by adding thereto a 2d, 3d, 4th, 5th, and 6th count. Each of these amendatory counts refers to and adopts as a part of these respective counts a specified portion of the last or preceding counts. We will consider the sufficiency of the counts upon which the trial was had:

The third count adopted a portion of the first, and the whole of the second, with the exception of a single sentence. Written out consecutively in full, it reads as follows: "The plaintiff claims of the defendant fifteen thousand dollars, for that heretofore, on, to wit, 1st day of July, 1891, defendant was operating, running, managing, and controlling a certain railway known as the East Dummy Line, running from Birmingham, in an easterly direction, to and by Fritchman's Garden, to East Lake, Ala.; that on said day plaintiff was in the service or employment of defendant, in the capacity of conductor on a certain train, composed of a steam locomotive engine and certain cars, which were then and there being run over and along said railway by defendant; that when

said train reached a point on said railway at or near said Fritchman's Garden it ran from the main line into a switch or siding, and plaintiff, by reason thereof, was thrown from one of said cars, on which car plaintiff then and there was, in the performance of his duty as conductor as aforesaid; and plaintiff's leg was fractured, his hip, shoulder, and head, and various other parts, bruised and lacerated, and plaintiff was otherwise seriously and permanently injured. By reason of his said injuries, plaintiff suffers, and continues to suffer, great mental and physical pain and loss of time, and plaintiff was rendered less able to work and to earn money, and was put to great expense for medicine, medical attention, care, and nursing, and plaintiff avers that his said injuries are permanent; and plaintiff further avers that said accident, and plaintiff's said injuries, were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with or used in said business of defendant, viz. the switch from the main line into the siding onto which said train ran as aforesaid was negligently allowed to be and remain without a lock, or other proper and sufficient means of fastening the same, and the same was not kept sufficiently locked or fastened. The said defects arose from, and had not been discovered or remedied owing to, the negligence of defendant, or of some person in the service of defendant, and intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition." The words, "and the same was not kept sufficiently locked or fastened," may be stricken out as mere surplusage, and enough remains to constitute a good count. We do not think these words, in the connection used, indicate that the plaintiff sought a recovery for negligence in not having the switch locked or fastened, but rather that it was not locked or fastened, in consequence of the allegation that there was neither lock nor fastening to the switch. Whether a lock or proper fastening was such a component part of a switch as that the failure to provide it rendered the company liable for injuries resulting therefrom would depend upon the proof. Upon this question the rule is clearly laid down in *Railroad Co. v. Hall*, 91 Ala., on page 121, 8 South. Rep. 374, where, in reference to "whipping straps," the court said: "Is it so manifestly serviceable as to command the consensus of intelligent railroad men, so generally as that it cannot be reasonably ignored or disregarded? Or is its utility disbelieved and disallowed in the management of many well-governed and well-regulated railroads? If this question be debatable, and skilled railroad men honestly differ in judgment as to the utility of this or any other cautionary appliance, and differ to such extent as that many well-regulated railroads abstain from their use, then such abstinence is not legal negligence." In the Case of *Hall* the principle was applied to roads commonly designated railroads. In the present case the road is designated and distinguished as a dummy road, but there can be no difference in the application of the principle. If it be

shown that the omission to provide a lock or proper fastening for the switch was culpable negligence, and the negligence arose as averred in the complaint, and the switch was displaced by an intermeddler, such displacement would not be necessarily such an intervention of an independent intervening cause as to constitute the sole proximate cause of the injury. The evident purpose of the use of locks or fastenings is to make the switch reasonably safe against the interference of or displacement by trespassers, as well as accidental causes. In such cases, ordinarily, the neglect of the defendant in failing to provide locks or fastenings would be regarded, at least, as jointly contributing to the result.

The fourth count is clearly defective. The averment that the switch "was negligently allowed to be open" does not show a defect in the ways, works, and machinery of the defendant corporation. Neither has such an averment any legal or proper connection with the person whose duty it is to see that the ways, works, and machinery were in proper condition. This count demonstrates the danger and confusion likely to arise in pleading by adopting portions of other counts by a mere reference to them. The safe practice is to draw the counts in full, as one entirety. With the exception of the defect pointed out in another part of this opinion, the other counts are sufficient, and the demurrer properly overruled.

The evidence shows, without dispute, that plaintiff had been in the employ of the defendant as conductor for a year. He testified himself "that the switch had no light or target on it, and had not since I had been running on the road. There never had been a lock or means of fastening on it since I went on the road,—a period of twelve months. I had been running on the road for twelve months." In the case of *Railroad Co. v. Bradford*, 86 Ala. 574, 6 South. Rep. 90, the court uses this language: "Contributory negligence which would defeat an action might have consisted of a failure on the part of the plaintiff, either to reasonably give notice of the defect in appliances used in his employment, or of the negligence of his superiors, if known to him, which produced the injury, or of a failure, after having given such notice, to quit the service to which such defect or negligence was incident, after a reasonable time had elapsed for its correction." In *Railway Co. v. Davis*, (Ala.) 9 South. Rep. 254, the principle is thus clearly stated: "The duty of the company to this class of its employees is to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service; and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The onus of inquiry or investigation is not upon them. If, as matter of fact, they knew of unsafe conditions in any of these particulars, and continue in the service after the lapse of a reasonable time for the defects to be remedied or removed, they assume this additional risk, though originally not



incident to their employment." Many cases are cited in support of the proposition, and it is manifestly just. If it be conceded that the failure to provide a lock or proper fastening for the switch be a culpable defect, there are no facts in the present record which relieve the plaintiff from being held guilty of contributory negligence, under the influence of the foregoing principles. Reversed and remanded.

#### On Rehearing.

(May 18, 1898.)

The evidence is conclusive, and without conflict, that the plaintiff voluntarily, and without objection, continued in the employment of the defendant, for a period of 12 months, in the almost daily use of, and with a full knowledge of the defect in, the ways, works, and machinery alleged to have caused the injury. Under this proof the court held that the plaintiff was guilty of contributory negligence. We are now asked to revise this conclusion. Considered in connection with the evidence, as a general proposition of law, the rule asserted is sustained by an overwhelming array of authorities. In the case of *Rush v. Railroad Co.*, (Kan.) 12 Pac. Rep. 582, the court uses this language: "There are cases where a servant, knowing the danger, may nevertheless recover, but this is not one of the cases. Usually, where some instrument or appliance has become unsafe from use, or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in his master's employment, and use it for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition. Also, when the master has been informed with regard to some defect in some instrument or appliance, and he agrees to remedy the defect, the servant may continue for a reasonable time in the master's employment, so as to give him an opportunity to fulfill his promise. Also, when the danger is one to which the servant is not exposed in the ordinary course of his employment, but one which he is at the time required immediately to encounter by a special command by his master, or of a superior servant, without time for reflection or choice on the part of the servant, he may obey the command without being guilty of contributory negligence, or without forfeiting his right to recover in case injury results. But not one of these cases is the present case. The plaintiff's intestate could have had no hope, in the present case, that the railway's tracks would ever be changed. There was no promise that they would be changed. They were just as they were when originally constructed; and, in the ordinary course of his employment, the plaintiff's intestate was using them every day, and knew that he must so use them every day." Under the evidence it was held to be a question of law for the court, and that, as to plaintiff, the defendant was not guilty of culpable negligence. In the case of *O'Rourke v. Railroad Co.*, 22 Fed. Rep. 189, *Brewer, J.*, uses the following language: "He [the employee] has the right to wait a reasonable time;

to consider the circumstances of the case, and to give notice to his employers that he is in danger; time enough to see whether the employer means to have the defect remedied; time enough to see the general way in which he conducts his business; and if he finds that his employer intends to use machinery with defects, or to conduct his works in a dangerous way; finds that it is to be his general habit; finds that, after he has been notified, he still intends to conduct his business in that way,—and then goes on and continues in the work, it is fair to assume that he takes the risk." In *Richards v. Rough*, 53 Mich. 212, 18 N. W. Rep. 785, the general proposition is stated as follows: "A servant who continues, without objection, to use machinery which he has found to be unsafe, assumes the risk, and cannot recover for injuries which he may receive in consequence of doing so." The same rule prevails in *Wisconsin*. *Dorsey v. Construction Co.*, 42 Wis. 583. Many authorities from other courts might be cited. This state has declared the law in the same unmistakable terms. In *Eureka Co. v. Baas*, 81 Ala. 201, 8 South. Rep. 216, it is said: "If the employee, while engaged in the service, acquires knowledge of any defect in the materials, machinery, or instrumentalities used, and notice thereby of an increased risk of danger, and afterwards continues in the service, without objection or notice to the employer, he assumes the increased risk himself; but he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the employer's promise to remedy the defect, yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence." In the case of *Railroad Co. v. Hall*, 87 Ala. 708, 6 South. Rep. 277, which arose under the employers' act, the doctrine was distinctly declared that, although the defendant may have been guilty of negligence in the erection and construction of its bridge, if plaintiff knew of the danger, and failed to exercise due care to avoid the danger, and was injured, he would be guilty of contributory negligence. This rule also prevailed in the English courts.

It is contended, however, that the rule as here stated has been changed by statute, and that under the employers' act, (section 2590 of the Code, and subsections,) the employee does not assume the responsibility of injuries caused by defects in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, although known to the employee, and that under the statute he may remain with impunity in the employment of his employer for any length of time after he becomes aware of the danger, provided the master or employer is aware of such defect; and we are referred to the case of *Railroad Co. v. Holborn*, 84 Ala. 133, 4 South. Rep. 146, and the case of *Railroad Co. v. Walters*, 91 Ala. 435, 8 South. Rep. 357. The *Holborn Case*, 84 Ala. 133, 4 South. Rep. 146, supports the argument and position of appellee; and if that decision furnishes a



proper construction of the employers' act, as found in section 2590 of the Code, the opinion rendered in the case under consideration is wrong, for in the Holborn case it is held that the rule as declared in *Eureka Co. v. Bass*, *supra*, which we have cited, is abolished. The employers' act, as found in section 2590, and subdivisions, is a substantial, if not an exact, copy of the English act of 1880. This court is not finally concluded by the decision of any other state court, or the British court, in their construction of a similar statute; but the opinion of learned courts upon similar questions are entitled to great weight, and this is especially true when the statute, from which ours was copied, had been construed prior to its enactment by our legislature. *Armstrong v. Armstrong*, 29 Ala. 538. In the case of *Griffiths v. Docks Co.*, 13 Q. B. Div. 259, it is said: "If the danger is one which was known to the master, and not to the servant, the knowledge of the master, and the want of knowledge of the servant, make together a cause of action; and as it is necessary that these two things should exist, in order to form a *prima facie* case, it is necessary that they should be shown to exist in the statement of the claim." The case of *Weblin v. Ballard*, reported in 17 Q. B. Div. 122, cited in the Holborn Case, *supra*, supports the conclusion reached in that case; and if the case of *Weblin v. Ballard* had remained in force, as the proper construction of the statute, we would be bound to hold that the construction given by this court to the statute in the Holborn Case was the same as that given by the English courts. In the same volume (17 Q. B. Div. 414) the case of *Thomas v. Quartermaine*, which involved the same question, came up for consideration, and the reasoning of the court tended greatly to weaken the decision of *Weblin v. Ballard* as an authority. The case of *Thomas v. Quartermaine* was appealed, and in 18 Q. B. Div. 685, the case of *Weblin v. Ballard* was virtually, though not in express words, overruled. The court held in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, that the doctrine of "*volenti non fit injuria*"—"that to which a person assents is not esteemed, in law, an injury"—*Broom, Leg. Max.*, applied, under the employers' act of 1880. *Bowen, J.*, uses this language: "Knowledge is not a conclusive defense, itself. But when it is a knowledge under circumstances that leave no inference but one, viz. that the risk has been voluntarily encountered, the defense seems to be complete." Lord Esher, M. R., dissented from the conclusion of the court. The question arose again in the case of *Yarmouth v. France*, 19 Q. B. Div. 647, and it was held (Lord Esher, M. R., rendering the opinion) "that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of the foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff." In this case there was also a dissenting opinion by *Lopes, J.*, not as to the law, but upon the facts, the latter judge holding: "There was no evi-

dence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment." In this last case, Lord Esher, M. R., stated that the doctrine, "*volenti non fit injuria*," applied, under the employers' act of 1880. This conclusion of the opinion is in the following language: "I see nothing in the decision in *Thomas v. Quartermaine* to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." In the same case, Lindley, J., after referring to the case of *Thomas v. Quartermaine*, and the sections of the act, held that "the maxim, '*volenti non fit injuria*,' is applicable, and that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. Those principles, in my opinion, are perfectly sound," etc. The act came up for consideration again in the case of *Osborne v. Railroad Co.*, 21 Q. B. Div. 220, in which the principles of law declared by Lord Esher, M. R., in the case of *Yarmouth v. France*, *supra*, and of *Bowen, L. J.*, in *Thomas v. Quartermaine*, *supra*, were reaffirmed. We have been unable to find any later adjudication by the English courts, construing the English employers' liability act of 1880; and it would appear, as the settled construction by the English courts, that mere "knowledge is not a conclusive defense, in itself. But when it is a knowledge under circumstances that leave no inference open but one, viz. that the risk has been voluntarily encountered, the defense is complete." That "plaintiff may recover unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." It is held by some of the English judges that these principles qualify to some extent the doctrine of "*volenti non fit injuria*," and, as thus qualified, the rule applies, under the employers' liability act. The principle is clearly laid down by *Roberts & Wallace* in their work on the *Duty and Liability of Employers*, (pages 136, 146, 160, 161, 240,) and in *Buswell's* work on the *Law of Personal Injuries* the same conclusion is reached, (sections 207-209.)

Many of the states have statutory provisions in regard to the duties of employers, but, so far as we have been able to ascertain, none of the states have a statute similar to ours, except the state of Massachusetts. Section 5 of the employers' act of the state of Massachusetts (see Acts 1887, c. 270, p. 899) is as follows: "An employe, or his legal representative, shall not be entitled, under this act, to any right of compensation or remedy against his employer in any case when such em-

ployee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence." This section omits the provision in our statute, and in the English statute,—"unless he was aware that the master or employer, or such superior, already knew of such defect or negligence." But this difference in phraseology is immaterial, as the law, without this provision, would not require the employee to do a useless thing, and the Massachusetts courts do not seem to have regarded the difference as material; holding that their act was "copied, with some variation of detail;" "the intention was merely to abridge the model, and make it more compact;" and, "therefore, [says the court,] it is proper, if not necessary, to begin by considering how the English act had been construed before our statute was enacted." The court then cites the cases to which we have referred. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. Rep. 766. The precise question which we are considering did not arise in this case. In the case of *Mellor v. Manufacturing Co.*, reported in 150 Mass. 382, 23 N. E. Rep. 100, the rule declared in *Thomas v. Quartermaine*, 18 Q. B. Div. 685, and *Yarmouth v. France*, 19 Q. B. Div. 654, that the employers' liability act did not prevent the proper application of the maxim, "*volenti non fit injuria*," was approved. In the subsequent case of *Malcolm v. Fuller*, 152 Mass. 167, 25 N. E. Rep. 83, a charge was given by the trial court in favor of the defendant, in which the maxim was applied, and, though this charge was not open to revision, it is quoted in the opinion, with the statement "that it was sufficiently favorable to the defendant," citing the case of *Mellor*, supra. It is very clear that so far as the authorities, outside of this state, go, the rule declared in the case of *Eureka Co. v. Bass*, 81 Ala. 200, 8 South. Rep. 216, was not abolished by the employers' liability act. Possibly it was somewhat modified, but as we understand the rule, "*volenti non fit injuria*," as applied in the particular cases cited from the English and Massachusetts courts, there has been in fact no material modification.

A more careful examination of section 2590 of the Code, in connection with the qualifying clause, leads us to the conclusion that our construction of the act, as given in the *Holborn Case*, supra, was not the proper one. Without the qualifying clause, it is evident there is nothing in the act which, of itself, would abolish the rule of "*volenti non fit injuria*," as declared in 81 Ala. 200, 8 South. Rep. 216. The qualifying clause was not intended to enlarge the rights of the employee, or extend the liability of the employer, or take away the defense of contributory negligence. It is obscure and involved, but its terms would indicate an intention to restrict the employer's liability. It says: "But the master or employer is not liable under this section, if," etc. It does not

provide for an additional liability under certain conditions; but the employer is not liable, notwithstanding he may have been culpably negligent in failing to discover certain defects, and negligence, "if the servant or employee knew of the defect or negligence, and failed, in a reasonable time, to give information," etc. The reasoning of *Bowen, J.*, on this point, in the case of *Thomas v. Quartermaine*, supra, is convincing. It would seem that the legislature, by a statutory enactment, recognized the application of the maxim of "*volenti non fit injuria*," as declared by the courts, and out of abundant caution, less the statute might be construed to give a cause of action absolutely when the defects or negligence specified in the statute was the cause of injury, although the risk of such defect and negligence was voluntarily and knowingly assumed by the employee, added the proviso above referred to. The case of *Holborn*, 84 Ala. 133, 4 South. Rep. 146, was materially modified by the subsequent case of *Railroad Co. v. Walters*, 91 Ala. 435, 8 South. Rep. 357, but we are of opinion that the proper construction of the act leaves in force the rule which prevailed before the adoption of the act, and the rule as declared by this court in the case of *Eureka Co. v. Bass*, supra, and of *Railroad Co. v. Hall*, 87 Ala. 708, 717, 720, 6 South. Rep. 277, continues in force under the employers' act. So far as the *Holborn Case* and the *Walters' Case* conflict with these conclusions, they are overruled. It follows that the application for a rehearing must be denied.

(96 Ala. 33.)

### BOYD v. STATE.

(Supreme Court of Alabama. April 25, 1893.)

#### GRAND JURY—COMPLETION OF PANEL.

Acts 1886-87, p. 201, provides that 24 persons shall be drawn by the jury commissioners to be summoned as grand jurors for the city court; that if, on account of absence or excuse allowed by the court, the number of grand jurors is reduced below 15, the court shall order the clerk to draw in open court such number of names as, in the opinion of the court, may be necessary to complete the grand jury; and that from those who appear the grand jury shall be completed, if enough appear to complete it up to 15. *Held*, that where only 20 persons appeared, and 4 were excused, it was error to order the clerk to draw 10 names from the jury box in open court, and, out of those drawn, to obtain two grand jurors, and complete the grand jury so that it was composed of 18 men.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Jordan Boyd was convicted of an assault with intent to commit rape, and he appeals. Reversed.

Leslie B. Sheldon and B. B. Boone, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The act regulating the drawing and organization of jurors for Mobile county (Acts 1886-87, p. 201) provides that 24 persons shall be drawn by the jury commissioners, in the manner the act prescribes, to be summoned as grand jurors.

for the city court, and of these 24 names it shall be the duty of the court to impanel a grand jury of not less than 15. If, on account of absence, or excuse allowed by the court, the number of grand jurors is reduced below 15, the court shall order the clerk to draw in open court a number of names which, in the opinion of the court, may be necessary to complete the grand jury, and such persons the sheriff shall be ordered to summon forthwith as grand jurors; and from those who appear the grand jury shall be completed, if enough appear to complete the grand jury up to 15; if not, this process shall be continued until the grand jury is completed.

At the November term, 1892, of the city court, of the 24 persons who had been regularly drawn and summoned as grand jurors in pursuance of the above-stated provisions, 20 appeared, 4 of whom were excused by the court. The record then recites: "And it appearing to the court that, from excuses for good causes, the grand jury is reduced to less than eighteen, to wit, sixteen, the judge of the city court of Mobile ordered the judge of probate to produce the city court of Mobile jury box in open court, and that the clerk of the city court of Mobile draw therefrom ten names to complete the grand jury, and, in compliance with the within order, the clerk of the city court of Mobile drew from the city court of Mobile jury box, in open court, ten names to complete the grand jury, and all of those summoned appeared in court, and out of this drawing the court obtained the following named jurors, to wit, Fred S. Cox and John S. Drags; and it now appearing to the court that the grand jury is complete, and composed of the following named jurors, to wit," following with the names of the 16 persons who had originally appeared and the 2 additional persons, viz. Fred S. Cox and John S. Drags, and an order and proceedings organizing these 18 persons as the grand jury for the term. The indictment in this cause was presented by this body. The organization was in plain contravention of the statute, and void. The indictment is consequently void. *Cross v. State*, 68 Ala. 40; *Berry v. State*, Id. 126. There is manifestly no merit in any of the exceptions reserved to the rulings of the court on the trial; so clearly so that a discussion of them is unnecessary. Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

#### HARRIS v. STATE.

(Supreme Court of Alabama. April 25, 1893.)

Appeal from city court of Mobile; O. J. Semmes, Judge.

Frank Harris was convicted of rape, and appeals. Reversed.

J. I. Clemmons, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The organization of the grand jury which found this indictment was declared void by this court in *Boyd v. State*, 13 South. Rep. 14, (at the present term.) Under that au-

thority, this indictment must be held void. There was no error in any of the rulings or instructions of the court on the trial. Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

(101 Ala. 273)

#### LOUISVILLE MANUF'G CO. et al. v. BROWN.

(Supreme Court of Alabama. April 25, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—JURISDICTION OF EQUITY TO ADMINISTER TRUST—PRACTICE—APPEAL.

1. Where, after the execution of an assignment for the benefit of creditors, a lessor of the assignors sues out a writ of attachment for rent, and has it levied on the property assigned, the assignee may invoke the aid of equity to administer the trust.

2. The court may order the sale of the property; and such power extends over a leasehold interest in a store included in the assignment.

3. Where an assignee for the benefit of creditors files a bill for the administration of the trust, creditors are not entitled to be made parties defendant, but may intervene by petitions, and propound their respective claims, and have their interests ascertained and protected.

4. After an assignment had been made for the benefit of creditors, an attachment for rent was issued and levied on the assets, whereupon the assignee filed a bill for the administration of the trust. *Held* that, while the court could order a sale of the assets, it should not have ordered a reference and decreed that the attaching creditor should be paid out of the proceeds of the sale before the cause was at issue, no answer having been filed nor decree pro confesso entered against those not answering, and no opportunity having been given other creditors to present and prove their claims.

5. An appeal lies from a decree, in a suit by an assignee for the benefit of creditors, for the execution of the trust, whereby a debt is ascertained and ordered to be paid out of the proceeds of a sale of the assets without giving intervening creditors an opportunity to contest such debt, and present and prove their own claims.

6. Such appeal may be taken by the intervening creditors.

7. An objection that an appeal was taken by interveners without joining as appellants the defendants to the original bill, and without a summons and severance, cannot be suggested for the first time in argument.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by S. Brown, assignee under an assignment of I. Phillips & Brother for the benefit of their creditors, against said assignors and others, for the administration of the trust. From a decree confirming the register's report, the Louisville Manufacturing Company and another appeal. Reversed.

The bill in this case was filed by S. Brown, as assignee, to have the chancery court take jurisdiction of and administer the trust bestowed upon complainant by a deed of assignment, made January 20, 1892, by I. Phillips & Bro. for the benefit of their creditors. In said deed of assignment the assignors transferred all of their stock of merchandise, and also their leasehold interest in storehouses Nos. 1816 and 1818 Second avenue, in the city of Birmingham, then occupied by them. The said storehouses, the leasehold interest in which

had been conveyed in the deed of assignment, had been leased by I. Phillips & Bro. for a term of years from Mrs. L. L. Molton. The said lease contained the following provision: "Should the party of the first part [I. Phillips & Bro.] fail to pay the rents as they become due as aforesaid, or violate any other condition of this lease, the said party of the second part [Mrs. L. L. Molton] shall then have the right, at her option, to re-enter the premises, and annul this lease." As soon as the assignment was made, Mrs. L. L. Molton sued out an attachment to recover the rent for the entire term. This writ of attachment had been levied by the sheriff, and he had taken possession thereunder of all the goods in the storehouse formerly occupied by I. Phillips & Bro. On January 29, 1892, S. Brown, as assignee, filed his bill of complaint against I. Phillips & Bro., L. L. Molton, and A. Dreher, one of the creditors of I. Phillips & Bro., and prayed to have his said trust administered under the orders and directions of the chancery court, and that the goods levied upon by the landlord be sold by the chancery court instead of by the sheriff, and the proceeds held in lieu of the goods, subject to any priority of lien that the landlord might have, and for a settlement of the trust by the chancery court. All the creditors or beneficiaries under the deed of assignment were not made parties defendant. A. Dreher is the only creditor made a party defendant. On January 30, 1892, a decree was rendered by the court removing said trust or assignment into the chancery court, the court thereby assuming jurisdiction of said trust, and requiring the said Brown (assignee) to give bond in the amount of \$50,000, which was made. The complainant, as assignee, filed his petition in said cause, setting forth the levy of said attachment by the landlord for \$9,200, which was acknowledged to be a valid lien on the goods, and praying for an order of the court authorizing him to sell said leasehold interest in the premises and the stock of goods to the highest bidder for cash, after giving 10 days' notice, etc., and that the proceeds be held by the petitioner, first, for the payment of said rent, and the balance held, to be administered under the orders of the chancery court. On the 11th of March, 1892, this petition was granted by the court, and the petitioner was authorized and directed to sell the leasehold interest and the goods assigned to him according to the prayer of the petition. On March 2, 1892, S. Brown filed his report, setting out that, after the publication as required by the decree, he had sold the entire stock and furniture and the leasehold interest to one Louis Burger for the sum of \$16,120. On March 3, 1892, a decree was rendered by the chancery court, referring it to the register to report the fairness of the sale, and to ascertain what portion of the proceeds of the sale should be applied to the payment of the rent of said premises upon which the landlord holds a lien. On March 25, 1892, appellants Louisville Manufacturing Company and Hunt Manufacturing Company filed their petition in said cause, and asked that they might come into said suit as parties de-

fendant, and "file answers, pleas, or demurrers, and to do everything necessary for the protection of their rights and interests, as if they were made parties defendant in said suit by complainant." The complainant demurred to this petition on the ground that the petitioners have shown no right to come in as parties defendant. The court sustained the demurrer of the complainant to this petition, but gave the petitioners leave to file their claim by petition, and have their interest ascertained and their rights protected. On March 28, 1892, the Louisville Manufacturing Company and the Hunt Manufacturing Company filed their petitions as allowed by the decree of the chancery court. On March 29, 1892, the register in chancery made his report in favor of the fairness of the sale, and ascertained that \$9,123.40 should be applied to the rent due the landlord. The register also reported that he had refused to allow the Louisville Manufacturing Company and the Hunt Manufacturing Company to cross-examine witnesses called by complainant on said reference, or to offer evidence in chief on the issues made by the said decree of reference. The Louisville Manufacturing Company and the Hunt Manufacturing Company filed exceptions to this report of the register, on the ground that they were not allowed to take part in said reference. Thereupon the chancellor decreed that the report be set aside, and ordered the register to re-execute said reference, and to permit the said petitioners to participate therein. On April 8, 1892, the register again executed said reference, reported again in favor of the fairness of the sale, and reported the same amount as the correct amount to be applied to the landlord's claim. This amount, as reported by the register, includes attorneys' fees and court costs. The petitioners the Louisville Manufacturing Company and the Hunt Manufacturing Company filed exceptions to the report of the register which found the amount which should be applied to the payment of the landlord's rent, on the ground that only the amount which was due at that time should be allowed. On April 11, 1892, the chancellor confirmed the register's report, and petitioners now bring this appeal, and assign as error the various rulings of the chancellor as set out above.

Mountjoy & Tomlinson and Garrett & Underwood, for appellants. Lane & White, for appellee.

HARALSON, J. 1. The first assignment of error is that the court below erred in taking jurisdiction of the administration of the trust, as created in the deed of assignment. A trustee has the undoubted right to come to a court of equity for its assistance and protection in all cases of doubt or difficulty in the administration of the trust; and the bill in this case makes a clear case for equitable interposition for the protection and direction of the trustee in the discharge of his duties, as such. Perry, Trusts, § 928; Hill, Trusts, § 548.

2. The second assignment questions the

power of the court to order a sale of the property assigned. When the trust is before the court by a bill filed for its execution, the whole matter of the trust and its proper execution is within its jurisdiction, and the trustee must proceed as directed. He cannot sell without the sanction of the court, even if the deed of trust gives him the express power to do so. He must sell as directed by the court. *Perry, Trusts*, §§ 764, 770, 928. In this case the leasehold interest of the store was included in the deed of assignment for the benefit of creditors, as well as the goods and merchandise in the store, and no distinction can be drawn between the two as to the power of the court to order their sale. *Id.* §§ 449, 450, 547.

3. The fourth assignment is a complaint against the action of the court in sustaining a demurrer to the appellants' petition to be made parties defendant to the cause. The court committed no error in refusing to grant the petitions of appellants to be made parties defendant for the purposes specified therein. It conformed its rulings to the principles of chancery practice, and allowed appellants, as beneficiaries of the trust fund, to intervene by petitions, and propound their respective claims; "to have their interests ascertained, and their rights protected." Under this order they may prove and have their own claims allowed, and may resist the claims of any or all of the creditors of the assignors, which is all they can demand. *Ex parte Printup*, 87 Ala. 148, 6 South. Rep. 418.

4. The third and fifth assignments relate to the action of the court (1) in ordering a reference to ascertain the amount of the rent due and payable to Mrs. L. L. Molton, and (2) in decreeing that the amount ascertained by the register on the reference should be paid out of the proceeds of the sale of the stock of goods sold, and the sale of the leasehold interest. It is true, generally, that a decree on any of the merits of the case, rendered before the defendants are in default for want of answers, or before decrees *pro confesso* have been entered against them, is premature, and should never be made. It was irregular and contrary to the practice in such cases for the court to have ordered the register to ascertain the amount of the debt due to L. L. Molton for rent, and to have decreed its payment, before the cause was at issue. These were matters of essential merit, which the defendants and creditors had a right to contest. The proper and usual practice in such cases is, after answers filed, or decrees *pro confesso* against such as have not answered, to give reasonable notice by publication for all the creditors to file and prove their claims by a specified day, or they will be barred, and, on the day named in such notice, for the register to pass upon all claims presented and filed, each creditor having the right to contest the claim of every other one, and for the register to report to the court the result of his inquiries, with all objections and exceptions which may have been made to his rulings, together with all the evidence taken; and to this report, when made, all parties should have the right to except, before the court makes

its decree passing on the merits of any disputed claim. *Morton v. Railway Co.*, 79 Ala. 592; *McDonald v. McMahon*, 66 Ala. 115. Any proceeding which deprives a person of his property and its control, or adjudicates his rights without notice and the opportunity of being heard in opposition, is *coram non iudice*, as to such person. *Ex parte Trice*, 53 Ala. 548; *Dugger v. Tayloe*, 60 Ala. 504. The trustee in filing his bill admitted this debt of L. L. Molton to be a first lien on the assigned property, and was active in procuring the orders of the court to have it ascertained and paid, without notice to the creditors, the real parties in interest. The only defendants he made parties to his bill were I. Phillips & Bro., the assignors, who had no real interest, Mrs. L. L. Molton, an adversary with whom the assignee was not at variance, and a single creditor, A. Dreher, who lived at Cullman. The bill states "that the other creditors are very numerous, and cannot, without manifest inconvenience and oppressive delays in this suit, be at this time brought before this honorable court, the most of them being nonresidents of the state of Alabama, and their residences unknown." But it was proffered that, "as soon as all their respective names and residences could be ascertained, they would, according to law, and the rules and practice of the court, be made parties defendant to the bill of complaint." When the appellants sought, as creditors, to come in and be made parties defendant to the suit, in compliance with the proffer in the bill for them to do so,—that they might answer, plead, or demur, and do everything necessary for the protection of their rights and interests, as if they had been made defendants in the beginning,—they were resisted in their application by the trustee; and on the execution of the first reference to the register, which was to ascertain L. L. Molton's claim for rent, and how it should be paid, and which involved inquiries and a report as to the main matters of contest in the case, when appellants appeared before the register, and asked to be allowed to cross-examine the witnesses, called by the complainant, and to offer evidence on the issues made by the decree of reference, the complainant, the assignee, objected, and the register sustained the objection; the assignee and the register proceeding upon a mistaken discharge of their duties, respectively. The court, it is proper to state, set aside the report of the register on account of that ruling, and ordered a new reference, the same as the other, upon the execution of which appellants were allowed to appear. Even then they encountered the assignee as an adversary. The assignee possibly feels interested to have that debt allowed, as he may suppose he may be personally liable for it. There was no error in the court ordering the assignee to sell the goods and the leasehold estate, and hold the proceeds, subject to the orders of the court; but there was error in decreeing on the merits of the cause before it was at issue, in having the Molton debt ascertained, and in ordering it paid; and the decree, to that extent, must be reversed, and set aside.

5. We stated in *Adams v. Sayre*, 76 Ala. 517, that it was the settled doctrine of this court that, as a general rule, there can be but one final decree upon the merits of a chancery cause, which is required to settle all the equities litigated, or necessarily involved, in the issues of the particular suit; that the policy of the rule is founded in the indisposition of appellate courts to multiply appeals, by undertaking "to review litigated cases by piecemeal." But we held that a decree may nevertheless be partly final, and partly interlocutory; final, so far as it determines all issues of law and fact, constituting the equities proper in the cause; and interlocutory as to anterior proceedings regulating its mode of execution, from each of which an appeal will lie to this court. *Thornton v. Railroad Co.*, 10 South. Rep. 442; *Morton v. Railroad Co.*, 79 Ala. 612. The decree in this case, so far as it goes, settled matters of contention and the material equities in the cause, and is such a decree as supports an appeal.

6. The appeal is taken by two of the creditors, who intervened by petition, and who were authorized to take it. *Jones v. Wilson*, 54 Ala. 50; *Weaver v. Cooper*, 78 Ala. 318; 3 Brick, Dig. p. 34. It was taken in their names alone, and the point is now made that it should be dismissed because not prosecuted in the name of all the defendants, and without a summons and severance. A sufficient reply to this, if any were needed, is that the cause was submitted without objection, and no motion was made to dismiss the appeal for the reasons assigned, and it is too late for appellees to suggest in argument, as they do, that the appeal is improperly here. *Vaughan v. Higgins*, 68 Ala. 548.

7. It would be premature at this time for us to pass upon the merits of Mrs. Molton's claim, or that of her assignee, for rent. It was prematurely considered and passed on in the court below. The cause must be reversed and remanded, that the chancery court may order a new reference, in the manner indicated in this opinion, to require all creditors to present and prove their claims, to ascertain what debts there are, and afterwards to make distribution of the trust fund.

(39 Ala. 545)

**NORTH BIRMINGHAM ST. RY. CO. v.  
LIDDICOAT.**

(Supreme Court of Alabama. April 25, 1893.)  
INJURIES TO PERSON BOARDING CAR — PLEADING.

1. In an action against a railroad company for injuries to plaintiff by the giving way of a handle on the car which plaintiff took hold of while entering it, a complaint, which fails to allege that it was at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that plaintiff was invited or knowingly permitted to attempt to board the car, or that he was in any way accepted as a passenger, fails to show any relation existing between the parties devolving on defendant the duty towards plaintiff of maintaining its car in repair.

2. The allegation that plaintiff was in the act of getting on the car "as a passenger, as he had a right to do," is a mere statement of

the pleader's conclusion, and without weight in determining the sufficiency of the pleading.

3. The allegation that plaintiff attempted to board the car a short distance south of where defendant's line crossed another railroad does not, by reason of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting line, raise the inference that the car was at rest, as it is not averred that the train was on a north-bound trip, or that it was within a hundred feet of the crossing, the distance at which trains are obliged to stop.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This was an action brought by the appellee, William Liddicoat, by his next friend, to recover damages for personal injuries, alleged to have been sustained by reason of the negligence of the defendant, the North Birmingham Street Railway Company. There was judgment for the plaintiff, and defendant appeals. Reversed and remanded.

The defendant interposed a demurrer to the complaint upon the following grounds: (1) Because it does not allege that the defendant's train was at a station or regular stopping place where passengers were received and discharged, when the plaintiff attempted to get aboard of the train. (2) Because it does not allege that the defendant or its servants knew or could have known that William Liddicoat was attempting to get aboard the train when he received the injuries complained of. (3) Because the complaint shows that plaintiff was guilty of contributory negligence that was the proximate cause of the injuries complained of by him, and does not allege that the defendant was guilty of wanton negligence or intentional negligence. The court overruled each of these grounds of demurrer.

Garrett & Underwood, for appellant.  
Chas. P. Jones and W. R. Houghton, for appellee.

STONE, C. J. Appellee, a minor between 11 and 12 years of age, sued appellant, a street-railway company operating cars with dummy engines, to recover damages for alleged injuries sustained by plaintiff while attempting to board one of appellant's trains. The train he attempted to board was going from the city of Birmingham to North Birmingham, and was approaching a point where the Birmingham Mineral Railroad Company's tracks cross appellant's tracks, when it came to a stop just before reaching the crossing, and then proceeded on its way. Appellant has passenger stations at short intervals along its road, one of which is located about 200 feet north of the intersection of the two roads, but it has no station at the point where appellee attempted to enter its car. It was, however, a common, if not daily, occurrence for persons to take advantage of the momentary stoppage of the train as it approached the crossing, to board or alight from its cars, and it does not appear that this practice was ever prohibited, or objected to, by appellant, or its servants in charge of its trains. The habitual stopping of the train at this point was in consequence of the requirements of the

statute, (Code, § 1145,) and not for receiving and discharging passengers, though that had become a frequent, if not daily, occurrence, as stated above. On the 23d of March, 1891, appellee was standing on the side of appellant's track, either upon or near the roadway of the intersecting road, when appellant's train, consisting of an engine and two cars, approached the crossing, going north. One of the cars was an ordinary passenger coach and the other an open car having running boards extending along each side, which furnished a step to passengers getting on or off the car. Appellee attempted to board one of the cars, but fell, and one of the trucks passed over and crushed his leg, necessitating amputation. For that injury this suit was brought. Whether appellee, when he attempted to board the train, was standing on the track of the intersecting road, and attempted to get on the car while the train was in motion, or whether he was south of the crossing and the train at rest when he made the attempt, are questions as to which the testimony is conflicting. There is also direct conflict in the testimony as to the cause of appellee's fall. His statement is that he undertook to board the open car while the train was at rest, south of the crossing, the open car being next to the engine; that he stepped on the running board, and seized with his hand the arm or support attached to the car to assist passengers in getting in and out of the car; that one end of the arm or support broke loose from its fastenings, and precipitated him upon the track. The engineer, on the other hand, testified that he was looking at appellee when the accident occurred; that he saw him, as the train was passing, standing on the roadway of the Birmingham Mineral Railroad Company at its intersection with appellant's road; and that, the box passenger coach being next to the engine, appellee jumped on the rear steps of that car and seized hold of the railings; that he lost his hold and fell on the track, and the front truck of the rear car passed over his leg; that the railing of which he took hold did not break loose, and was not out of repair. There is other testimony seemingly corroborative of each of these versions of the accident. The averments of the complaint, so far as material to be noticed, are that "on the day and year aforesaid, at a point in North Birmingham, on defendant's line of road, a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad, the plaintiff boarded, or attempted to board, or attempted to and was in the act of getting on, one of the defendant's passenger cars, as a passenger, as he had the right to do; that the car the plaintiff was attempting to get on was an open car with a running board on each side for passengers to get on and into the car; that on each of the seats of said car was a handle or arm made and used for the purpose of enabling passengers to catch hold of the same, to enable them to pull themselves into the car; that plaintiff caught hold of one of these handles or arms, and was pulling himself into the car, when the handle or

arm turned or broke, whereby plaintiff was thrown to the ground and under the car, and his leg was run over," etc. There was a demurrer to the complaint, which was overruled. The defendant then pleaded the general issue and contributory negligence on plaintiff's part. The errors assigned are the rulings of the court on the demurrer to the complaint, on the charges given and refused, and on the motion for a new trial.

It may be declared as a general rule that the relations of carrier and passenger are founded in contract, either expressed or implied, made upon a valuable, but not necessarily a pecuniary, consideration; "and when such relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law exacts of him who supplies that agency the duty of exercising care in its selection, maintenance in repair, and operation." 2 Amer. & Eng. Enc. Law. p. 739. The relation begins "when the contract of carriage having been made, or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises, or has entered any means of conveyance provided by the carrier." *Id.* p. 244. It is the duty of the carrier to provide safe and convenient stations, and means of ingress to and egress from its cars; and if a person has the bona fide intention of taking passage by a train, and goes to a station at a reasonable time, he is entitled to protection in these respects, as a passenger, from the moment he enters the carrier's premises. The carrier may, by proper notice, prohibit the receiving or discharging of passengers at other places than the stations provided by it, and persons attempting, uninvited, to board its trains at such other places, in the absence of wanton or willful negligence on the part of the carrier, act at their own peril until they have entered its carriage, or are accepted as passengers. If, however, a carrier is in the habit of receiving or discharging passengers at a place other than a regular station, or persons are invited or directed by its authorized servants to board or alight from its cars at such other places, they have the right to presume that it is safe to board or quit the train at such place, unless the risk in doing so is so obvious that a man of ordinary care and prudence would not, under like circumstances, make the attempt. *Railroad Co. v. Kane*, 69 Md. 11, 13 Atl. Rep. 337. It is immaterial for what purpose its cars are stopped at such place, other than a regular station, whether in consequence of a duty enjoined on it by law, as when approaching the track of an intersecting road, or arising from convenience or necessity in the usual mode of operating its trains. If the public are in the habit of entering or quitting its cars at such place, without objection from its agents or servants, such persons are entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular stations, except in so far as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use. The customary use of



such place for receiving and discharging passengers may become so generally known and well established as to impose upon the carrier the duty of maintaining such place in as safe and convenient condition as a regular station, and to authorize a passenger, without notifying the conductor or other servant of the carrier of his desire or intention to board the train, to presume that a reasonable opportunity will be afforded him for that purpose, and that it is safe to do so. A passenger attempting to board a train at such place, and under such circumstances, is as much justified in the assumption that the carrier's cars are in a safe condition as he would be were he attempting to board them at a regular station; for the duty of the carrier to so maintain them attaches in all cases and under all circumstances where the relation of carrier and passenger exists, either by express contract or by implication of law. What has been said has no application to a person who, being at either a regular station, or a place of customary use for receiving and discharging passengers, has not a bona fide intention of boarding a train as a passenger, but simply intends or attempts to obtain passage without the knowledge and consent of the carrier's servants or employees, and without paying fare. Such a person would in no sense be a passenger, but a trespasser, to whom the carrier would owe no higher duty than to refrain from wanton or willful negligence; or, upon discovering him to be in a position of peril, to employ such reasonable care as the facilities at hand would permit, to avoid the threatened injury. *Railroad Co. v. Webb*, (Ala.) 12 South. Rep. 374; *Railway Co. v. Womack*, 84 Ala. 149, 4 South. Rep. 618. But the failure of the carrier to maintain its cars in repair would not, as respects such person, be either wanton or willful negligence, however gross such negligence might be, and for an injury resulting under such circumstances the carrier would not be answerable in damages to the person injured. Whether or not a person is a passenger is generally a question for the jury, and always so when different inferences may be drawn from the testimony. *Brown v. Scarboro*, (Ala.) 12 South. Rep. 289. There is testimony in the case before us tending to show that appellee was, when injured, attempting to board one of appellant's cars with the bona fide intention of riding thereon, upon paying the customary fare; while, on the other hand, there is testimony tending to show that his attempt to board the train at the time and place mentioned was prompted by a mere boyish propensity,—in common parlance, to “steal a ride,”—as he had done or attempted to do on other occasions; and if the testimony on another trial should be substantially as we now find it, the question will be one for the jury under proper instructions from the court.

It cannot be affirmed as a universal proposition of law that it is negligence per se for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature

of the car and of the place, and all the attendant facts and circumstances enter into the question; and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt. *Railroad Co. v. Kane*, 69 Md. 11, 13 Atl. Rep. 387; *Railway Co. v. Stewart*, 91 Ala. 421, 8 South. Rep. 708. All the questions for review in this case may be solved when tested by the principles we have above formulated.

Taking up, now, the demurrer to the complaint, and construing, as we must, the averments of the latter most strongly against the pleader, we are unable to declare that the complaint shows on its face that the relation of carrier and passenger legally existed between appellant and appellee at the time the alleged injury was suffered. It is not averred that appellee was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers on its cars, or that appellee was invited or knowingly permitted to attempt to board the car by any authorized servant or employee of the company, or that he was in any manner accepted as a passenger. In the absence of averments showing an express contract of carriage, or of facts from which such contract is implied in law, no relation is shown to have subsisted between the parties at the time of the accident that devolved upon appellant the duty towards appellee of maintaining its cars in repair. Failing in this respect, and there being no averment that the injury was caused by the wanton or willful negligence of the company, no cause of action is shown for which it is answerable to appellee. *Railroad Co. v. Hairston*, (Ala.) 12 South. Rep. 299; *Railway Co. v. Chewning*, 93 Ala. 24, 9 South. Rep. 458. We are not unmindful of the averment in the complaint that “plaintiff was in the act of getting on one of the defendant's passenger cars as a passenger, as he had the right to do,” but these words are the mere averment of the pleader's conclusion. No facts are stated, and no weight can be accorded them in determining the sufficiency of the complaint. They are perfectly consistent with a most heedless attempt to board the train when in motion, and at a place not set apart by any order or usage of the company for receiving passengers. Moreover, there is almost irresistible implication that, when the attempt was made to board the car, the train was in motion. There is a manifest distinction in this respect between the complaint in this case and that in *Railroad Co. v. Jones*, 83 Ala. 377, 3 South. Rep. 902. In the latter the averment that the plaintiff's intestate was a passenger is supported by the statement that she was in the defendant's coach,—a position which, of itself, *prima facie* indicated the relation of passenger; while here there is no fact averred in the complaint which indicates that appellee had become, or was in a position entitling him to become, a passenger in appellant's



train at the time of the accident. When we look to the averments of fact in the complaint, as controlled by the intendments against the pleader, it must be inferred from the complaint that appellee's attempt to board the train was at a place where he was not authorized or invited to make the attempt; that the cars were in motion at a rate of speed which would have deterred a man of ordinary care from making the attempt under like circumstances; and that in making such attempt appellee was a trespasser. *Montgomery v. Railway Co.*, (Ala.) 12 South. Rep. 170; *Railway Co. v. Chowning*, 93 Ala. 24, 9 South. Rep. 458.

It is contended in argument for appellee that it must be inferred the train was at rest when appellee undertook to board it, because of the averment that appellee's attempt to board was made when the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad," and because of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting road. There are conclusive reasons why this argument cannot prevail. Although the court takes judicial knowledge of the requirements of the statute, and it is averred in the complaint that appellee's train was south of the crossing, it is not averred that the train was on a north-bound trip. Indulging the view most unfavorable to the pleader, as we must, the train at the time of the accident was south bound, and, therefore, according to the complaint, had passed the intersecting road, and, consequently, the point where it was required by the statute to come to a stop. On the other hand, if we could assume the train was north bound, it is not averred it had approached within 100 feet of the crossing when plaintiff undertook to board it, that being the distance from the crossing at which it was required by the statute to come to a full stop. The averment that the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad" is not the equivalent of an averment that the train was within 100 feet of the crossing. This last fact is not necessarily implied in the averment made. The inference does not arise, as matter of law, from the facts averred in the complaint, that appellant's train was at rest when appellee attempted to board it, but, as we have shown, the intendments on demurrer are to the contrary.

It results from the foregoing principles that the first and second grounds of demurrer to the complaint should have been sustained; and in view of the intendments against the pleader, as above indicated, it may be the third ground of demurrer should have been sustained, notwithstanding contributory negligence is ordinarily matter of defense. We cite the following authorities: *Railroad Co. v. Hairston*, (Ala.) 12 South. Rep. 299; *Montgomery v. Railway Co.*, 1d. 170; *Railway Co. v. Chowning*, 93 Ala. 24, 9 South. Rep. 458. The charges given and refused by the court, on which the remaining assignments of error are based, need not be specially

noticed. The principles we have announced will furnish sufficient guide on another trial. For the error of the city court in overruling the demurrer to the complaint its judgment is reversed, and the cause is remanded.

(99 Ala. 271)

MORROW v. RUSSELL. WALLING v. SAME. CAMPBELL v. SAME.

(Supreme Court of Alabama. April 25, 1893.)

ELECTION CONTESTS—CAPTION OF BOND.

An election contest, triable "before the judge" of probate, is pending in the court to the extent that a bond to secure costs, all the purposes and objects of which are to be worked out through the processes of the court, should bear a caption showing that the bond is filed in the court, and not with the judge individually.

Appeals from city court of Decatur; William H. Simpson, Judge.

Application by D. B. Morrow, W. J. Walling, and A. B. Campbell for mandamus to E. M. Russell, requiring him to dismiss election contests pending before him. Applications denied. Relators appeal. Affirmed.

E. W. Godbey and Wirt & Speake, for appellants. J. B. Moore, Rouillac & Nathan, and Morris A. Tyng, for appellee.

MCCLELLAN, J. These are appeals from orders of the city court of Decatur denying applications for writs of mandamus to be directed to the probate judge of Morgan county requiring him to dismiss contests of elections to the office of sheriff, tax collector, and clerk of the circuit court of Morgan county pending before him. The sole alleged ground for dismissing said contestations is that the several contestants had not given security for the costs thereof, as required by the statute, and the contention that they had not complied with the law in this regard is rested solely on the fact that the bonds, which were given and which were intended to be security for costs, and which in every other respect were entirely formal, regular, and sufficient, each had the following caption: "State of Alabama, Morgan county. In the probate court of Morgan county, Alabama." And the argument is that the caption is an essential part of the bond; that it is of vital importance that it should correctly state the forum in which the paper is filed, falling in which the bond is void; that these contests were pending before the judge of the probate court, and not in the probate court; that these captions show that the bonds were filed in a tribunal in which the cases, to secure the costs in which they were intended, were not pending, and hence no bonds at all can be said to have been filed in the tribunal where the cases are pending, and that, therefore, the proceedings must be dismissed. The invalidity of the bonds is also sought to be supported by an ingenious argument based on the provision of the statute of frauds which requires undertakings to answer the debt, miscarriage, or default of another to be in writing, expressing a consideration, the assumption that bonds se-

curing costs are such undertakings as to the sureties and the supposed inaccurate statement of the forum in the caption. But this argument, as well as all other suggestions of counsel for appellants, proceeds entirely on the theory that the caption in point of fact is an incorrect statement of the tribunal. Without following the argument of counsel, or committing ourselves to the soundness of any one of the several propositions advanced, we experience no difficulty in sustaining the action of the city court upon the broad ground that the caption of the bond in each of these cases correctly sets forth the tribunal in which the law requires security for costs to be given. We need not hesitate to concede that these causes are triable by the judge of probate, and not, strictly speaking, by the probate court. It does not follow from this concession that the bonds must appear to have been filed before or with said judge as an individual, separate and apart from the court, any more than that bonds for security for costs in contests of elections to the general assembly should be filed in the house or senate, as the case may be, because the trial is to be had before one or the other of those tribunals, or that security for the costs of contests triable by a circuit judge or chancellor should be filed with and be entitled as before those officers, instead of being lodged with the clerk of the circuit court, or the register of the chancery court, and made to bear a caption appropriate to papers filed in said courts. It does not follow, in other words, from the fact that a cause is by statute made triable by and before the presiding officer or the individuals constituting the membership of a tribunal, that the cause is pending before such officer or individual, and not in the court of which they are officers, or even in an entirely different court for any purpose whatever. For instance: In contests of the election of members of the general assembly, the cause is in a sense pending in the circuit court of the county or a circuit court of the senatorial district, and security for costs must be there filed and approved by the circuit court clerk, (Code, § 408;) notice of contest must be returned to him after service, (Id. § 411;) interrogatories to take testimony must be filed with him, and he must issue commissions to that end, (Id. § 412; *Roney v. Simmons*, [Ala.] 11 South. Rep. 740;) the costs of such contest must be certified "to the clerk of the circuit court in which security for costs is required to be given, \* \* \* and said clerk must thereupon issue execution for the same, returnable to the next term of the circuit court," etc., and such clerk is allowed specified fees for the issuance of original and alias executions, (Code, §§ 413-415; *Roney v. Simmons*, supra.) And in a contest before a judge of the circuit court, the cause, at least for all the purposes of securing and collecting costs, notice of contest, etc., is pending in the cir-

cuit court, (Code, § 428;) commissions to take testimony are issued by the clerk of the court, (Id. § 402;) and depositions, when taken, are returned into said court, (Id. § 405.) And so, also, in respect of a contest of an election to the office of judge of the circuit court before a chancellor, the case, for all purposes of costs and the like, is in the chancery court, and prosecuted through the processes of that court issued by its register. Id. §§ 429-431. And that all these contests are pending in the courts, the judges of which try the issues involved in them, for all the purposes of security, judgment, and execution for costs, is made more manifest by reference to certain general provisions applicable to all contests, and to certain provisions in themselves applicable alone to contests tried by the probate judge, but extended by other sections to contests before circuit judges and chancellors. Thus section 398 of the Code provides that the contestant must give security for costs within a specified maximum limitation, "in such sum as the judge of the court in which the contest is to be tried may deem sufficient,"—a clear recognition of the pendency of the contest in the court the judge of which hears and determines it. Commissions to take testimony where the contest is triable by a judge of probate are issued by such judge not as judge, but as performing the duties of clerk of the probate court. Code, § 402. Proceedings against defaulting witnesses are issued out of and returnable to a regular term of the probate court, and not by and before the probate judge, except as a part of such court, (Id. § 420,) and execution for costs issues out of the probate court, and must be made returnable to a regular term of said probate court, (Id. § 427.) The execution for costs, in contests before chancellors and circuit and probate judges, when the contestant fails, issues on the bond for costs and against the contestant and his sureties. It is a process of the court. It is issued by the ministerial officer of the court, the register of the chancery court, the clerk of the circuit court, or the officer performing clerical duties in the probate court. It is returnable, not to or before the judge of the court, but to the court itself,—to some regular term of the chancery court, circuit court, or probate court, as the case may be. To hold that a bond, all the purposes and objects of which are to be worked out and accomplished through the processes of the court, and with reference to which nothing whatever is to be done, no action whatever is to be had except by the court, does not belong to the files of the court, and should not bear a caption appropriate to its functions in the court, would be an anomaly too extraordinary for toleration. We cannot subscribe to such a doctrine, but hold with the court below that the bonds in each of these cases belong to the records of the probate court, as properly appears by their caption. Affirmed.

(30 Ala. 339)

## RICHMOND &amp; D. R. CO. v. TROUSDALE &amp; SONS.

(Supreme Court of Alabama. April 25, 1893.)

## CARRIERS — LIVE-STOCK SHIPMENTS — DELAY IN TRANSPORTATION — JURISDICTION — EXAMINATION OF WITNESS — INSTRUCTIONS.

1. An action may be brought in Alabama against a foreign corporation for breach of a contract made with defendant's agents in Alabama for the carriage of live stock from Alabama to Georgia, defendant operating a railroad over which the transportation was effected.

2. Where there is unreasonable delay on the part of a carrier in transporting live stock, and the stock, when delivered, is found to be in an unsound condition, the burden is on the carrier to show that such unsound condition is not due to the unreasonable delay.

3. An instruction that, if a carrier failed to deliver live stock in a safe condition within a reasonable time, a presumption of negligence arises, and the burden is on the carrier to excuse itself from negligence, is not erroneous, as assuming that the stock was shipped in a sound condition, and injured during transportation.

4. In an action against a carrier for injury to live stock, alleged to have been caused by unreasonable delay in transporting the same, an instruction that the measure of damages is the difference in the market value of the stock if they had been delivered without delay, and their market value after delivery in the condition shown by the evidence, is not erroneous, as assuming that the stock was injured by unreasonable delay in transporting.

5. A carrier is liable for all injury done to live stock in transportation that is referable to negligent delay in transporting them, through the effect of such delay upon the physical condition, or latent vicious propensities, of the animals, whereby they are reduced in weight, and injure each other.

6. In an action for injury to live stock, caused by delay in transporting the same, an instruction that the evidence is undisputed that a reasonable time for the delivery of said animals after their receipt by defendant is 10 or 12 hours is not objectionable, as disregarding testimony that "usually stock, in shipping, go through very nicely in 10, 15, or 20 hours," as the witness merely meant that stock would not be injured on a journey lasting from 10 to 20 hours.

7. In an action against a carrier for injury to stock, caused by delay in shipping them, evidence as to "what was the custom, in such cases, as to some one going along with the stock," is irrelevant.

Appeal from circuit court, Jefferson county; John B. Tally, Judge.

Action by Trousdale & Sons against the Richmond & Danville Railroad Company to recover damages for injury to stock, caused by negligence of defendant in delaying their transportation. From a judgment for plaintiff, defendant appeals. Affirmed.

On the introduction of one A. J. Camp, a witness for the plaintiff, and after he had testified that at the time the bill of lading, which was signed by him, was given to the plaintiff, he was the agent of the defendant in Birmingham, the defendant's counsel asked the witness the following question: "What was the custom, in such cases, as to some one going along with the stock?" The plaintiff objected to this question, which objection was sus-

tained by the court, and the defendant duly excepted thereto. Among the written charges requested by the plaintiff was the following: "(6) The jury are charged that the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of same to the railroad, is ten or twelve hours, and if their being kept on the car for a longer time by the defendant caused them to be vicious, and to injure one another, the defendant is liable to answer in damage for such injury." The defendant duly excepted to the giving of this charge, as well as all the others given at the request of the plaintiff. The defendant then requested the court to give, among others, the following written charges, and separately excepted to the refusal to give each of them: (1) "The common-law rule was that a common carrier was an insurer of goods intrusted to it for carriage, and that if such goods were lost, destroyed, or injured, the burden of proof was on the carrier, in an action for the damages, to acquit itself of negligence, or to show that the loss or injury was caused by the act of God, or the public enemy; but that rule does not apply in this case, because the articles are live stock, which, by their nature, are susceptible to injury during the transportation, and in such a case the common carrier is not liable, except for actual negligence causing or contributing to the injury complained of, which negligence must be shown by actual proof in the case." (4) "The burden of proof is on the plaintiff to show that the stock was injured by improper treatment while in the defendant's custody, and that their market value was decreased by such improper treatment." (12) "The burden of proof is on the plaintiff to show that his animals were injured through the defendant's negligence, and this burden is not shifted by proof that the defendant failed to deliver them within a reasonable time, and that they were in an injured condition, because, by their very nature, such animals are liable to injury during transportation in a railroad car." (13) "If the jury believe from the evidence that the only injury sustained by the animals was such as animals usually sustain when undergoing transportation on railroads, they can find only nominal damages; that is to say, some small amount, as one dollar or one cent."

James Weatherly, for appellant. Gregg & Thornton, for appellee.

McLELLAN, J. This action is prosecuted by Trousdale & Sons, a domestic corporation, against the Richmond & Danville Railroad Company, a foreign corporation. It sounds in damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain live stock from Birmingham, Ala., to Atlanta, Ga., and there deliver them to the plaintiff, which was both consignor and consignee. The contract was made in Birmingham, Ala., where the plaintiff was domiciled, and where the defendant was present by its agents, and whence it oper-

ated a line of railway to Atlanta, Ga., a great part of which was in Alabama, and over which the transportation was to be effected. This was, therefore, an Alabama contract, not only made here, but, in part, to be performed here; and the courts of this state, clearly, we think, have jurisdiction—service being had—of this action, for its breach, notwithstanding the defendant is a foreign corporation, and its full discharge was to be consummated by delivery to the consignee, in another state. See *Banking Co. v. Carr*, 76 Ala. 388.

The evidence tended to show that the animals, when delivered in Atlanta, from 24 to 36 hours after they should have been delivered—a reasonable time for transportation and delivery being put at from 10 to 12 hours, and the time required in this instance, at 46 hours—"had been down, and were skinned up;" that they "looked very thin, hollow, skinned, and scalded, from standing in the car;" "seemed to be feverish;" "one lame in hind legs and limping;" one specially valuable horse "was sore and lame, and appeared to have no life;" twelve others, "all sore and lame and skinned," etc.; that all the stock were in excellent condition when shipped from Birmingham, and that the bad condition in which they were on arrival at Atlanta was due to the fact that they were kept on the cars a very much longer time than was necessary for their transportation and delivery, without water or food. On the other hand, there was evidence tending to show that the animals, or some of them, were not in a sound condition when they were received for shipment, and that the diseases and hurts they exhibited on delivery in Atlanta existed, or had been sustained, before they were shipped, and did not result from their transportation at all. It is insisted that the trial court assumed or declared the falsity of the evidence last referred to, or that, in effect, it was withdrawn from the consideration of the jury by the instructions given. We think not. The charges supposed to have this infirmity are as follows: "If the defendant, having undertaken to deliver the stock, failed to deliver it in a safe condition, within a reasonable time, the presumption of negligence arises, and the burden of proof is shifted to the defendant to excuse itself from negligence." And again: "If the jury believe from the evidence that the plaintiff is entitled to recover, the measure of the damage is the difference in the market value of the stock in Atlanta, Ga., if they had been delivered without any delay in shipment or delivery, and their market value after their delivery in Atlanta, Ga., in the condition the evidence shows they were in." The first charge quoted we understand to mean only this: That if there has been unreasonable delay on the part of the defendant in the transportation and delivery of the live stock, and when, after such unreasonable delay, they are found to be in an unsound condition, the onus is then on the defendant to show that the unsound condition of the stock was not due to the unreasonable delay in transportation, or, in other words, that evidence of

unreasonable delay, and the existence of injuries on delivery, raises a prima facie presumption that the delay was negligent, and the injuries resulted from it, and puts it on the defendant to rebut this presumption, and show, either that there was no negligent delay, (which was not attempted to be shown in this case,) or, conceding the delay, that the injuries did not result from it, but (as was attempted to be done in this case) that the stock was in an unsound condition—had received the injuries complained of—before the shipment. This we understand to be the law, especially where, as in this case, the contract of affreightment sets forth that the stock, when received, was "in outward apparent good order," and the injuries counted on, and shown in the testimony, were "outward and apparent." This charge does not assume that the defendant has not discharged this burden, or take away from the jury, or tend to mislead them to forego, the right to find, on the whole evidence, that the stock was unsound when it came to the hands of the carrier. And so with the other charge quoted, which was given at the request of the plaintiff. It does not assume that the stock was injured in the transportation, but asserts only that, if the jury should find negligent delay—as to which there was no controversy—in the transportation and delivery, the measure of plaintiff's recovery would be the difference in value of the animals at the time they should have been delivered, in the condition they would have been in at that time, and their value when they were delivered in the condition they were in at that time. This did not tend to prevent the jury to find that their injuries were not caused by the delay, but existed before the carriage began, and hence that their condition was the same when they were delivered as when they should have been delivered. The instruction, in effect, was that, if the jury found any damages at all for plaintiff, it should be measured by the change in the condition of the live stock wrought by the unreasonable delay, if such change had been wrought. It may be true that railroad transportation of live stock always, and inevitably, involves reduction in their weight, some lameness, and even abnormal weakness; but that this is true, and that these effects incident to the nature of the subject-matter, and the manner of transportation, cannot be made the basis of a recovery in damages, where there has been no negligence on the part of the carrier contributing thereto, or aggravating the natural injuries resulting from car wear, and necessary deprivation of water and food, is not to say that where the carrier has been guilty of negligent delay, and subjected the stock to the injurious effects of such transportation for an unreasonable and unnecessary length of time, and in consequence thereof the stock has been injured, though only in this natural way, to a greater extent than would have been the case had the delay not occurred, the carrier would not be responsible for whatever increased damage the stock has sustained on account of the delay, though such damage may be purely incident to keeping the

(97 Ala. 417)

## FALLS et al. v. UNITED STATES SAVINGS, LOAN &amp; BLDG. CO.

(Supreme Court of Alabama. Nov. 25, 1892.)

STATUTES—EVIDENCE—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—CONFLICT OF LAWS—USURY.

animals on the car. To the contrary, we do not doubt the liability of the carrier for all damage that is referable to a negligent prolongation of the transportation, through its natural effect upon the physical condition, or latent vicious propensities, of the animals, whereby they are reduced in weight or strength more than they would have been, had prompt carriage and delivery been made, and injure each other in consequence of viciousness aroused by the excess of their confinement beyond the time necessary for transportation and delivery. These views will suffice to show the grounds of our opinion that the trial court did not err in its rulings on charges having reference to this part of the case. The charges asked by the defendant were faulty, in that they involved a tendency to mislead the jury. If, indeed, that was not their direct effect, from a consideration of any injuries which resulted to the stock from their nature, habits, and propensities, in connection with, and as operated upon by, the negligent delay of the carrier. Charge 6, given for plaintiff, correctly asserted the law in this connection. Charges 1, 12, and 4, refused to defendant, were open to the objection pointed out above, if not to others, also. Charge 3, asked by defendant, is, in a sense, abstract,—there was no evidence that plaintiff was remiss in its efforts to repair the injuries sustained by the stock, if any, or that such injuries might have been lessened or cured by proper attention, which was not given,—and was affirmatively bad, in that it limits the recovery to nominal damages, though, for aught that is hypothesized, the plaintiff might well have been put to great trouble and expense in repairing the injury which his property had sustained through defendant's negligence. Charge 6, above referred to, is not open to the objection urged in argument, which proceeds on the idea that there was evidence that 20 hours, or any number beyond 10 or 12, would be a reasonable time for the transportation from Birmingham to Atlanta. A witness for plaintiff testified that "usually stock, in shipping, go through very nicely in ten, fifteen, or twenty hours;" but this evidence went to show that stock would not be injured on a journey lasting from 10 to 20 hours on cars, and not that it was reasonably necessary for any length of time beyond 10 or 12 hours to be consumed in the transportation from Birmingham to Atlanta.

We cannot see that the court committed any error in sustaining plaintiff's objection to the question put by defendant to the witness Camp. The form of the question was enough to support the objection, and, besides, the fact sought to be elicited was not relevant. It there was a custom for shippers of stock to accompany it, non constat but that this was a mere privilege, and not a duty of the shipper; and, if the duty of the shipper, in this instance it does not appear that its performance would have avoided the injury, or that its remission contributed thereto. The other exceptions to rulings on testimony are not urged in argument. The judgment of the circuit court is affirmed.

1. Under Code 1886, § 2790, providing that the proceedings of any legislative body purporting on the face of the book to be printed by authority of the state are authority without further proof, a book, whose title page contained the words, "The General Statutes of the State of Minnesota. \* \* \* Prepared by George B. Young,"—immediately followed by a statute of Minnesota, purporting to give George B. Young authority to publish such statutes,—was competent evidence, in a court of Alabama, of the statute law of Minnesota.

2. Where a corporation had a place of business in Birmingham, Ala., and an agent at such place, it complied sufficiently with Const. art. 14, § 4, providing that no foreign corporation shall do business in Alabama unless it have at least one known place of business, and one authorized agent, and with Sess. Acts 1886-87, § 4, providing that no foreign corporation shall transact any business in Alabama before filing in the office of the secretary of state a sealed, written instrument designating at least one known place of business in Alabama, and an authorized agent.

3. Where, in an action by a Minnesota company to foreclose a mortgage in an Alabama court, the mortgage showed on its face that such company was a corporation, the admission of a certified copy of its articles of incorporation, though not properly authenticated, was harmless error.

4. The error, if any, in admitting such evidence, was immaterial, for the further reason that defendant had admitted such company's corporate existence by the execution of the mortgage.

5. A statute of Minnesota, authorizing a corporation of its creation to contract for and recover more than 8 per cent. for a loan, is obnoxious to the Alabama statute, (Code 1886, § 1754,) declaring usurious all contracts for the payment of more than 8 per cent. interest on loans, and providing that they cannot be enforced except as to the principal.

6. Plaintiff, being a Minnesota corporation, and having its business domicile in that state, and defendant having constituted herself a stockholder, such act must be deemed to have been performed in Minnesota, and governed by the laws of that state; and her membership fee, together with an attorney's fee expressly provided for foreclosure of the mortgage, is collectible.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by the United States Savings, Loan & Building Company against H. J. Falls and others to foreclose a mortgage. There was a judgment for plaintiff, and defendants appeal. Reversed.

In the first paragraph of the bill the complaint described itself as "a body corporate under the laws of the state of Minnesota, doing business in the county of Jefferson, state of Alabama." The defendants demurred to the bill, on the grounds—First, that it is not shown therein that the complainant had a known place of business in the state of Alabama at the time said loan was made; second, that it was not shown that the complainant had a resident agent or agents in the state of Alabama at the time the loan was made;

and, third, that the bill shows that the rate of interest charged against the defendants by the complainant was usurious. The court overruled each of these grounds of demurrer. In their joint answer the defendants alleged that the loan, to secure which the mortgage was made, was executed by Mattie D. Falls for the purpose of enabling her husband to get the money he desired, and that she subscribed for the said stock and executed the mortgage and note with this end in view. Their answer also contained the following averments: "The respondents, further answering, say that the entire transaction set forth in said bill took place in the county of Jefferson, Birmingham, Ala. That the defendants to said bill resided here, and the property in said mortgage is located here, and said complainant by its agent negotiated and conducted and concluded said transaction here. And this respondent says that said complainant had no place of business in said state, or agent authorized as required by the laws of the state of Alabama, and the effort [was] to locate said transaction in Minnesota, [and was intended] to avoid the laws of the state of Alabama in reference to these requirements, as well as the laws against usury. \* \* \* And respondents say that, at the time of making said contract, said complainant had not filed in the office of the secretary of state, at the capitol at Montgomery, any instrument in writing as required by law designating a known place of business in this state, and an authorized agent residing thereat. And respondents say that for this reason said contract of mortgage was and is contrary to the policy of the state of Alabama, and void, and that said debt and every agreement relative thereto is and was void as to every part save the principal sum by reason of the usurious character of said contract as aforesaid."

R. H. Pearson and John Vary, for appellants. J. M. McMaster and F. H. Ewing, for appellee.

STONE, C. J. In Code 1886, § 2790, is this language: "The proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government, state, or territory, are evidence without further proof." A book published in St. Paul, Minn., in 1879, was offered in evidence to prove the statute law of that state. It was objected to. The title page of the book has these words: "The General Statutes of the State of Minnesota. \* \* \* Prepared by George B. Young." Immediately succeeding the foregoing statement is found the following: "Edited and published under the authority of chapter 67 of the Laws of 1878 and chapter 67 of the Laws of 1879." These statutes are printed in full on the second leaf of the book. Chapter 67 of the statutes of 1878 declares that "the said statutes shall be compiled and published by a commission consisting of George B. Young and such others as he may associate with him, under the supervision and direction of the governor." Chapter 67

of the Statutes of 1879 provides that "the edition of the General Statutes and other public laws of this state in force at the close of the legislative session of eighteen hundred and seventy-eight, (1878) prepared by George B. Young, pursuant to chapter sixty-seven (67) of the General Laws of Eighteen Hundred and Seventy-Eight, (1878,) shall be competent evidence of the several acts and resolutions therein contained, in all courts of this state, without further proof or authentication." It is difficult to conceive of language which would more clearly express the fact that the laws found in said book were printed by authority of the state than is here shown. Our statute does not require that the state shall be the publisher. That it is done with its authority is enough. *Clanton v. Barnes*, 50 Ala. 280; *Bradley v. Bank*, 60 Ala. 252. There is nothing in this exception. There is, if possible, less merit in the objection to the introduction in evidence of the Minnesota Compilation of Statutes, published in 1891, so far as those statutes can be considered in this case. See the certificates in the first of the volume, made by the secretary of state and state librarian, and see section 261 of the book itself.

The real transaction in this case was a loan of money by a Minnesota corporation—the United States Savings, Loan & Building Company—to Mrs. Falls; and the negotiation and agreed contract were conducted and consummated in Alabama. The corporation had a place of business in Birmingham, Ala., and had an agent thereat. It had complied with our constitutional and statutory provisions. Const. art. 14, § 4;<sup>1</sup> Sess. Acts 1886-87, p. 102.<sup>2</sup> This compliance gave it a constitutional and legal right to transact business in Alabama.

An objection was reserved to the action of the city court in receiving in evidence what purports to be a certified copy of the act and proceedings by which appellee was incorporated. The precise objection is that the authentication is not a compliance with legal requirements. We hold it to be unnecessary to decide this question. That the appellant executed the note and mortgage, the collection of which by foreclosure is the purpose of this suit, is fully shown, and nowhere denied. We hold that the mortgage shows on its face that the United States Savings, Loan & Building Company is a corporation. This is shown in very many of its recitals, and this dispensed with all proof of its incorporation. So whether the transcript was properly authenticated or not was immaterial. Mrs. Falls had admitted complainant's corporate character by the execution of the mortgage. 1 Mor.

<sup>1</sup>Const. art. 14, § 4, provides that no foreign corporation shall do business in Alabama unless it have at least one known place of business and one authorized agent in Alabama.

<sup>2</sup>Sess. Acts 1886-87, § 4, provides that no foreign corporation shall transact any business in Alabama before filing with the secretary of state a sealed, written instrument designating at least one known place of business and an authorized agent in Alabama.

Priv. Corp. § 89; 2 Mor. Priv. Corp. §§ 592, 774. Each separate government or state has its own legislative system and policy; and in determining and enforcing rights which originate out of our jurisdiction, comity requires that we shall admeasure the redress by the yardstick of the place where the right accrued. In entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract, and determines the measure of right it secures. This right by comity, however, has limitations. No state will enforce contracts or redress grievances entered into or suffered in another state or foreign country, if the enforcement involve a breach of legal or moral right as maintained in the law of the forum. When a corporation of foreign creation not only attempts to enforce rights before our tribunals, but goes further, and actually performs corporate acts within our jurisdiction, they can claim and exercise no exceptional rights or privileges which may have been conferred by the law of their creation, if such enforcement involves a breach of our own public policy or statutory system. The legislature of one state cannot confer rights and authorize their exercise beyond its own boundaries, unless they be in harmony with the general policy of the state or country in which the exercise is attempted. "The power of a corporation to act in a foreign country depends both upon the law of the country where it was created, and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits." Story, Conf. Laws, (8th Ed.) § 106, note a. In 2 Mor. Priv. Corp. § 599, in this language: "It is a fundamental principle that the laws of a state can have no binding force, proprio vigore, outside of the territorial limits and jurisdiction of the state enacting them." And in section 964 the same author says: "It has been held that, although a corporation be expressly authorized by its charter to charge a certain rate of interest upon its loans, it will nevertheless not be permitted to charge the same rate in a foreign state, if that would be contrary to the usury laws there in force." And in section 965 this author says: "Foreign corporations have no right by the law of comity to do acts within a state which are prohibited by the laws of that state to its own citizens or corporations engaged in a similar business." It is not our intention to determine in this case whether a building and loan association, incorporated and doing business in Alabama, can contract for and recover a greater rate of interest than 8 per cent. per annum. See our statutory system, commencing with section 1553 of the Code of 1896. What we do decide is that the statutes of Minnesota have no binding force with us; and any

provision found in them which authorizes a corporation of their creation to contract for and recover more than 8 per cent. for the loan or forbearance of money is obnoxious to our statute enacted for the prevention of usury. We hold, further, that the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit. Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than 8 per cent. interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than this. We have made no accurate calculation, and hence cannot declare the precise rate of interest Mrs. Falls would be required to pay, if she were to comply with the letter of her contract. It is greatly in excess of 8 per cent. per annum. The plea of usury is very fully sustained. With us, however, usury is only a partial defense. It extends only to a denial of all interest, when the party contracting to receive usury is the complainant. The rule in chancery is different from that which prevails at common law. *Dawson v. Williams*, 73 Ala. 111; *Uhlfelder v. Carter*, 64 Ala. 527.

Several other defenses were urged in this case which we consider untenable. This was in no sense a loan of money to the husband. The loan was to Mrs. Falls; and we think there is nothing in any of the objections urged, save the single one of usury. That, with us, is only a partial defense. A single feature of the controversy before us, we think, must be governed by the laws of Minnesota. The United States Savings, Loan & Building Company was incorporated under the laws of Minnesota, and has its business domicile in that state. The first step taken by Mrs. Falls was to constitute herself a stockholder in that corporation. This act must be considered as having been performed in Minnesota, and as governed by the laws of that state. Under their system corporations in forming are permitted to charge a graduated membership fee. In the case before us it amounted to \$155. We hold that this fee, together with the agreed attorney's charge of \$200 for foreclosing the mortgage, is collectible. The latter—the attorney's fee of \$200—is expressly provided for in the mortgage. No question is raised upon its reasonableness, and we feel no hesitancy in holding that this item was properly allowed to complainant. Mrs. Falls did not receive the full \$10,000, the amount of the agreed loan. Three monthly installments were retained, amounting to \$510; also the membership fee, \$155, was withheld; the latter rightfully, as we think, and she is entitled to no credit for that. What she actually owes is \$9,490,

\*Code 1886, § 1754, declares usurious all contracts for the payment of more than 8 per cent. interest on loans, and provides that they cannot be enforced except as to the principal.



plus \$200 attorney's fee for foreclosing the mortgage. The decree of the chancellor is reversed, and a decree here rendered that the complainant, instead of the sum of \$12,638, recovered in the court below, have and recover of appellants \$9,490, and other \$200 attorney's fee, with a lien, and to be enforced as directed in the decree of the chancellor. Let the costs of appeal be paid by the appellee. Reversed and remanded.

#### On Rehearing.

(May 2, 1893.)

Since the opinion in this case was delivered, November 25, 1892, an elaborate and earnest argument has been submitted by appellee, asking a reconsideration of that decision. One position assumed and pressed with great zeal is that the contract under consideration is not tainted with usury, even assuming it to be governed by the statutes of Alabama. The precise argument used in this connection is that the payments stipulated to be made monthly by Mrs. Falls, other than those which are, in the very terms of the by-laws and contract, called "interest," are not payments on the debt contracted, but calls or installments paid on the shares of stock subscribed for. If this position be sound, the interest actually collected is only one half of 1 per cent. per month, equal to 6 per cent. per annum, and hence not usurious. The corporate powers, by-laws, and methods of doing business which pertain to the United States Savings, Loan & Building Company are set forth in the transcript before us. We will briefly sketch what we understand to be the main features of its plan of operations, so far as it is necessary to a proper understanding of this case. The authorized capital of the corporation was and is \$10,000,000. It is divided into shares valued at \$100 each. Unlike most money corporations the capital stock is not required to be paid in at or within a short time after organization, with a view of supplying a fixed security for creditors. On the contrary, the shares are paid for in monthly installments, aggregating 7.20 per cent. during the year, or six-tenths of 1 per cent. per month. Paid at this rate, and without other resource, the entire capital stock will be paid in in a fraction under 14 years. This is the rate to non-borrowers, called "investors." The business of the corporation is lending its money, and its chief loans are made on real security, appraised and valued at double the amount of the loan. The monthly installments paid in, less 10 per cent. thereof reserved to defray the expense of administering the corporation, supplemented with the monthly payments of interest, constitute the operating capital of the corporation, on which it conducts its business of lending money. These loans are made monthly, and consequently the funds are kept employed and interest-bearing. What are denominated "shareholders" are divided into two classes,—those who borrow from the corporation, and those who do not. To obtain a loan from the corporation, the applicant must first become a

shareholder, paying for the privilege a small, graduated membership fee, of \$1.50 per share, down to 75 cents. After paying three monthly installments, he may apply for and obtain a loan on the following terms and conditions: (1) The applicant must first obtain the requisite shares of stock; and for this service he must subscribe for double the number of shares, which would be requisite to make up the sum proposed to be borrowed, rating the shares at their full matured value of \$100 each. So, in borrowing \$10,000,—the sum borrowed in this case,—the borrower must subscribe for 200 shares. That was done in this case. (2) The applicant must also have paid three monthly installments of 60 cents per share, and three months' interest on the sum proposed to be borrowed, at 6 per cent. interest. These sums, which were required to be prepaid, in this case amount to \$510; being for installments, \$360, and for interest, \$150. So the borrower actually obtained only \$9,490. (3) The borrower, before obtaining the loan, was required to, and did bid 100 of his subscribed shares, to be surrendered to the company as a bonus for the privilege and personal favor of being allowed to become a borrower; but monthly installments exacted from shareholders of 60 cents per month were still required to be paid by the borrower on the entire number of subscribed shares, including the 100 surrendered as a bonus. So the borrower is required to pay, and did bind himself to pay, in this case, double the sum of the installments required of nonborrowers,—equal to one-seventh of the sum borrowed. These payments, unpaid, if credited, without discount or diminution, would mature the stock and extinguish the debt in seven years. (4) The borrower was required to mortgage and did mortgage real estate appraised at \$20,000, to secure the payment of the monthly installments and interest until the sum borrowed should be repaid, after deducting from all installments paid a sum to cover the operating expenses. (5) In addition to this mortgage security, the borrower was also required to pledge and did pledge for the repayment of the money borrowed her remaining 100 shares of stock which had been made the basis of the loan. (6) Notwithstanding the installments required to be paid monthly, which in the course of the year amounted, in addition to interest paid during the year, to a fraction over 14 per cent. of the principal of the money borrowed,—the sum of the year's installments paid on the principal of the debt being one-seventh thereof,—this did not diminish the sum of the interest required to be paid each year, so long as any portion of the money borrowed remained unpaid. Thus: The sum borrowed in this case was \$10,000. The agreed interest on this was 6 per cent., equal to \$600 for the first year. But the payment of this same sum of \$600 interest was to be kept up so long as any of the principal debt remained unpaid. Even when the principal of the debt became reduced by installments paid to one-seventh of the original sum borrowed, the rules of the company and the contract in



this case required the borrower to pay the same agreed amount of interest—\$600—for the forbearance of the remaining one-seventh of the debt for one year.

The borrowers must first become shareholders. In what sense do they become such? They acquire none of the privileges or rights of shareholders, in the ordinary sense of that term. They receive no dividends, and have no share in the profits of the enterprise. When they repay the money borrowed, according to the terms of the loan, they receive no certificate of stock, and when the business of the corporation is wound up, they have neither part nor lot in its profits or accumulations. On the contrary, when the principal debt is extinguished by the payment of the monthly installments demanded, and the fixed, unchanging sum of agreed, so-called "interest," is paid up to and including the time when the installments extinguish the principal debt, then their connection with and interest in the enterprise ceases. Not by the receipt or retention of a certificate of stock. Not by any participation or right to participate in the profits or accumulations of the adventure. It ceases by a cancellation of the so-called "certificates of stock," and a final severance of the borrower's connection with the corporation. By the very terms of the note and mortgage the borrower is required to make the agreed monthly payments of installments and interest, "until said stock becomes fully paid in, and of the value of \$100 per share, \* \* \* and shall then surrender said stock to said company in payment of said note." These are the terms the contract imposes on the borrower; these the conditions on which she can obtain a release of her lands from the mortgage lien. When these terms are complied with, (and of course not till then,) "this deed [the mortgage] shall be null and void, otherwise to remain in full force and effect." It is nowhere said that the borrower shall share in the profits or assets of the association; the very language of the note and mortgage as copied repels such interpretation. Can it with any propriety be said that persons, filling the relation we have been describing, ever become shareholders in the corporation? They acquire none of the rights which attach to that relation. Are they not simply borrowers of money; and is not all else simply machinery to bring about that end,—useless machinery, save that it may furnish excuse for demanding of the borrower a membership fee, and that he shall contribute to the expense fund of the corporation's administration? The corporation is also empowered to impose and does impose penalties and forfeitures for delays and defaults in the payment of installments and interest. Such imposed penalties are found in the transcript before us. Being practically a loan of money, was the loan in the present case an agreement to demand and pay a greater rate of interest than 8 per cent. per annum,—the lawful interest of the state of Alabama? We employ the word "agreement" intentionally; for, to be

usurious, the contract itself must stipulate for interest above the lawful rate. We have been referred to two calculations, with the view of convincing us that the interest stipulated to be paid in this case is not usurious on its face. One of those calculations is shown in the deposition of the witness Douglas, found in the transcript before us. The other is seen in the report of the case of *Thompson v. Gillison*, 28 S. C. 534, 6 S. E. Rep. 333. In each of those instances the calculator was betrayed into the same oversight or error. Each allowed to the lender the same sum as interest for each of the years the loan was permitted to run, as if the principal or interest-bearing fund had remained undiminished during the whole term of the loan. Had that been the case,—in other words, if the borrower had paid only the interest during the intervening years, and had left the principal intact until the final settlement, and then paid the entire principal at one time,—their calculations would stand vindicated. This, because in such case the interest-bearing fund would remain the same during the entire period of the loan. But they were not dealing with such facts. The problem they were handling was like the one we have in hand; the principal, or interest-bearing debt, was being reduced, say, one-seventh each year. We have made many calculations, and have, in that way, demonstrated the correctness of the proposition that, by the very terms of the contract Mrs. Falls made with the United States Saving, Loan & Building Company, she bound herself to pay interest, and to pay it monthly, at a rate greatly in excess of 6 per cent. per annum, and very materially in excess of 8 per cent. per annum.

Let us state the account on the facts of the case we have in hand. Computing the several payments of the principal debt required to be made during each year as aggregating one-seventh of the debt, the whole debt will necessarily become extinguished in seven years. In this we do not compute the sums paid as interest, but include only the excess of the several payments over and above interest. Thus, the sum of the amount of the loan being \$10,000, it necessarily follows that for the first year the interest-bearing debt must be \$10,000. But the principal, or interest-bearing debt, being reduced one-seventh by payments during the first year, it follows that the sum of the debt left unpaid for the computation of interest for the second year will be only six-sevenths of \$10,000. And so the process of reduction of the interest-bearing debt will go on at the rate of one-seventh each year. For the seventh year the principal on which interest is to be computed will be only one-seventh of \$10,000; a fraction over \$1,428. Six per cent. interest paid at the fixed, unchanging sum of \$600 per annum for these seven years will aggregate \$4,200. Calculated on the balances left after the several yearly payments are deducted, the sum of the several payments of interest will amount to \$2,400, or four-sevenths of \$4,200. This shows an excess of interest stipulated to

be paid during the seven years of \$1,800, if we compute interest at 6 per cent. per annum. If the unchanging sum of \$600, stipulated to be paid during each year—aggregating \$4,200 during the seven years—be in fact paid, the borrower, instead of paying 6 per cent. for the forbearance of the money, will in fact have paid at the average rate of 10½ per cent. per annum. And this excess of interest Mrs. Falls bound herself to pay by the very terms of the contract she entered into. The contract requires Mrs. Falls to pay \$170 per month, equal to \$2,040 during each year. In the calculations we submit, we treat these payments as if made in gross at the end of each year. Treating them thus, and computing interest only on the balances left after the annual payments, the following results are shown: (1) At 6 per cent. interest, the debt of \$10,000 will be entirely extinguished, principal and interest, by these annual payments of \$2,040, in a fraction less than six years; and in so paying, the entire interest paid by the borrower will amount to a fraction less than \$2,200. Paid at the agreed rate of \$600 for each of the six years, it would amount to \$3,600. (2) At 8 per cent. interest, the same annual payment of \$2,040 would extinguish the debt, principal and interest, in something less than 6½ years, while the sum of all the interest paid would be \$3,178. Paid on the basis of the contract at the gross sum of \$800 per year, it would amount to \$5,200. We might give other examples by way of illustration; but we think these sufficient. It will be observed that, in making our calculations, we have assumed that the borrower received the full \$10,000. She actually received only \$9,490. And we have pretermitted all consideration of the membership fee she was required to pay, and her share of the operating expenses of the corporation, which the rules of the association hold her liable for. We have likewise taken no account of the fact that the interest was made payable monthly. These items brought into the account would materially swell the burden the contract imposes on the borrower.

If further proof be required to show the contract we are considering is usurious in its terms, it is furnished in the decree the chancellor rendered in this cause. No one contends that in rendering his decree he went beyond the letter of the contract he was construing. Yet, although the decree was rendered less than two years after the money was borrowed, the \$10,000 had increased to \$12,638; and of this sum only \$440 was for fines assessed for non-payment of monthly installments and interest. This taken from the \$12,638 leaves about \$2,200 of interest and charges for the use of \$10,000 from the date of the contract—May 10, 1890—to the date of the decree,—March 10, 1892. This accorded to complainant about 1 per cent. interest per month, or 12 per cent. per annum. The other class of shareholders are nonborrowers, sometimes called "investors." The monthly installments required of these is just one-half of the sum required of the bor-

rowers,—being one fourteenth of the value of their stock,—and they pay no interest. They have no shares required to be surrendered as a bonus, or premium; no dead shares. They pay installments only on the shares they own, and acquire all the rights of shareholders or stockholders in the corporation, to the extent of the stock they subscribe for. They have a voice in the government of the corporation, and share in its dividends and other accumulated assets. They share ratably in all the excess of interest paid by the borrowers, and in this way realize more than lawful interest on their investment. Under all the calculations, the shares of the investors mature in about seven years up to the full \$100 per share. These are shareholders in fact and in law, for they have all the powers and rights of shareholders in corporations. No one will dispute that the investors realize more than lawful interest. Whence comes the fund from which this excess of interest is realized? It must come from the borrowers, for there is no other source from which it can be derived. To secure to one class unlawful interest, while none of the shareholders pay in excess of the lawful rate, is a physical impossibility. The consequence is that their shares will have matured up to their full value of \$100 per share, while they have paid out but little, if any, over half that sum, and have lain out of the use of their money for a time which averages only three and a half years, or four at most. So, the nonborrower realizes a much higher rate of usurious interest than the borrower pays. This, because there are many more borrowers who pay usurious interest than there are investors who divide that usury between them. We have said this was practically a loan of money. Stripped of all mere formal accompaniments, we are not able to discover any material connection Mrs. Falls ever had with the corporation, other than as a borrower of money. She had no voice in its government, no share in its profits or assets. In determining the character of any given transaction, the law regards the substance, not the form it is made to assume. In *Uhlfelder v. Carter*, 64 Ala. 527, this court said: "In determining whether a contract is infected with usury, its substance and effect, not its form, are material. The intent to take or reserve more than lawful interest for the loan of money, or the forbearance of a debt, must exist; and this is deduced from the relations of the parties, their acts contemporaneous with or subsequent to the contract, and all attendant circumstances. When this intent exists, and such is the substance and effect of the contract, no form or covering which may be given to it, no device or shift, can sustain it. A simple loan, or the mere forbearance of an existing debt, which, with the lawful interest, is not put at hazard, but is certainly to be paid, will become usurious, by ingrafting upon it stipulations intended for the additional profit of the creditor, and not as compensation for loss or inconvenience he may bear." Our calculations and argument are based, not on contingent or possible

losses the association may suffer in its administration. We have considered the questions on a basis the most favorable and successful that could possibly attend the enterprise, even if every borrower meets his contractual engagements punctually, and every installment is paid on the day it matures. We have allowed to the borrower full credit for the entire sum of the installments he is required to pay, without deduction of anything therefrom to meet corporation or other expenses or losses. And we have shown that with these most favorable, possible results,—we may say impossible,—the borrower is bound, by the very letter of the contract, to pay a rate of interest greatly in excess of 8 per cent. per annum. And it is of no moment that no witness testifies that the interest is usurious. The corporate powers, the by-laws, and the contract are shown in the transcript, and these furnish the evidence—the indisputable evidence—that the rate of interest required and contracted to be paid is manifestly in excess of 8 percent. The question is simply one of arithmetical calculation,—and the laws of arithmetic are judicially taken notice of,—and the excess is so obvious that it is impossible to suppose it was not intended. The excess of interest, noted above, is one of the fixed, certain terms of the contract by which the money was lent, and which Mrs. Falls, in obtaining the loan, bound herself to pay. No ingenuity can infuse any element of contingency or uncertainty into her contractual obligation to pay up to this point. Beyond this, however, there is an uncertain liability, namely, it cannot, from anything shown to us, be certainly known how much she may be required to pay beyond the sums shown in our calculations. Enough for us that the contract itself requires the borrower to pay more than lawful interest.

But there was another reason operating upon the writer of this opinion which induced him to request a recall of the certificate of reversal, and a further consideration of the case. He had come to doubt the correctness of the conclusion announced, that in determining the question of usury, we must be governed by the Alabama statutes. The facts shown by the record are as follows: "The United States Savings, Loan & Building Company is a private corporation, incorporated under the laws of Minnesota, located and doing business in the city of St. Paul, of that state. One of its purposes is the loan of money on long time, secured by mortgage on real estate, the accruing interest and partial installments of the principal to be repaid monthly. True, they are not, in the books of the corporation, or in the contract of the parties, called installments of the debt, but monthly payments on the capital stock. We think, however, that this is a misnomer; for we cannot perceive that the borrower on subscribed shares ever becomes a stockholder in fact. He acquires none of the rights or powers of a stockholder, as that term is generally understood and applied. The negotiation for a loan was entered upon in Birmingham,

Ala. That negotiation was conducted by the husband of Mrs. Falls, representing her, and by a soliciting agent, representing the corporation. As we understand the record, the following comprises substantially what was done in Alabama: The soliciting agent furnished the information and the blanks necessary to be filled out and signed, in order to make the application in proper form to obtain membership and the loan, and probably filled those blanks, and forwarded the application. It is probable that he also represented the corporation in having the abstract of title prepared, a valuation made of the property offered as security, and the preparation of the note and mortgage, to be executed by the applicant. All these acts, however, were provisory. They were but an offer. It is not only not shown that the soliciting agent entered into any binding contract that the company would accept the offer and lend the money, but the converse of this proposition is established. Not until the proposition was considered at the home office, not until the papers were examined and the offer accepted, was any contract made which would bind the company. Not until then could Mrs. Falls have maintained an action for a breach of contract, if the company had refused to advance the money; for no contract had been concluded. Such is the unmistakable language of the record. *Derrick v. Monette*, 73 Ala. 75; 3 Brick. Dig. p. 361, § 426; *Whart. Conf. Laws*, § 421. When Mrs. Falls' proposition was accepted, a check for the money was issued by the proper officer of the United States Savings, Loan & Building Company, in St. Paul, Minn., payable to the order of Mrs. Falls. That check was drawn on the Minnesota Loan & Trust Company, the building and loan company's trustee, having its business habitation in Minneapolis, Minn. True, that check was cashed at a bank in Birmingham, Ala., but there is nothing unusual in that; and it is not shown that the building and loan company had any agency in procuring that to be done, even if we concede such agency would affect the question. The note given by Mrs. Falls and her husband, although signed in Birmingham, Ala., is made payable "to the order of the United States Savings, Loan and Building Company at the office of the treasurer, St. Paul, or to its trustee in Minneapolis, Minn. \* \* \* This note is understood to be made with reference to and under the laws of the state of Minnesota." The mortgage also stipulates that the money is to be paid "at the office of [the company's] treasurer at St. Paul, Minnesota, or at the office of its trustee, Minneapolis, Minnesota;" and it also contains the clause: "This mortgage is understood to be made with reference to and under the laws of the state of Minnesota." So, we repeat, no binding contract was agreed on or concluded in Alabama. That justly celebrated jurist, Chancellor Kent, (2 Comm. 459,) employed this language: "If a contract be made under one government, and is to be performed under another, and the parties had in view the laws of such other country in reference to

the execution of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed; and the foreign law is in such cases adopted, and effect given to it." In *Story, Conf. Laws*, § 280, it is said: "Where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." In 3 *Amer. & Eng. Enc. Law*, 543, 544, the principle is thus expressed: "As a general rule, the validity of a contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed, or was made, in reference to the laws of some other place, in which case it will be governed by the laws of the place of the performance." Each of these standard works has an abundant citation of authorities. See, also, *Hunt v. Hall*, 37 Ala. 702; *Cubbedge v. Napier*, 62 Ala. 518; *Mortgage Co. v. Sewell*, 92 Ala. 163, 9 South. Rep. 143; *Boone, Mortg.* § 86; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *De Wolf v. Johnson*, 10 Wheat. 367; *Cromwell v. County of Sac*, 98 U. S. 51; *Peyton v. Helnekin*, 131 U. S. Append. ci.; *Dolman v. Cook*, 14 N. J. Eq. 56; *Goodrich v. Williams*, 50 Ga. 425. I am aware that artifice is sometimes resorted to in the making of contracts, with a view of evading the laws against usury. To this end a false or fictitious place of performance is sometimes inserted in the writing. Whenever such attempt is made to appear, the courts refuse to lend their sanction to it. If such was the intention in this case, it has not been shown. I feel forced by the authorities to hold that, in the matter of collectible interest under this contract, the laws of Minnesota must govern. It is not my intention to disturb our former rulings as to the law which should govern this contract. On that question I think the present case clearly distinguishable from any we have heretofore decided, in two particulars: First, the final agreement of the parties—the closing of the bargain—was consummated in Minnesota, and the money borrowed was promised to be repaid there; second, it is one of the express terms of the contract that it is "made with reference to and under the laws of Minnesota." This provision, standing alone, would not be decisive, for it might be prostituted to improper uses. Taken in connection with the facts of this case, I think it supports the conclusion I have reached. I repeat: It is not my intention to overturn our former rulings. *Farrior v. Security Co.*, 88 Ala. 275, 7 South. Rep. 200; *Mortgage Co. v. Sewell*, 92 Ala. 163, 9 South. Rep. 143; *Evans v. Kittrell*, 33 Ala. 449. The foregoing is only my own opinion, formed alone on what is shown in the transcript. My brothers, however, differ with me, and adhere to the first opinion. The result is that the application for a reversal of the former ruling is denied.

(70 Miss. 531)

## CAZENEUVE et al. v. CURELL.

(Supreme Court of Mississippi. May 1, 1893.)  
APPEALABLE JUDGMENTS—DISTINGUISHING EQUITY  
AND LAW JURISDICTION.

Const. § 147, declares that "no judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction." *Held*, that where an action in trespass for damages was brought in the chancery court, against a sheriff, for oppressive levy of an attachment, though that court had no jurisdiction of the subject-matter, a decree overruling a demurrer on that ground alone cannot be reviewed by the supreme court.

Appeal from chancery court, Hancock county; W. T. Houston, Chancellor.

Action by Joseph F. Caseneuve and others against N. Curell. Plaintiffs had decree overruling a demurrer to the complaint, and defendant appeals. Affirmed.

E. J. Bowers, for appellant. A. M. Dahlgren and W. S. White, for appellees.

WOODS, J. The record shows that this suit is really an action of trespass brought in a court of equity. The recovery is sought for an oppressive and excessive levy made by a sheriff of a writ of attachment, and is purely an action for damages for a trespass. Section 161 of the constitution does not confer jurisdiction, in cases of this character, upon chancery courts. That section confers jurisdiction on chancery courts, concurrent with the circuit courts, "of suits on bonds of fiduciaries and public officers for failure to account for money or property received or wasted, or lost by neglect or failure to collect," etc. This is not a suit for the failure of a public officer to account for money or property received for appellees' benefit or on their behalf, nor is it a suit for money or property wasted or lost by neglect or failure of the officer to collect under process in favor of appellees. It is a suit for the recovery of damages for an oppressive and grossly excessive levy, and section 161 has no application, and the court below was without jurisdiction, in our opinion. But the court assumed jurisdiction, and as this is the only error assigned or apparent, we cannot reverse the decree overruling appellant's demurrer to the bill of complaint. Section 147 of the constitution declares that "no judgment or decree in any chancery or circuit court, rendered in any civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction; but if the supreme court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the supreme court may remand it to that court which, in its opinion, can best determine the controversy." We find here practical authority for the virtual obliteration of the lines of demarcation between

courts of law and equity, if the judges and chancellors of the inferior courts choose to disregard, or fail to observe, those distinguishing lines. And this court is forbidden to reverse or annul decrees or judgments rendered in the lower courts, even if there was want of jurisdiction, if no other error than want of jurisdiction is to be found. That diverse and conflicting rules of practice and procedure may obtain in the several court districts is plain. The chancery court of one district may assume jurisdiction of common-law causes, and the equity courts of the adjoining districts may refuse to entertain such jurisdiction. In the same district, variant and uncertain rules and methods may obtain. The diversities of practice may be found in the same district, under different chancellors or circuit judges from time to time presiding therein. It is practically within the power of the chancellors and circuit judges, under this provision of the constitution, to virtually abrogate the distinctions between courts of common-law and equity jurisdiction. We have the singular anomaly of a constitutional scheme of two courts,—common-law and equity,—and yet with power in the inferior judges to effectually blend the jurisdictions, each in his own district. But, remarkable as the results flowing from this anomaly are, we are not to disregard the plain requirements of the fundamental law. The court below, in the case at bar, clearly had no jurisdiction, and should have sustained the demurrer to the bill, and so have driven complainant to his common-law remedy. But the learned chancellor having entertained jurisdiction, and this being the only error committed, we are forbidden to reverse. It may be thought by some that the supreme court is forbidden to reverse only final judgments or decrees, when error from want of jurisdiction appears. But the all-sufficient answer to this suggestion is that the framers of the constitution, with a clear apprehension of the distinction between final and interlocutory decrees and judgments, declare that no decree shall be reversed because of want of jurisdiction in the lower court. There is nothing to even suggest that only decrees or judgments determining and settling the merits were included in this constitutional provision. We are not to arbitrarily interpolate qualifying words or expressions to limit a constitutional inhibition. The language is plain, unambiguous, all-comprehensive. The purpose of this 147th section of the constitution is to prevent reversals because of want of jurisdiction in the court below. In other words, a decree or judgment in all other respects correct shall not be reversed simply because the right decree or judgment has been rendered or pronounced in the wrong court. If the final decree or judgment cannot, in such case, be annulled or reversed by us; if the laborious result of protracted litigation, in its completed finality, cannot be reviewed by us,—what reason can be assigned for holding that an interlocutory order, a single step in the progress of the completed litigation, may be reversed or annulled by this court. Rather, must it not be held that if the final

decree or judgment, the perfected product of the litigation, is irreversible here when the only error is want of jurisdiction in the court below, each step in the cause of the litigation resulting in that perfected product must be held irreversible also? That the inhibition laid on this court in this section of the constitution is not confined to action on final decrees or judgments is manifest from a consideration of the startling incongruity of the civil administration which would result from adopting the construction contended for by those who would restrict the inhibition to final decrees or judgments. We shall, in that case, have the intolerable anomaly of appeals maintainable from decrees on demurrers in courts of equity, in cases where the lower court was without jurisdiction, and, in like cases, no appeals allowed from judgments of circuit courts. Surely, no one can be found to insist that this absurd inconsistency of civil administration was any part of the constitutional scheme for mitigating what must have been supposed to be the evils of too rigidly observing the bounds of jurisdiction between the courts of law and equity. We are bound to uphold and observe and enforce the organic law as we find it plainly written; and if inconvenience, incongruity, seeming absurdity, shall mark the administration of civil law, we must not concern ourselves unnecessarily thereat. The only error assignable is the want of jurisdiction in the court below to render the decree, and, as the learned chancellor entertained jurisdiction, under section 147 of the constitution, forbidding a reversal in this court because of such error, the decree overruling the demurrer is affirmed, and the appellants given leave to answer within 30 days after mandate filed in the chancery court of Hancock county.

(70 Miss. 779)

NATCHEZ, J. & C. R. CO. et al. v. LAMBERT, Tax Collector.

(Supreme Court of Mississippi. May 8, 1893.)

RAILROAD COMPANIES — CONSOLIDATION — RIGHTS OF NEW COMPANY.

Act Feb. 19, 1890, (Acts, p. 675,) authorized the N. J. & C. R. Co. to sell absolutely all or any of its railroad and other property, "together with all franchises, rights, powers, privileges, and immunities." Section 2 authorized the same company and the L. N. O. & T. Ry. Co. to consolidate, under the name of the latter, on such terms as they might agree to. *Held*, that the consolidated company is entitled to all the privileges of the N. J. & C. R. Co., including its exemption from taxation.

Appeal from chancery court, Adams county; Claud Pintand, Chancellor.

Bill by the Natchez, Jackson & Columbus Railroad Company and another against J. M. Lambert, tax collector. From a decree dismissing the bill, complainants appeal. Reversed.

Mays & Harris, for appellants. Frank Johnston, Atty. Gen., and K. P. Lannan, for appellee.

CAMPBELL, C. J. It was not known what interpretation would be put on section 13, art. 12, of the constitution of 1869; and section 21 of the act to incorporate

the Mobile & Northwestern Railroad Company, approved July 20, 1870, (Acts 1870, p. 255,) was a device to meet an assumed view of that section of the constitution. It took the form of an irrevocable agreement by the state with the company that all taxes to which it might be subject for 30 years should be applied to payment for constructing said road, or debts incurred for that, and that the affidavit of the president or cashier of the company that such application had been made during the year should be accepted by tax collectors, in lieu of money, for such taxes. A proviso is to the effect that whenever the profits of the company should enable it to pay an annual dividend of 8 per cent. upon its capital stock the foregoing agreement should terminate. Although this was a thin disguise to evade the constitutional restraint apprehended to be contained in the section mentioned, it was resolved to secure the benefit of the provision to other railroad companies; and on August 8, 1870, an act of the legislature was approved, to extend the provisions of the twenty-first section of the act to incorporate the Mobile & Northwestern Railroad Company to several other companies, and, among them, to the Natchez & Jackson Railroad Company, which afterwards became the Natchez, Jackson & Columbus Railroad Company; and they were by said act declared to be entitled to all the rights, privileges, immunities, and franchises, granted by said twenty-first section. By an act approved February 25, 1875, (Acts, p. 66,) every railroad company in the state was required to pay a privilege tax; and on March 5, 1878, (Acts, p. 233,) an act was approved which recites the act of August 8, 1870, cited above, and that doubt as to its validity, because of its history, existed, and, to put the matter beyond doubt as to this, the twenty-first section aforesaid was re-enacted, and applied to the charter of the Natchez, Jackson & Columbus Railroad Company.

In 1878 this court interpreted section 13, art. 12, of the constitution of 1869, to mean that the property of corporations for pecuniary profit could not be placed beyond the reach of the taxing power; that the legislature could forbear, during pleasure, to tax, but could at any time revoke a grant of immunity from taxation contained in any act passed since the adoption of the constitution of 1869. *Mills v. Cook*, 58 Miss. 40. By the Code of 1880, each railroad in the state was subjected to taxation, but in 1884, by act of March 12th. (Acts 1884, p. 29,) the Code was amended so as to restore to the Natchez, Jackson & Columbus Railroad company the exemption from taxation "provided in its charter, and acts amendatory thereof." It is worthy of remark that this act characterizes the exemption as "from taxation," as plainly it was. The revenue act of 1890 continues this exemption to railroads entitled to it. Acts 1890, p. 6. It was in the power of the legislature at any time to annul the agreement contained in the twenty-first section aforesaid. It had complete control over the matter, and could revoke the

provision for immunity from paying taxes, which is undoubtedly immunity from taxation, for paying is the burden. Instead, it manifested a disposition to preserve this immunity, and restored it to the Natchez, Jackson & Columbus Railroad Company in 1878 and 1884, and guarded it against repeal by the act of 1890, as shown above; and by act approved February 19, 1890, (Acts, p. 675,) said company was authorized "to sell absolutely all or any of its railroad and other property, \* \* \* together with all franchises, rights, powers, privileges, and immunities," etc.; and by the second section of said act the Louisville, New Orleans & Texas Railway Company and the Natchez, Jackson & Columbus Railroad Company were authorized to consolidate with each other, under the name of the former, upon such terms as they might agree upon.

The question is as to the intent of the legislature as to the continuance of the immunity from taxation it enjoyed after a sale by the Natchez, Jackson & Columbus Railroad Company, or consolidation, as authorized. It is not a question of legislative power, for that is undoubted. Nor are the considerations which justly cause courts to lean against a grant from immunity from taxation so influential here as they often are, for there can be no danger of tying the hands of the taxing power. It is merely a question of legislative purpose, deducible from the language employed, considered in connection with the history of the dealing with the subject by the legislature. Thus considered, we have no hesitation to declare that the intention of the legislature was that a purchaser should get the railroad just as held by the Natchez, Jackson & Columbus Railroad Company, with all franchises, rights, powers, privileges, and immunities possessed by it under the previous legislation; and, in authorizing consolidation by the two companies named, the purpose was that the united company should enjoy the franchises, rights, powers, privileges, and immunities each had before, and that the state, in consenting thus, must be held to have contemplated that the affidavit to evidence the application of money to pay for construction, which was to be a legal tender for taxes, might be made by the proper officer of the consolidated company; and, as to the remote contingency on which the arrangement to escape the burden of taxation was to cease to be operative, the state may be justly assumed to have intended to waive that condition, or else to have looked to its right to claim a cessation of the immunity when the condition mentioned in the proviso of the twenty-first section mentioned should exist as to the Natchez, Jackson & Columbus Railroad, as a component part of the consolidated company. But it is to be remembered that the state was not parting with anything; was renouncing no right; foregoing nothing, except, for the time being, to let matters stand as they were; and by the light of this its act is to be interpreted. This case is very unlike *Railroad Co. v. Maine*, 96 U. S. 499.

There the right of the state to tax was involved, and important requirements made of the several companies, which by consolidation made a new company, of which no requirement was made with reference to these duties imposed on the separate companies, having reference to taxation, and the new company was held subject to the power of the state to tax. Nothing was required of the Natchez, Jackson & Columbus Railroad Company on this subject, but it had the privilege to pay taxes by a prescribed affidavit, which could be as well made by an officer of a new company having control as by one of the Natchez, Jackson & Columbus Company. And, as to the very remote contingency mentioned in the proviso, that could be availed of as well under new control as under the old. The substantial thing aimed at was to free the road from taxation for 30 years, by the easy terms of making an affidavit. But, in truth, all knew this was mere grace, and could be withdrawn at will. The delusion that the restriction of the constitution could be escaped by the circuitry employed in the twenty-first section of the charter of the Mobile & Northwestern Railroad Company had been dispelled by the authoritative utterance of this court, and the legislature was willing for the immunity to stand as before until a future day, when it should see proper to put an end to it. Favor had been shown to the Natchez, Jackson & Columbus Railroad Company, and it was intended that it should be, as before, in the hands of a purchaser, or in union with the Louisville, New Orleans & Texas Railway Company. It was known the state would lose nothing, and it was supposed that the interest of the state would be promoted, by a transfer, as authorized. We approved the doctrine so well put in *Tennessee v. Whitworth*, 117 U. S. 139, 6 Sup. Ct. Rep. 649, and find it much more applicable to this case than *Railroad Co. v. Maine*, 96 U. S. 499, is. If the words, "rights, privileges, and immunities," used in the act of 1890, authorizing sale or consolidation of the Natchez, Jackson & Columbus Railroad Company, do not include its immunity from taxation, it would be difficult to pass it, except by an express declaration that exemption from taxation should be among the rights, privileges, and immunities to be transferred. Especially must these words be held to include the immunity from taxation when they are the very words used in the act of the legislature by which the immunity granted by the twenty-first section of the charter of the Mobile & Northwestern Railroad Company was extended to the Natchez, Jackson & Columbus Railroad Company, and other companies. Acts 1870, p. 327. We think it clear that the immunity possessed by the Natchez, Jackson & Columbus Railroad Company was not lost by its sale and consolidation, which were expressly authorized, and that, as to this, everything remained as before. By their charters the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railway Company were empowered to consolidate,

and the immunity claimed by the Louisville, New Orleans & Texas Railway Company, for the right to pay the taxes on what was the Natchez, Jackson & Columbus Railroad Company, was not lost by its merger in the Yazoo & Mississippi Valley Railway Company, but it went into that company with all its rights, privileges, and immunities, as far as could be, in the merger, and nothing was lost thereby, except as necessarily resulted from the union. Section 181 of the constitution of 1890 has no effect as to the exemption claimed. It left the matter as if the constitution had not been adopted. It let it alone to rest upon legislation, unaffected by the fundamental law. The plea of former adjudication was bad. The suit in which a decree dismissing the bill was rendered, and relied on as an adjudication, or as a pending suit, was fatally defective. The complainant could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the Natchez, Jackson & Columbus Railroad Company, but to a different one. The demurrer to the bill was rightly sustained on this ground, and the decree sustaining the demurrer and dismissing the bill in that case, now here on appeal, will be affirmed. We reverse the decrees made in this case, sustaining the plea and the demurrer, and dismissing the bill, and remand the case for further proceedings in the court below in accordance with this opinion. The defendant may answer within 30 days after mandate filed in the chancery court.

(69 Miss. 460)

# BOARD OF SUP'RS OF QUITMAN COUNTY v. STRITZE et al.

(Supreme Court of Mississippi. Oct. 1891.)

## QUIETING TITLE—PLEADING—DEMURRER TO BILL.

A bill by a county to remove cloud upon title from lots acquired by it by gift is not bad on a demurrer to the whole bill, if it show a right to relief as to any of the lots.

Appeal from chancery court, Quitman county; W. R. Trigg, Chancellor.

Bill by the board of supervisors of Quitman county against William Stritze and others to cancel defendants' claims to certain lots donated to plaintiff. There was a judgment for defendants on a demurrer to the bill, and plaintiff appeals. Reversed.

One Phelps, in order to induce the board of supervisors of Quitman county to locate the county seat on a ten-acre lot owned by him, donated by deed, to the county, one acre of the land, situated in the tract, as a site for the courthouse and jail; and also conveyed one half the lots into which he had divided and platted the other nine acres, reserving for himself alternate lots. The board of supervisors of Quitman county exhibited this bill in the chancery court against William Stritze and others to cancel their claim to all the lots, the one on which the courthouse and jail were situated included. The bill alleges that the board, in consideration of such conveyance, located the county site, and



caused a courthouse and jail to be erected on the one-acre lot conveyed for that purpose; that the defendants claimed all the land conveyed by Phelps to the county, and that this claim was a cloud upon their title; and prayed that defendants' title be canceled. Defendants demurred to this bill, on the ground that there was no equity on the face of the bill. The demurrer was sustained by the court below, and the bill was dismissed, from which complainant appealed.

T. J. Williams, for appellant.

COOPER, J. If the demurrer of the defendants had been limited to so much of the bill as seeks relief touching the nine acres of land other than that upon which the courthouse and jail are located, the questions sought to be litigated might have been decided. In the condition of the record it is unnecessary to decide whether the board may lawfully acquire and hold the said nine acres; or whether, if it may not, it is competent for any one but the state to make the objection to such ownership. It is clear that, as to the one acre upon which the courthouse and jail are situated, the power to acquire and own is given by law. Code 1880, § 2148. The demurrer is to the whole bill, and should have been overruled. Decree reversed, demurrer overruled, and defendants given leave to answer within 30 days after the mandate shall have been filed in the court below.

(70 Miss. 320)

**BOARD OF SUP'RS OF QUITMAN COUNTY v. STRITZE et al.**

(Supreme Court of Mississippi. Dec. 12, 1892.)  
COUNTY BOARD—POWER TO ACCEPT DONATION OF LAND.

Where land is donated to a board of county supervisors in consideration of their building a courthouse and jail on a part of it, neither the grantor nor those claiming derivatively from him can question the right of such body to own and possess or sell such land; the power to call into question such right being in the state alone.

Appeal from chancery court, Quitman county; W. R. Trigg, Chancellor.

Bill by the board of supervisors of Quitman county against William Stritze and others to cancel defendants' claims to certain lots donated to plaintiff. There was judgment for defendants, and plaintiff appeals. Reversed.

T. J. Williams, for appellant. St. John Waddell, for appellees.

COOPER, J. When this case was in this court on a former appeal, (13 South. Rep. 35.) we threw out an intimation that the appellees had no concern with the power of the board of supervisors to hold the land in controversy, but that the state alone could question its right so to do. But it was unnecessary to the disposition of that appeal to decide that question, and it was left undetermined. Notwithstanding our suggestion on the former appeal, the case seems to have been argued and decided in the court below without reference to the point, which lies at the thresh-

old of the investigation. No allusion is made to it by counsel upon either side. It is, however, decisive of the whole controversy. The power to acquire, hold, and dispose of real estate is incident to corporations generally, and may be said to be universal, except when either expressly forbidden by the act creating the corporation, or by necessary implication springing from the character of the corporation itself. But boards of supervisors may by law acquire real estate for certain purposes, and, having such capacity, conveyances to them are not void, but voidable only. The sovereign alone can object. 4 Amer. & Eng. Enc. Law, 233. By the conveyance from Phelps the title to the land passed to the board of supervisors of Quitman county, and neither he, nor the defendants, who claim derivatively from him, have any interest in the question whether this body shall be permitted to own and possess or sell the same; that is a matter between the board and the state, in which strangers have no right to be heard. Grant v. Coal Co., 80 Pa. St. 218; Leasure v. Insurance Co., 91 Pa. St. 491; Mallett v. Simpson, 94 N. C. 37; Cowell v. Springs Co., 100 U. S. 55; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. Rep. 336; Union v. Yount, 101 U. S. 352; Hough v. Land Co., 73 Ill. 23. The complainant is entitled to the relief prayed. The decree is reversed, and the cause remanded.

(70 Miss. 26)

**WESTERN UNION TEL. CO. v. McLAURIN.**

(Supreme Court of Mississippi. Nov. 28, 1892.)

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE ON SUNDAY.

Where a telegraph company receives a message on Sunday for transmission, calling an attorney to appear in court on Monday morning, but does not deliver it until Monday evening, it is liable for the statutory penalty for failure to deliver a message, and for the damages resulting to the attorney by not being able to respond to the message, whether sending the message is a work of necessity within the exception of the Sunday law or not.

Appeal from circuit court, Warren county; J. D. Gilliland, Judge.

Action by W. K. McLaurin against the Western Union Telegraph Company to recover the statutory penalty for failure to deliver a message, and for damages. Plaintiff had judgment, and from an order refusing a new trial, defendant appeals. Affirmed.

On July 19, 1891, one Metcalf killed one Dwyre in the town of Cleveland, Miss. The preliminary hearing before the committing magistrate was set for 10 o'clock, Monday, July 20th. Julius A. Robinson, a lawyer living in Cleveland, delivered to defendant, at 6:30 o'clock P. M. Sunday, a message prepayed addressed to plaintiff, an attorney living in Vicksburg, in these words: "Metcalf killed Dwyre. Come on first train. Good fee for defense. [Signed] Julius A. Robinson." The telegram was not delivered to plaintiff until Monday evening, when it was too late to get a train to reach Cleveland in time for the trial. Plaintiff went to Cleveland on a freight



train but arrived too late. Metcalf refused to employ him, or to have anything further to do with him, because he did not get to Cleveland in time for the hearing. Robinson says in his deposition that he was authorized by Metcalf to telegraph for plaintiff, and that Metcalf saw the telegram before it was sent. Plaintiff sued defendant before a justice of the peace to recover of it the statutory penalty of \$25, and the further sum of \$150 as damages for failing to deliver the telegram. On the trial judgment was rendered for the defendant, and plaintiff appealed to the circuit court, where, upon a trial before a jury, plaintiff recovered a verdict for \$25 statutory penalty, and \$125 damages.

Mays & Harrie, for appellant.

Dabney & McCabe, for appellee.

The courts have always construed the word "necessity," as used in the Sunday laws, liberally, so as to include social necessity as well as absolute necessity. *State v. Knight*, (W. Va. Feb. 5, 1887,) 1 S. E. Rep. 569; *Wilkinson v. State*, 59 Ind. 416; *Yonaski v. State*, 79 Ind. 398; *Railroad Co. v. Lehman*, 58 Md. 209; *Hennersdorf v. State*, (Tex. App.) 8 S. W. Rep. 928; *Telegraph Co. v. Yopst*, (Ind. Sup.) 11 N. E. Rep. 16; *Burnett v. Telegraph Co.*, 39 Mo. App. 599; *Telegraph Co. v. Wilson*, (Ala.) 9 South. Rep. 414.

CAMPBELL, C. J. If the view of the Sunday law held by the courts of Indiana and Missouri, and cited by counsel, is to prevail in this state, this case would seem to have been given to the jury with proper directions; and, although the jury did not regard "necessity" with reference to work lawful on the Sabbath day, commonly called Sunday, in the sense with which that term was employed in framing the "Shorter Catechism," wherein it tells how the Sabbath is to be sanctified, neither did the courts mentioned, but they recognized an enlarged meaning of necessity, so as to embrace social necessity, and admitted as an exception messages under circumstances which, in our opinion, did not create as great a necessity as disclosed by this case. It is argued that the necessity must be that of the sendee, and not that of the sender. Our understanding of the cases cited is that the necessity or charity of the act takes it out of the prohibition of the law, and then all the legal consequences of the act on any secular day will follow as to the rights and liabilities of the parties. We do not commit ourselves to the view held by the cases cited, nor do we express any dissent from them. It may be that the true view is that, if a telegraph company should, in a spirit of piety or regard for the law, refuse to receive a message for transmission on Sunday, and was sued for that, and invoked the law of God and the state as a defense, it would find this ample protection against a claim for damages; but the piety which admits of open offices and receipt of messages and pay for their dispatch on Sunday should be equal to the duty of transmission and delivery as on other days, and the sendee whose right of action rests not on

contract, but on breach of duty, may recover without regard to the day. We do not commit ourselves to this view now, as the case does not call for it. In either view of the law, the appellant has no just cause to complain of the action of the court below, and the judgment will be affirmed.

(69 Miss. 569)

FAISON et al. v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi. Oct., 1891.)

CONNECTING CARRIERS—GOODS LOST IN TRANSIT—PRESUMPTION.

In an action against the last of several connecting carriers, to recover for goods shipped over the lines of such carriers by through bill of lading, and lost, the burden is on defendant to show that such loss did not occur on its line, and the presumption is not rebutted by showing that its preceding carrier loaded such goods into one of its sealed cars, which had no end windows or other means of entering except through the doors, where it was not shown that the seal remained as put on.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by G. W. Faison & Son against the Alabama & Vicksburg Railroad Company for goods of plaintiffs alleged to have been lost by defendant in transporting them. There was judgment for defendant, and plaintiffs appeal. Reversed.

The goods were received by the Virginia, Tennessee & Georgia Air Line in good condition. It issued a through bill of lading, showing consignment to appellants at Indianola, Miss. There were eight cases of goods in all. One of them was lost. The case that was lost was valued at \$184.41. The loss occurred in October, 1888. The goods were shipped over the East Tennessee, Virginia & Georgia Railroad Company and the Alabama Great Southern to Meridian, Miss., and then over the Vicksburg & Meridian Railroad to Vicksburg. The Vicksburg & Meridian road was in the hands of a receiver, appointed by the United States circuit court for the southern district of Mississippi. The receiver was discharged, and it was decreed that the Alabama & Vicksburg Railway Company should stand in the place of the receiver as to several claims that were outstanding. It was admitted that the claim in suit was one of the claims mentioned in the decree of the federal court, for which the Alabama & Vicksburg Railway Company assumed responsibility. When the goods were arrived at Vicksburg it was found that they were short by one case of calicoes. It is not disputed that the goods were lost, nor is there any question made as to the value. As it did not appear where the goods were lost, and as the goods were delivered in good order at Philadelphia to a connecting carrier, to be transported on a through bill of lading, and as some of the goods were missing when the delivery was made at Vicksburg, this suit was brought against appellee, as the last carrier. By agreement the case was tried by the court, without a jury. There was a judgment for the defendant, and plaintiffs appealed.

Brame & Alexander, for appellants.  
Nugent & McWillie, for appellee.

CAMPBELL, C. J. As the defendant was the last of successive carriers, having independent lines of carriage, but carrying continuously in pursuance of through bills of lading, and the car containing all the boxes at Chattanooga, where, according to the evidence, they were last seen, afterwards came to the possession of the defendant, it devolved on it to show that the missing box was not in the car when received by it. The evidence warrants the belief that all the cases or boxes were delivered, at Chattanooga, to the Alabama Great Southern Railroad Company, and put in a car, which is alluded to as having been "sealed," and probably was; and this car was received by the defendant at Meridian, but when and in what condition, as to seals or contents, is not shown. One box or case of goods was missing at Vicksburg, on the arrival and opening of the car there. When or where or how the box got out of the car is not shown. The argument is that as the car was "sealed" at Chattanooga, and as it had no "end windows," there was no way of getting at its contents en route without breaking the seals, and it must be assumed that one of the boxes was not, in fact, delivered to the connecting road at Chattanooga, and therefore did not come to the possession of the defendant. If this argument was supported by the evidence, a different question would be presented, but it is not supported by evidence. It is not shown that the car was sealed at Chattanooga, so as to deny access to its contents without breaking the seals. It is not shown that the seal remained as put on. All is conjecture and unsatisfactory inference as to that. It does appear that nearly two weeks elapsed after the delivery of the goods at Chattanooga and their arrival at Vicksburg, and the car is not accounted for during that time; and it is shown that somewhere one of the cases or boxes was "recovered." There is no hint that this occurred before delivery of the goods at Chattanooga. It must be assumed that it was done after delivery at Chattanooga. To do this it was necessary to get at the case or box. This may have been done after the car came into the hands of the defendant. It was for it to show that it did not. It failed to exculpate itself by overthrowing the presumptions against it, and must be held liable for the loss, which may have occurred on its line of carriage. The judgment should have been for the plaintiffs, and the judgment rendered will be reversed, and cause remanded for a new trial.

(89 Miss. 529)

HALL et al. v. STATE, to Use of LAFAYETTE COUNTY.

(Supreme Court of Mississippi. Oct. 1891.)

COUNTY TREASURER—BOND—LIABILITY OF SURETIES—FAILURE OF PRINCIPAL TO SIGN BOND.

1. Code 1880, § 367, provides that a county treasurer shall give bond, with two or more sureties, for the faithful performance of his duties, to cover the money likely to come into

his hands in any year. Section 726 provides that he shall give an additional bond to cover all school funds likely to be in his hands at any time. *Held*, that though, by inadvertence, or ignorance of the authorities, no additional bond was required of such treasurer for school funds, his sureties would be liable for a conversion of such funds by the treasurer, where they executed a bond plainly intended to cover all moneys that might come into the treasurer's hands, from whatever source.

2. The fact that such treasurer did not sign the bond did not exonerate the sureties on such bond from liability thereon, he having inscribed his oath of office on the back of such bond.

Appeal from chancery court, Lafayette county; B. T. Kimbrough, Chancellor.

Bill by the state, to the use of Lafayette county, against J. M. Hall and others, sureties on his bond as treasurer of Lafayette county, to reform the bond. There was a decree for plaintiff, and defendants appeal. Affirmed.

J. M. Hall was elected treasurer for Lafayette county for the term of 1884 and 1885, and again for the term of 1886 and 1887. He executed a bond as county treasurer, according to section 367 of the Code of 1880, but never executed a school bond, according to section 726, for either term. Suits were brought at law against the sureties of Hall on the county bond, alleging a default as to school funds, which resulted in favor of the sureties. Then the bill in this case was filed. The theory of the bill is: In order that Hall might enter on the duties of the office to which he had been elected, it was necessary for him to give two bonds,—one, the general bond; the other, the special school-fund bond. The fact that the special bond was required was unknown to him, but he was aware of the fact that, after some fashion, he was required to give bond for the faithful performance of all his official duties. He set to work to get up his bond under that impression. He arranged through defendant Price, who was the cashier and active agent of the Bank of Oxford, that the bank would make his bond. The agreement was that for such service the bank should have the deposits of his official account, including the school funds, and should receive from him, in addition, out of his commissions, the sum of \$100 per annum. The defendants herein—all except Hall himself—were the owners of the Bank of Oxford. Price had the thing perfected, and the thing was done accordingly. None of the parties knew of the special bond requirement, yet at the same time they contemplated doing what was needful to put Hall right as to his bonded obligation, and such was their contract. They contemplated that the school moneys should go along with the general funds, under their arrangement, and it was not within their contemplation that there should be any distinction made between the one fund and the other. It was their intention to secure all. When they executed the general bond they thought they had secured all. The bill prays that the bond be reformed so as to accomplish what the defendants contracted to accomplish. The sureties of Hall admit that they agreed

to become sureties for Hall, but allege that nothing was said to them about a separate school bond; that no school bond was ever presented to them, or mentioned to them; that nothing was ever said to them about school money; that they never agreed that the county bond which they signed should cover school money; that they signed the county bond, which was the only bond they were asked to sign. They also allege that the second bond was never signed by Hall at all,—his oath of office was written on the back of the bond,—and claim that they signed as sureties, upon condition that Hall would sign, and, as Hall did not sign the second bond, they are not bound on that, even for county funds. The chancellor decided that the sureties were liable for school funds, and ordered an account to be taken.

H. A. Barr, Chas. B. Howry, and J. W. T. Falkner, for appellants. Phil A. Rush, Edward Mayes, and Eugene Johnson, for appellees.

CAMPBELL, C. J. The general bond of a county treasurer, given under section 367 of the Code of 1880,<sup>1</sup> is not a security for school funds which come into his hands, because an additional bond is required for school moneys. Therefore, when nothing occurs except the giving of the general bond, presumably, they who sign it do it with reference to the additional bond required, and intending to bind themselves only for moneys other than school funds. But if the general bond given should be so worded as to include, in terms, school money, the obligors would be bound for such money, for the requirement by statute<sup>2</sup> of "an additional bond, . . . in an amount not less than the school funds likely to be in his hands at any one time," looks to the fact, and not the form, of security, and may be satisfied by a single paper as well as several. An additional bond is directed to be required of the county treasurer to cover school funds because of the apprehended insufficiency of the penalty of the general bond, and the purpose to make sure of the safety of school funds. But if the constituted authorities, through ignorance, inadvertence, or otherwise, in dealing with this matter, were to not follow the law, by requiring a separate and additional bond for the performance of his duties by the county treasurer as to school funds, and to take a bond, at the beginning, expressly stipulating for the performance of all his duties, including his dealings with school funds, it would be enforceable according to its terms, because of the contract. It is incontrovertible that Hall and his sureties intended to give a bond sufficient, in its penalty and its terms, to cover all moneys that should be in his hands, from every source. They contracted for that, and designed, in good

faith, to carry out the contract, and thought they had done so; and it was an afterthought to escape liability because only one bond was given. True, there was no formal and express agreement between the obligors in the bond and the officials, as to its terms, but it was as plainly implied from what occurred as if it had been expressed. Such was clearly the intention of all concerned, and it should not fail of execution by reason of ignorance or mistake, whether of fact or law, in expressing that intention in the instrument used. Equity will not make contracts for parties. Its power is confined to enforcing those made by the parties. And where parties, through erroneous views of law, reject one sort of contract, and make another,—led thereto by a mistaken opinion as to the law, as in *Hunt v. Rousmanier*, 1 Pet. 1,—equity will not relieve. But where parties contract for a particular result, and intend to effect it, and fail to accomplish it, even through ignorance or mistake of law, equity will effectuate the intent of the parties. If an agreement is just what the parties intended it should be, no matter what led to it, there can be no interference with it; but if, in putting it into form, it fails to express and stipulate for what the parties understood and intended it should, a case is made for a court of chancery. The facts of this case bring it within the latter class. Its facts distinguish it very clearly from the ordinary case of a county treasurer giving bond, and make it proper for the chancery court to carry into effect the real intention of the parties,—to make the instrument express the thought which the makers had when they signed the bond. Sureties are subject to the same rules as others in this respect. This matter has not been adjudicated before, and this defense is not available. The suggestion of laches, as furnishing a ground for denial of the relief sought, loses the force it might have in many cases by the circumstances of this. Large allowance must be made for the incompetence and negligence of ignorant officials in their dealings as public agents, so to protect the too confiding people from the consequences of their failure of duty, where it can be done, as in this case, without any injustice to the individuals concerned. The fact that Hall did not sign one of the bonds does not make any difference.

Affirmed.

(70 Miss. 673)

STATE v. HALL et al.

(Supreme Court of Mississippi. April 10, 1893.)

**BONDS—REFORMATION—ENFORCEMENT IN EQUITY—PENALTIES.**

1. Where the bond given by a county treasurer was a general bond, but was reformed in an action therefor so as to also be a security for the school fund in his hands, which fund the treasurer and his sureties thought was included in the bond when executed, the reformed bond should be regarded as if originally executed by the treasurer and his sureties.

2. While a court of equity will not en-

<sup>1</sup>Code 1880, § 367, provides that a county treasurer shall give bond, with two or more sureties, for the faithful performance of his duties, sufficient to cover the amount of money likely to come into his hands in any year.

<sup>2</sup>Code 1880, § 728.

force a penalty created by contract between private persons, it will, in a proper case, enforce a penalty created by statute.

Appeal from chancery court, Lafayette county; B. T. Kimbrough, Chancellor.

Action by the state of Mississippi against J. M. Hall and others to recover on an official bond. On a former appeal the bond was reformed, and from the judgment of the court thereon, as reformed, plaintiff appeals. Reversed.

For prior report, see 13 South. Rep. 38.

E. Mayes and P. A. Rush, for the State. H. A. Barr, for appellees.

WOODS, J. The effect of the former opinion of this court in this case, on the earlier appeal, was to reform the bond of the treasurer and his sureties so as to make it conform to the real purpose of the parties, and in the further progress of the litigation the reformed bond was to be treated as the school-fund bond of the parties. The prime object of the appeal to chancery was the reformation of the bond, and that appeal was perfectly sustained by this court in its former opinion in this case. 13 South. Rep. 38. The bond should have been regarded and treated in the court below precisely as if the treasurer and his sureties had executed it as a school-fund bond originally. The bond having been so reformed, the chancery court should have proceeded to give all the relief to which the complainant was entitled. The learned court granted relief to the amount of the treasurer's deficit, with interest, but refused to enforce the statutory penalty. Whether this action of the court was founded upon the views pressed upon us by the counsel for the appellees, viz. the absence of equity of penalties, and its general refusal to enforce them, or, as stated in brief of counsel for appellant, because the treasurer and his sureties had never manually executed a school-fund bond, and therefore the case was not within the letter of section 375 of the Code of 1880, is immaterial. In either event the court was in error. From what has already been said, it will be manifest that the bond should have been regarded as if originally executed by the appellees as the treasurer's school-fund bond.

Equally untenable is the position assumed by counsel for appellees, that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to make the distinction between statutory penalties and penalties created by contract between private persons. The latter, courts of equity refuse to enforce, but the former,—the expression of the will of the lawmaking power,—the courts of equity will not undertake to disregard and nullify by refusing their aid, in proper cases. 1 Pom. Eq. Jur. § 458; Story, Eq. Jur. § 1326; State v. McBride, 76 Ala. 51; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. Rep. 878. Having acquired jurisdiction, the court below should have given full relief by following the law and enforcing the penalty. Legal remedies are constantly being worked out in courts of equity in causes where jurisdiction was acquired on some recognized ground of

equity interference. The decree of the court below is reversed, and the proper decree entered here, in accordance with this opinion.

(39 Miss. 46)

COHEA et al v. JOHNSON.

(Supreme Court of Mississippi. Oct., 1891.)

SALE OF DECEDENT'S ESTATE—DEED OF ADMINISTRATOR—POWER OF ADMINISTRATOR DE BONIS NON—RES JUDICATA.

1. A conveyance in the form of a deed from a grantor individually, except that to his signature he adds the word "administrator," is admissible as an administrator's deed when it appears everywhere in the record that the grantor was the administrator of the estate to which the land in question belonged, and on the face of the conveyance that the land was conveyed as land of the estate by him as administrator.

2. Where the administrator de bonis non with the will annexed, who is also one of the heirs and devisees, joins with other heirs in a suit for the partition and sale of a certain lot of testator's land, and a decree is made granting the partition, and stating that the sale should be made by a commissioner of the court, rather than by the administrator and heirs, such decree does not adjudicate his right to sell land of the testator as administrator de bonis non with the will annexed.

3. Where executors are positively directed to sell land, and the power to make the sale is confided to them *virtute officii*, and there is no personal trust confided to the nomination, the power of sale survives to the administrator de bonis non, under Code 1880, § 1984; and the fact that the testator grants to his executors or to any two of them authority to execute all the provisions of the will does not affect such power in the administrator when the executors are empowered to act by virtue of their official character.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Ejectment by Clara T. Cohea and others against A. J. Johnson. Judgment was entered in favor of defendant, and plaintiffs appeal. Affirmed.

Perry Cohea died in the year 1848, testate, leaving a considerable estate in lands lying in and adjoining the city of Jackson, Miss. By his will he directed his lands to be divided into lots, and to be sold by his executors, and the money to be divided among four of his children and the children of a fifth one, or their representatives. J. Stone, D. A. Cohea, and Samuel Mathews were appointed his executors, and duly qualified as such. About 1859 the executors had the said lands subdivided, and parts of them sold, as directed by the will. Among the subdivisions thus made, and which were not sold, was a lot of 26 acres, designated on the map of the said executors as "Lot No. 6," and commonly called the "Calquehoun Lot." This lot lay inside the city limits of Jackson. Two of the executors, Stone and Cohea, died, and Mathews resigned. W. B. Jelks was appointed administrator de bonis non of the estate with will annexed. Section 18 of the will restricts the acts of the executors to those done with the concurrence of all, or at least two of them. There was no further disposition of said lands until September, 1873, when said Jelks, who was one of the heirs of Perry Cohea, and enti-

tled to one-fifteenth interest in said lands, and who had taken possession of said lands, filed a bill in the chancery court of Hinds county, styled *W. B. Jelks et al. v. S. A. Boatner et al.*, setting out the history of said lot No. 6, and praying that the court would order a division of it into small lots, and a sale of it by him, and the proceeds divided among the heirs. The court decreed the sale to be made, but refused to appoint him the commissioner to do this. Nothing further was ever done under this decree. Jelks remained in possession of the Calquehoun lot No. 6, and finally disposed of it to sundry parties. The land in controversy is a part of it, which is in the possession of A. J. Johnson, and for their interest in this, a part of the heirs of Perry Cohea brought ejectment against him. This cause was tried before a special judge, without a jury, by agreement. On the trial the plaintiffs put in evidence their descent from their ancestor, Perry Cohea, and his seisin of the land in question. The defendant then put in evidence the appointment of W. B. Jelks as administrator de bonis non cum testamento annexo of Perry Cohea; a deed from W. B. Jelks, administrator, to Elizabeth Jamison; a sales list of the said lands, as sold to the state, on March 4, 1878, for the taxes of 1877; a deed from the auditor to Elizabeth Jamison; and a deed from Elizabeth Jamison to himself. Upon these two separate titles the defendant based his defense. On the trial the judge held the tax title void, but that the three years' statute of limitations was operative in this case, and the adult plaintiffs barred by it. He further held that the power of sale in the will of Perry Cohea gave to Jelks, as his administrator de bonis non with will annexed, the power of sale, and that the deed from him was a legal execution of such power. And he thereupon gave judgment for the defendant, and from this judgment this appeal was taken.

E. E. Baldwin, for appellants. Calhoon & Green and M. M. McLeod, for appellee.

WOODS, J. The deed from Jelks, administrator, was properly admitted in evidence. That Jelks was the administrator with the will annexed of the Cohea estate, appears everywhere in the record that the land in controversy was conveyed by Jelks, administrator, in the particular deed whose introduction in evidence was objected to, as the land of the Cohea estate, appears on the face of the conveyance itself; and that Jelks, administrator, in this conveyance was dealing with the land as administrator of Cohea's estate appears too clear to need discussion.

The contention of appellants' counsel that the question of the power of Jelks, administrator de bonis non with the will annexed, to execute the provision of the will of Perry Cohea deceased, in the sale of the land in suit, is *res adjudicata*, under the decree of the chancery court of Hinds county, in the case of *Jelks et al. v. Boatner et al.*, is without merit. That was a decree in a proceeding instituted by some of the heirs of Cohea against other heirs

of the same person, and not by Jelks, administrator, et al., as an inspection of the bill in that case plainly shows. The question of the power of Jelks, administrator, is not hinted at in any pleadings or proceedings, nor does the decree undertake to settle this question, which was not then before that court. It is true the decree of the chancery court declares that the sales of the lands "should be so made by a commissioner of the court as an impartial and disinterested person, rather than by W. B. Jelks, the administrator and one of the heirs;" but even this declaration is uncalled for, since no judgment of the court touching Jelks' impartiality and disinterestedness was anywhere sought by any one. But this unauthorized remark of the court does not touch the question of Jelks' power to sell the lands, under the will of Cohea, as administrator de bonis non with the will annexed. The contention of counsel must have arisen from a misconception of the purpose of the bill in the case of *Jelks et al. v. Boatner et al.*, and a misapprehension as to the parties, and the character of the parties, to that litigation. The question before us now, as to the power of Jelks, administrator, to sell the lands of the Cohea estate, under the provisions of the will of Perry Cohea, deceased, and the question as to the desirability of the sale of the lands of that estate in a particular manner for the purpose of distribution among Cohea's heirs, and of the power of the court to decree such sale, are wide asunder as the poles.

These two preliminary contentions disposed of, we come now to consider the power of Jelks, administrator de bonis non with the will annexed, to make sale of the lands in controversy. The testator, among other provisions and directions to be found in his will, directs the executors thereafter named to pay all his debts, including physician's bill and funeral expenses; the payment to Edward Cohea, a minor son of the testator, by the executors, of the sum of \$250 immediately, as an outfit for his departure to, and entrance into, Hanover College, and the maintenance and education of said Edward at said college until he should attain his majority; the payment of a bequest of \$600, by the executors, to Julia Kneeland, a niece of testator, as soon as that sum can be spared from the pressing wants of the testator's estate. All the personal property of the testator, other than slaves, is directed to be sold by the executors on such terms as they shall deem most beneficial for Cohea's heirs; two-eighths of land in Copiah county are to be sold and disposed of by the executors upon such terms as they shall deem best for the estate; a certain lot or tract of land, theretofore by verbal agreement contracted to be sold to Caswell Clifton, the executors are directed to convey to said Clifton, in pursuance of that verbal agreement. The fourteenth paragraph of the will then continues: "It is my will that all my remaining lands in Hinds county shall be sold by my executors upon such terms and upon such credit as, in their discretion, shall seem most advisable for the interests of all concerned in my estate.

It is my will, and my said executors are directed to lay off said remaining lands into lots of ten, twenty, or thirty acres each, and sell the same upon the most advantageous terms, securing payment thereon in a safe and satisfactory manner." Then the fifteenth paragraph of the will directs the executors, in their discretion, to delay the sale of the lands mentioned in paragraph 14 until they could make a crop thereon. The payment of an annuity to Maria Frances, a minor child of the testator, is next directed and provided for. The seventeenth paragraph then declares: "After all my just debts and legacies are paid, and charges on my estate provided for, it is my will and desire that all moneys remaining in the hands of my executors, from whatever source arising, shall be equally divided among my said children," etc. And the eighteenth paragraph is in these words: "I do appoint and nominate as the executors of my last will and testament, my son-in-law, J. Stone, my son, David A. Cohea, and my friend, Samuel Mathews, hereby granting to them, or any two of them, full power and authority to execute and carry into effect each and all provisions of this, my last will and testament, according to the true intent and meaning thereof." It is clear that this will does not confer upon the executors the power to sell the lands if they shall so elect. The terms of sale are confided to the discretion of his executors, but the sales of the lands themselves are to be made at all events; and these sales are to be delayed only for one season,—in order that a crop may be made, if the executors deem that course to be beneficial to the estate. The lands are devoted to sale absolutely, but the sales are to be made on terms within the discretion of the executors, and the sales may be delayed for a length of time sufficient to make a crop on the lands, if, in the discretion of the executors, that course seems desirable. Nothing is inferable from the will, and all the parts of it, which suggests any other means of meeting the legacies, annuities, and charges made upon the estate than those arising from the sales of lands; and the sum remaining in the hands of the executors, whether from land sales or otherwise, after payment of debts, legacies, annuities, and charges,—the residuum of the entire estate now converted into money,—is to be equally divided between his heirs named. Unless the lands are sold, the entire intent of the testator will fail. Not only the clear intent (to be gathered from every part of the will) of the testator was that the lands were to be sold by the executors, but the fourteenth paragraph of the will expressly directs the sale of the lands, and only the questions of terms and credits in the making of the sales are left to the discretion of the executors. The lands are to be sold at all events, and the power to make sale is confided to the executors *virtute officii*, and not in any other character. There is no personal trust confided to the executors *nominatim*, but merely that official

one usual in the appointment of executors generally, and belonging to the office. From this construction of the will it follows that the power of sale in the premises survived to Jelks, administrator *de bonis non* with the will annexed, under the law as it has long existed in this state; the statutes in the Codes of 1880, 1871, 1867, and Hutchinson, being substantially the same. See Hutch. Code, § 113, c. 49; Code 1880, § 1984.<sup>1</sup>

The fact that the testator, in the eighteenth paragraph of the will, grants to his executors or any two of them power and authority to execute all the provisions of the instrument according to the true intent thereof, does not at all militate against the correctness of the opinion just pronounced. The power of the administrator with the will annexed is to be determined by the law applicable to the particular class of cases to which it may be found to belong. We have already said that in those cases in which certain powers are conferred upon executors, which are to be executed *virtute officii*, the power survives to the administrator with the will annexed, while in those cases where a relation of purely personal trust is created in executors *nominatim*, the trust cannot be executed by the administrator *cum testamento annexo*. The fact that the testator grants authority to the executors, or any two of them, to execute all the provisions of his will, is not potential at all in considering the question of the power of the administrator with the will annexed to execute the provisions of the will in those cases where the executors are empowered to act by virtue of their official character. The administrator with the will annexed, by virtue of his office, succeeds the former executors in the execution of the power conferred on them officially. He succeeds to the office, and succeeds to the powers of all the former incumbents of it. These views fully meet the necessities of the case before us, and settle finally the rights of the parties. As we understand the record, from pages 72-77, inclusive, these views also finally determine the litigation in 35 or 39 other suits now pending in the court below, and in which the same questions are involved. We regret our inability to meet the expressed wishes of counsel on both sides, and consider and settle every question presented, in order to put an end to all litigation growing out of this same fruitful source. The facts in the two or three cases yet remaining open after this opinion are not before us, and we cannot undertake to deal with these cases in any manner. Affirmed.

<sup>1</sup>Code 1880, § 1984, provides: "If land be directed by the will to be sold, the sale shall be made and the proper conveyance executed by the executors, or such of them as shall undertake the execution of the will, or by the person appointed by the will to execute the trust; and if the executor should fail to qualify, or should die before he execute the will, and if the person appointed should fail to execute the trust, the sale shall be made by the administrator with the will annexed."

(101 Ala. 186)

BELL et al. v. OTTS.

(Supreme Court of Alabama. May 2, 1893.)

EJECTMENT—VERDICT—JUDGMENT—APPEAL—DISMISSAL.

A verdict in ejectment was: "We, the jury, find for the plaintiff for the land sued for, [describing it,] and twenty-five dollars damages for detention as against defendant B." Then appeared the following: "And judgment is rendered against defendants M. and E. for the land sued for, together with all the costs in this behalf expended, for which execution may issue." *Held*, that there was no such judgment as would support an appeal.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Ejectment by Mary M. Otts against Martha Bell and others. Judgment for plaintiff. Defendants appeal. Dismissed.

The judgment from which the present appeal is prosecuted is in the following language: "This day came the parties by their attorneys, and the demurrers to pleas were sustained by the court, the material facts therein averred being provable under the general issue; and, issue being joined, thereupon came a jury of twelve good and lawful men, to wit, R. W. Beck and eleven others, who, being duly sworn and impaneled according to law, on their oaths say: 'We, the jury, find for the plaintiff for the land sued for, viz. S.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of Sec. 6, T. 18 S., R. 2 W., in Jefferson Co., and twenty-five dollars damages for detention as against defendant Martha Bell,' and judgment is rendered against defendants Samuel Mace and Henry Edwards for the land sued for, together with all the costs in this behalf expended, for which execution may issue."

S. J. Darby and B. K. Collier, for appellants. Alex. T. London, for appellee.

**HARALSON, J.** The verdict in this case was: "We, the jury, find for the plaintiff for the land sued for, [describing it,] and twenty-five dollars damages for detention as against defendant Martha Bell." On this verdict a judgment ought to have been entered against all the defendants for the land sued for,—for \$25 against Martha Bell, as damages for detention, and against all of them for the costs. Code, §§ 2709, 2710; *Bishop v. Lalouette*, 67 Ala. 197. Immediately following this verdict, with a comma between, appears what purports to be a judgment in the cause, based on the verdict, namely: "And judgment is rendered against defendants Samuel Mace and Henry Edwards for the land sued for, together with all the costs in this behalf expended, for which execution may issue." A judgment should be complete and certain in itself, and must appear to be the act—the adjudication—of the court, and not a memorandum or certified result. *Speed v. Cocke*, 57 Ala. 209. Among various definitions of a "judgment" in the books, not differing in legal effect from each other, we have the one,—that it is "the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." 1 *Freem. Judgm.* § 2; *Whitwell v. Emory*, 59 *Am. Dec.* 220. The language of a judgment is: "It is considered

by the court that the plaintiff have and recover, or that the defendant go without day." If, ever, what purports to be a judgment falls short of being a finding—an adjudication of the court—complete and certain, but is, in substance, a mere memorandum of the clerk, which declares, as here, no more than that a judgment was rendered, without setting out what the judgment was, it cannot be sustained as the final consideration and determination of the court. *Bank v. Godbold*, 3 *Stew. (Ala.)* 240; *Hinson v. Wall*, 20 Ala. 298. There is here absolutely nothing in the shape of a judgment against the defendant Martha Bell for anything; and, as for the other defendants, there is simply a declaration that judgment is rendered against them for the land and costs, but no judgment is in fact rendered. This entry is lacking in form and material averments to constitute it a judgment, and to support it as such would be to sanction an uncertainty and looseness in the record and preservation of solemn and important judicial ascertainment, such as would be pernicious. Our conclusion is there is no such judgment here as will support an appeal, and it is therefore dismissed. Appeal dismissed.

(99 Ala. 474)

ALABAMA STATE LAND CO. v. KYLE  
et al.

(Supreme Court of Alabama. April 27, 1893.)

ADVERSE POSSESSION—RUNNING OF STATUTE—CHARACTER OF OCCUPANCY—COLOR OF TITLE—EVIDENCE.

1. Where land has been conveyed by the state to trustees to aid in the construction of a railroad, such grantees or their successors in title cannot claim, in ejectment, that the statute of limitations did not immediately begin to run in favor of an actual occupant of the land, because by the deed such trustees were required to pay to the state 10 per cent. of the proceeds of all sales of the lands which might be made by them.

2. On an issue as to adverse possession by defendant, a certificate of entry is admissible, without proof of its execution, as color of title to fix the boundaries of defendant's possession, and in connection with other evidence that he actually held possession and claimed title under it.

3. In ejectment, where defendant claims by adverse possession, he may testify as to an agreement by which a tenant of his predecessor in title continued in possession as his tenant.

4. Defendant testified that shortly after such an agreement he saw the tenant in possession, and that, after an absence of about 10 years, he returned, and found the tenant still there. *Held*, that it would be presumed that such possession under defendant continued during that time.

5. One claiming under a certificate of entry cleared portions of each 40 acres covered thereby, and got wood and timber from all parts of the land, living meanwhile in a house built by him on 40 acres adjoining the land covered by his certificate. He sold 40 acres, but this did not sever the 40 on which his house stood from the rest of the tract. *Held*, that his possession was adverse.

6. The fact that one claiming title to land leased it to a man who cut and hauled a quantity of wood from it, and that thereafter it was unoccupied for five years till the claimant again leased it to one who occupied it for five years,



does not constitute such continuous possession for ten years as will give title under the statute.

Appeal from city court of Gadsden; John H. Disque, Judge.

Ejectment by the Alabama State Land Company against R. B. Kyle, John S. Paden, Charles E. Heath, Samuel Clayton, Mrs. Jane Clayton, and Sam Henry. From a judgment for defendants, plaintiff appeals. Reversed.

Three demises are alleged in the declaration. In the first count recovery is sought on the demise of the state of Alabama; in the second on the demise of Swann and Billups, trustees; and in the third on the demise of the Alabama State Land Company. The land sued for was the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$ , of section 31, township 11, range 6 E. The land sued for was embraced in a grant of lands to the state of Alabama by an act of congress approved June 3, 1856, to aid in the construction of certain railroads therein mentioned, and it was included in the land afterwards set apart and allowed by the state for the two railroads, which were consolidated into the Alabama & Chattanooga Railroad Company. On February 8, 1877, the governor of the state of Alabama executed a deed to Swann and Billups as trustees, conveying to them, among others, the land here sued for. On December 8, 1886, Swann & Billups, as trustees, executed a deed to the Alabama State Land Company, conveying, among others, the lands sued for in this action. This deed constitutes the basis of the claim of the appellant, the Alabama State Land Company, to the land sued for in this action, and was introduced in evidence on the trial.

James Aiken, who was introduced as a witness on behalf of the defendants, testified that one Joseph Clayton came to his law office, and brought with him a certificate of entry to the lands sued for in this action, and that the witness sent the original to Washington to the land office, and that he had never seen the original since. The defendants' counsel then offered to introduce in evidence a paper which the witness Aiken testified was a correct copy of the certificate of entry. Plaintiff objected, on the ground that the execution of the original had not been shown; and, second, that it had not been shown that Clayton was in possession, claiming and holding under the original copy. The court overruled this objection, allowed the copy to be introduced in evidence as color of title only, and to this ruling of the court plaintiff duly excepted. The paper so introduced was a copy of the certificate of entry, dated April 10, 1860, duly signed by the receiver, showing that the said Joseph Clayton had entered the land sued for in this action. There was testimony introduced for the defendants tending to show that the said Joseph Clayton went into the

possession of the land included in the said certificate, and claimed the same as his own, and exercised acts of ownership over it, until he sold or attempted to sell the same by various deeds duly executed by him. The defendants introduced in evidence the following deeds: From Joseph Clayton and wife to W. P. Golightly to the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 31, township 11, range 6 E., dated in 1877; deed from Joseph Clayton and wife to Sam Henry, dated April 10, 1877, to the E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and 20 acres, more or less, of N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , (describing same by metes and bounds,) all in section 31, township 11, range 6 E.; deed from W. P. Golightly and wife to R. B. Kyle, dated October, 1878, to the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 11, range 6 E.; deed from R. B. Kyle and wife to J. S. Paden, dated February 9, 1887, to the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 11, range 6 E.; deed from Jane Clayton, widow of Joseph Clayton, to Joseph S. Clayton, her son, dated April 16, 1888, to N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 31, township 11, range 6 E. The defendants' evidence further tended to show "that in 1878 and 1879 Sam Henry resided about four miles from the land, and that during said time he leased the land to a man who cut and hauled a large quantity of wood from the land; \* \* \* that nothing further was done by him except to pay the taxes on the land, and to claim it as his own, which he did until the year 1883, when he leased it to another tenant, who cultivated it for about five years." The land described in the deeds from Clayton to Golightly, and Golightly to Kyle, and from Kyle to Paden, was cultivated one year by a man named Higgins as a tenant of Golightly, who turned over the possession to Kyle. Kyle testified that he never lived on the land, but that one Higgins was on the land as the tenant of Golightly; and that immediately after his (Kyle's) purchase he saw Higgins, and told him that he could continue to live on the land, and that Higgins thereupon agreed with Kyle to hold said land as Kyle's tenant, and agreed to keep up fencing, etc., in payment of rents. This agreement was made while Higgins was in possession of the land. The plaintiff moved the court to exclude the conversation testified to between Kyle and Higgins, on the ground that it was irrelevant and inadmissible, and "that the declaration was not made while the parties were on the land." This motion was overruled by the court, and plaintiff excepted. The witness Kyle further testified that he went over the land shortly after this, and saw Higgins there cultivating a portion of the land, and improving the fences, etc., and was not on the land any more until about the time he sold to Paden, when he returned, and found Higgins still living on the land. Paden testified that when he purchased from Kyle, in 1887, he found Higgins in possession, and that he (Paden) had continued to keep a tenant, cultivating



a portion of the land ever since. It was further shown by the testimony for the defendant that after their several purchases Henry, Kyle, and Paden claimed the land described in their deeds, and paid taxes on it up to the time of bringing the present suit. In rebuttal to the testimony of the defendants, plaintiff introduced the certified transcript from the commissioner of the general land office, showing that the lands sued for, and which were claimed by the defendants under title derived from Joseph Clayton by virtue of his entry of the same, were at the time of said entry embraced in the grant of the land to the state of Alabama by an act of congress approved June 3, 1856, and that the right of the Alabama & Chattanooga Railroad Company had attached to the same, and that Clayton's entry thereof was illegal, and had been canceled. The cause was tried without the intervention of a jury, and upon hearing all the evidence the court rendered judgment for the defendants.

Smith & Lowe, for appellant. Amos E. Goodhue, for appellees.

HEAD, J. The Alabama State Land Company claims title to the land sued for by conveyance from Swann and Billups. The history of the title of Swann and Billups may be found in the reported cases of *Swann v. Gaston*, 87 Ala. 569, 6 South. Rep. 386; *Same v. Lindsey*, 70 Ala. 507; *Ware v. Swann*, 79 Ala. 330; *Standifer v. Swann*, 78 Ala. 88; and it is unnecessary to repeat it here. The plaintiff's *prima facie* title is made out, and the defendants set up no superior title in themselves other than that which they claim to have acquired by adverse possession of the premises for ten and twenty years. Until the state of Alabama divested itself of title to these lands by the authorized conveyance of the governor executed to Swann and Billups on the 8th day of February, 1877, it is clear the statute of limitations did not begin to run in favor of defendants. *Swann v. Gaston*, 87 Ala. 569, 6 South. Rep. 386. But it is contended by the plaintiff that the statute did not then begin to run, because, by the conveyance to Swann and Billups, a trust was created for the use of the state, in this: that Swann and Billups, the trustees, were required by the instrument to pay into the state treasury, after paying the costs and expenses of making the sales, 10 per cent. of the proceeds of all sales of lands which should be made by them under and by virtue of the conveyance, in order to reimburse the state certain interest it had theretofore paid by reason of its indorsement of the bonds of the Alabama & Chattanooga Railroad Company, which trust continued, not completely executed until a period within less than 10 years before the institution of the present suit. It appears that such a trust was so created and continued. The conveyance, in all other

respects, was for the use of individuals. We have been referred to no authority in support of this contention of the plaintiff, and have been able to find none. This is an action of ejectment by the vendee of Swann and Billups to enforce the legal title. No recovery can be had on the demise of the state, laid in the declaration, for confessedly the state parted with the legal title by the conveyance to Swann and Billups. From the moment of that conveyance the grantees therein became seised as individuals, and invested with full and ample power to sue and enforce the title so acquired. This is not an action by the state asserting a title in itself against the adverse holding of the defendants. It could maintain no action, because it has no title. Swann and Billups having acquired the title, if thereafter they and their vendees acquiesced in the adverse possessions of others for the period prescribed by the statute of limitations, they are, by such acquiescence, as effectually barred as if they had conveyed to such adverse holders. The fact that the state, in parting with its title, reserved an ulterior equitable interest in the proceeds of the lands can exert no influence whatever upon the question of legal title with which we are now concerned. It will be time to consider its immunities from the operation of the statute when it comes to enforce its equitable rights. *Bank v. McKenzie*, 2 Brock. 393, opinion by Marshall, O. J.; *Bank v. Wister*, 2 Pet. 318.

There was no error in admitting secondary evidence of the certificate of entry which purported to have been issued to Joseph Clayton. It was shown, in connection with evidence of Clayton's possession and claim of ownership of the land under it, subsequently introduced, that the paper had been in the possession of Clayton, and that his attorney sent it to the land office in Washington. The original being shown to be without the jurisdiction of the court, a copy, duly established by evidence as such, was admissible. It was not necessary to prove the execution of the certificate. It was offered merely as color of title to fix the boundaries of Clayton's possession, and was admissible for that purpose, without proof of execution, in connection with other evidence that he actually held possession and claimed title under it. There was clearly no error in permitting proof by Kyle of his agreement with Higgins, by which he constituted Higgins his tenant of that portion of the lands in controversy claimed by him. As to the 40 acres in suit, sold by Clayton to Gollightly, and by Gollightly to Kyle, and Kyle to Paden, the evidence shows a continuous, actual, adverse possession by the several parties for more than 10 years after the state parted with its title, and before this suit was brought. Under the facts shown in evidence it will be presumed that Higgins' possession, as tenant of Kyle,

which was shown to have commenced, continued until Kyle returned to the place, and found him there, at the time of the sale to Paden. *Clements v. Hays*, 76 Ala. 280; *Daniels v. Hamilton*, 52 Ala. 105. The entire lands claimed by Joseph Clayton under the certificate of entry lay in a body, as one tract. He, in fact, had and acquired no title to any part of them, but went into possession under claim of title to the whole, under the certificate. He built his house on the 40 acres in section 36, and lived in it, and cleared and cultivated land around it, lapping over into a part of his entry in section 31. During his occupancy he cleared portions of each 40 embraced in the whole tract, and got wood and timber generally from all parts of the land. This possession continued until he sold to Gollightly and Henry, and thereafter, except as to the lands sold Gollightly and Henry, until his death; and a similar possession and claim of title continued in his widow and children from his death to the time of trial. The sale of the 40 acres to Gollightly did not sever the 40 in which Clayton's house stood from the rest of the tract. The latter still cornered with a 40 unsold. We think, under the evidence, it must be held that the possession of Clayton, and his widow and children after him, must be referred to the boundaries of the land continued in the certificate of entry, which possession ripened into title before this suit was brought. As to the 40 acres sold to Sam Henry, the case is different. As we have seen, the statute began to run with the execution of the deed by the state to Swann and Billups on the 8th day of February, 1877. The only evidence of possession of Henry's land after that date is that, in 1878 and 1879, Henry leased the land to a man who cut and hauled a large quantity of wood from it; and it is shown that after that time there was no other occupancy until 1883, when Henry leased it to another tenant, who occupied it five years. This clearly falls short of that continuous possession for 10 years essential to give title under the statute of limitations, and the judgment of the city court will be reversed and a judgment here rendered for the plaintiff for the 20 acres sued for, which were sold to said Henry by Clayton.

We have considered the questions raised by defendants' counsel, viz.: (1) That the certification by the department of the interior of the lands embraced in the grant is too indefinite to show that these lands were a part thereof; (2) that it is not shown that there was a definite location of the Alabama & Chattanooga Railroad, by which their lands could be identified; and (3) that the assignment of errors in this case is by the Alabama State Land Company, and therefore there can be no recovery on the demise of Swann and Billups; and that, as defendants were in the adverse possession of the land when Swann and Billups conveyed to the

Alabama State Land Company, that conveyance is void for maintenance; hence no recovery can be had on the demise of that company,—and think they are without merit. The evidence in the record overcomes the first and second objections. It is true there can be no recovery on the demise of the Alabama State Land Company, because of the doctrine of maintenance, as asserted; but, on due consideration, we construe the appeal and assignment of errors to be by the plaintiffs in the cause, in the name of a fiction, justifying a recovery here, as in the court below, on the demise of Swann and Billups. The judgment in this case will take effect as of the date of the submission of this cause. Reversed and rendered.

(101 Ala. 320)

EASTMAN et ux. v. RIED et al.

(Supreme Court of Alabama. April 28, 1893.)

BILL FOR SPECIFIC PERFORMANCE—ASSESSMENT OF DAMAGES—DECREE PRO CONFESSO.

1. On a bill for specific performance, a decree assessing damages against defendants cannot be rendered unless it appears that they are or may be unable to perform their contract, and then not without giving them the opportunity to do so, by awarding damages in the alternative.

2. In an action against E. and wife to specifically enforce a contract, by which E. agreed to deliver to plaintiff R. stock in a company to be formed, provided R. obtained subscriptions for the capital stock of the company, it appeared that R., without E.'s knowledge, assigned a half interest in the contract to his coplaintiff. *Held*, that it was error to render two decrees, one in favor of each complainant for one-half the total damages assessed against both defendants.

3. In such case, where the only allegation connecting E.'s wife with the case was that E. had placed all the stock of said company belonging to him in her name, and there was no allegation that she participated in the fraud, it was error, on her failure to answer, to enter an absolute money judgment against her.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by John B. Ried and another against Elwell Eastman and wife for specific performance of a contract. From a money judgment for plaintiffs, defendants appeal. Reversed.

The complainant John B. Ried, the party with whom said alleged contract was made, before the services were performed under it, on the 1st day of December, 1888, as is averred, assigned to L. W. McCants, his co-complainant, an undivided half interest in said contract. Section 1 of the bill refers to the making of said alleged contract by the said Elwell Eastman with complainant John B. Ried, by which, as is averred, he promised, "if the said Ried would procure subscribers to the capital stock of a company, to be incorporated in the state of Tennessee, he would pay and deliver to the said Ried, for his services in procuring such subscribers, one hundred thousand dollars of the capital stock of the company to be

organized," a copy of which alleged contract is attached to the bill as Exhibit A. It is further averred that complainants, acting under said contract, procured S. T. Brittle, George D. Fitzhugh, and others, to subscribe to the capital stock of the company to be formed, and thereby enabled said Eastman to organize his contemplated company in the state of Tennessee, under the name of the Benton Iron & Land Company, and said Eastman expressed himself satisfied with the manner in which complainants performed their part of said contract; that said Eastman received \$212,000 worth of the capital stock of said company, or 2,120 shares of its stock, which were paid to him for the services performed by him and complainants, and he has refused, though requested, to pay and deliver to complainants the 500 shares of the stock in said company, or any part of it, to which they are entitled under their said contract, and said 500 shares are worth \$20,000; that with the view of preventing complainants from recovering their shares of said stock, the said Eastman has placed all of the stock which he owns in said company in the name of his wife, Mary E. Eastman, as appears by the books of said company, but he still owns and controls and has in his possession, the larger part of said stock; that said transfer was made without any consideration, in fraud of complainants, while said Eastman was indebted to them, and that said Eastman does not own any property in his own name which is subject to execution. The prayer of the bill is for an injunction restraining defendants from disposing of said stock; that, on final hearing, it be decreed that the assignment of said stock by said Eastman to his wife be decreed to be void against complainants, that said Elwell Eastman be required to surrender to the court 500 shares of the capital stock of said company, and that he be required to specifically perform his said contract. To this is added a prayer for general relief. The defendants having failed to answer, decrees pro confesso were regularly entered against them.

The complainants examined several witnesses, whose depositions were read on the submission of the cause, who proved the services rendered by complainants; the value of the property of the company, organized partly by their efforts; and the value of the stock in said company. One of these witnesses, John H. Parker, testified that he was the president of said company, and had been, since the date of its organization, and knew complainants and Elwell Eastman; that said company was organized with a capital of \$1,000,000, and the stock was paid in, at \$8 per share, which is supposed to be worth \$15 or \$25 per share; that 5 shares of stock were issued to E. Eastman, and still stand on the books in his name; that none were ever issued to Mary E. Eastman; that 885 shares were issued to

Mamie L. Eastman, and on July 18, 1889, 65 shares were transferred by Mamie L. Eastman to S. T. Brittle, and still stand in his name; and on the same day 20 shares were transferred by her to O. W. Williamson, and still stand in his name. The court ordered a reference to the register to ascertain the amount of the stock that each of the complainants was entitled to, and its value, and on the coming in of his report rendered a moneyed decree or judgment in favor of each of the complainants for \$7,500 against the defendants, specifying in the decree that the amount of the separate judgment in favor of each complainant was the value of the stock agreed to be delivered to complainants, respectively. There was no decree for specific performance, or for anything else, except for the recovery of said sums of money by each of the complainants.

Lane & White, for appellants. W. A. Collier and W. R. Houghton, for appellees.

HARALSON, J. 1. This bill is one ostensibly for specific performance of a contract, alleged to have been made by defendant Elwell Eastman with complainant John B. Ried. Without deciding whether the alleged contract is one that can be decreed by a chancery court to be specifically performed or not,—as to which, it may be said, there are grave doubts,—yet, if the bill was filed and entertained for that purpose, an assessment of damages against defendants could not properly have been made until it appeared that the defendant Elwell Eastman was or might be unable to perform his contract, and then not without giving him the opportunity to do so. Damages, in such a case, should be awarded in the alternative. It may be accepted as a general and a correct rule that if a complainant knows at the time he files his bill that the contract cannot be specifically performed or decreed, the bill will not be sustained for a compensation in damages, for it would be one, then, purely for the recovery of a moneyed demand, of which a court of equity has no jurisdiction. Wat. Spec. Perf. § 516; 1 Pom. Eq. Jur. § 178. This same author (Waterman) says: "Where the defendant deprives himself of the power to perform the contract specifically during the pendency of a suit to compel such performance, a court of equity may retain the suit, and award to the complainant compensation in damages, to prevent a multiplicity of suits; and such a decree will be proper where the defendant has deprived himself of the power to perform the contract prior to the filing of the bill, but without the knowledge of complainant, or even when the defendant never had the power to perform, if the complainant filed his bill in good faith, supposing, when he brought the suit, that specific performance of the contract could be obtained.

The rule assumes, of course, a sufficient contract and performance by the plaintiff, and every other element requisite on his part to the cognizance of his case in chancery; and that the special relief sought is defeated not by any defense or counter equities, but simply because an order therefor would be fruitless, from the inability of the defendant to comply. \* \* \* Relief must then be given by a decree in the alternative awarding damages unless the defendant should secure the specific performance sought. In many cases this would be an effective and proper course, inasmuch as the defendant, although not having, himself, at the time, the title or capacity requisite to such performance, might be able to procure it otherwise." Wat. Spec. Perf. § 517.

2. Nor was it proper or consistent with equity practice in such a case to render two separate decrees against the defendants,—one in favor of each complainant for one-half of the total damages assessed against both. The decrees of a chancery court are very numerous and elastic. Speaking on this subject, Mr. Pomeroy says: "It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of courts in shaping the relief in accordance with the circumstances of particular cases. \* \* \* The ordinary remedies, however, which are administered by equity, those which are appropriate to the circumstances and relations most frequently arising, are well ascertained and clearly defined." 1 Pom. Eq. Jur. § 170. It is not pretended that complainant McCants had any contract with the defendant Eastman for which he alone could sue him either for a specific performance or for damages. Ried simply indorsed on Eastman's proposal for a contract with him a proposition to McCants, "If you will aid in this matter, I will divide equally with you." This was done, so far as appears, without the knowledge or consent of Eastman. If it were conceded that, under the allegations of the bill, McCants, having aided Ried to get up the stock, was a proper party plaintiff, still that did not subject defendants to a double moneyed decree. With all the elasticity and adaptability of chancery decrees to meet variant reliefs, there were no peculiar equitable considerations in the case to make such a decree as was rendered proper. If free from any other objection, the decree should have been a joint one in favor of complainants.

3. But on what principle was it that this double moneyed judgment was rendered against Mrs. Eastman? It is not averred that she had anything to do with Mr. Eastman and his proposed contract with complainant Ried, or that she ever knew about it. Nor is it averred or shown that she had any connection with the fraud by which it is alleged her husband sought to deprive complainants of their stock. The only alle-

gation which connects her with the case at all is that said Eastman "has placed all of the stock of the said Benton Iron & Land Company which he owns, in the name of his wife, Mary E. Eastman, as appears on the books of the company, but [he] still owns and controls said stock, and has the larger part thereof in his possession." The only excuse for making her a party was that, in the event the stock was found to be in her name on the books of the company, as alleged, and complainants presented a case for relief, the court might, by its decree, divest the title out of her, and invest it in complainants to the extent of their rights, or order her to transfer it to complainants, but never to expose her to an absolute and unconditional moneyed judgment on such an allegation as is made concerning her. In allowing the decree pro confesso to be taken against her, what did she admit? Nothing to show that she knowingly had any responsible connection with this matter whatever. Surely a judgment should not have been rendered against her on an allegation of fraud committed by her husband, with which it is not alleged she had any knowledge or connection.

4. It may be that, under the authorities, Mamie L. could be taken and held to be identical with Mary E. Eastman, but to avoid any question as to the identity of the two names it will be safer to eliminate that question from the case by an amendment. Reversed and remanded.

(28 Ala. 358)

#### JOHNSON v. WASHBURN.

(Supreme Court of Alabama. April 11, 1893.)

APPEAL — BILL OF EXCEPTIONS — SUFFICIENCY — TIME OF SIGNING — ACTION ON NOTE — AGREEMENT NOT TO TRANSFER — INDORSEMENT ON NOTE — BONA FIDE HOLDER — SUFFICIENCY OF ANSWER.

1. Act Feb. 18, 1891, (Sess. Acts 1890, pp. 1092-1103,) creating the city court of Gadsden, provides (section 27) that, 10 days after the rendition of final judgments, they shall be "as completely beyond the control of the court as if the term of the court at which such judgments are rendered had ended." Held, that the signing of a bill of exceptions is not limited to 10 days after the rendition of the judgment, as it is not a taking of control of the judgment by the court, within the statute.

2. Such statute does not adjourn the court in fact, and makes no change in the law affecting the reservation of exceptions to the rulings of the court, which would not otherwise appear.

3. Such statute (section 5) provides that regular terms of such court shall be held on the first Monday in January and July in each year, and shall continue open until 30 days before the first day of the next term thereafter. Held, that a bill of exceptions signed May 30, 1892, was signed more than 30 days before the next regular term, to begin on the first Monday of July, 1892.

4. Code 1886, § 2594, provides that actions on bonds for the payment of money must be prosecuted in the name of the party really interested, whether he has the legal title or

not, subject to any defense the payor may have had against the payee, previous to notice of assignment or transfer. *Held*, that a plea which averred "that the note sued on was made payable to A. or order, and at the time said note was made payable it was agreed that it should not be transferred except to S., and afterwards by consent of the parties to said note, in pursuance of said agreement, and to carry out the same, said agreement \* \* \* was indorsed on said note, and the indorsement was made while said A. was still the owner," was demurrable, since it did not negative the fact that the note was traded first to S., and afterwards by him to plaintiff, or that plaintiff could maintain a suit in his own name under the statute.

5. The alleged oral agreement, made contemporaneously with the execution of the note, would, if it could have any binding force, vary the written contract to pay to A.'s order.

6. The subsequent indorsement of such agreement on the note, being without consideration, imposed no binding obligation.

7. Though the agreement imposed on A. a binding obligation not to transfer the note except to S., there was nothing stated in the plea which showed that defendant was cut out of any defense, or otherwise injured, by A.'s alleged breach thereof.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Thomas L. Johnson against J. B. Washburn on a bond or bill single. From a judgment for defendant, plaintiff appeals. Reversed.

The defendant interposed three several pleas. The second plea is copied in the opinion; the first and third are as follows: (1) "Now comes defendant, and for answer to plaintiff's complaint says that the instrument sued on was made payable to Ed Ashley or order; and at the time said instrument was made, as part and parcel of the consideration thereof, it was agreed that the note or instrument sued on should not be transferred except to W. P. Shahan, and said transfer of said note or instrument is and was illegal and void." (3) "Now comes the defendant, and for answer to plaintiff's complaint says that the instrument sued on was made payable to Ed Ashley or order; and at the time said instrument was made so payable the parties thereto agreed in writing that said instrument could not be transferred except to W. P. Shahan, and said written agreement was then and there made part and parcel of said instrument by indorsement thereon, and this defendant is ready to verify." The plaintiff demurred to each one of these pleas separately, assigning the same grounds to each, which were as follows: "First. Said pleas do not show that the plaintiff is not the party really interested in said bond. Second. Said pleas do not show that the defendant is not liable for the payment of said bond. Third. For aught that appears by said pleas the defendant still owes said bond. Fourth. For aught that appears by said pleas the defendant is liable to the plaintiff for the payment of said bond. Fifth. Said pleas do not show a consideration for the agreement alleged in the pleas. Sixth. The said pleas

do not show that the plaintiff is not the owner of said bond, and entitled to the payment thereof." Upon the consideration of the demurrers, the court sustained them as to plea No. 1, and overruled them as to pleas 2 and 3; and issue was joined on replications filed to these pleas.

J. A. Bilbro and Geo. D. Motley, for appellant. Dortch & Martin, for appellee.

STONE, C. J. The judgment of the city court, from which the present appeal was prosecuted, was rendered March 30, 1892. The bill of exceptions was signed May 30, 1892, precisely two months after the judgment was rendered. A motion is made by appellee to strike the bill of exceptions from the transcript, because the same was signed and bears date at a time when the court had no lawful authority to allow and sign the same. The precise ground of this motion is made to rest on the language of the statute "to establish the city court of Gadsden," approved February 18, 1891. *Sess. Acts 1890*, pp. 1092-1103. Section 27 of that statute declares "that final judgments rendered in said court shall, after the expiration of ten days from their rendition, be taken and deemed as completely beyond the control of the court as if the term of the court at which said judgments are rendered had ended at the end of said ten days." There are provisos to this clause, but they do not directly affect this case. The argument is that, for the purposes of this motion, the term of the court at which the judgment was rendered must be regarded and treated as having been adjourned at the end of 10 days after March 30th, the date of the judgment; and that consequently, when the bill of exceptions was signed,—May 30, 1892,—there was no authority therefor, either under the statute, or under the order of the court. In the judgment entry of March 30th is this clause: "It is ordered by the court that the defendant be allowed thirty days from this date in which to have a bill of exceptions signed by the presiding judge of this court." We cannot assent to this argument as made, for more reasons than one. First, signing a bill of exceptions is neither within the letter nor spirit of the statutory prohibition. It is not and cannot be a taking of control of the judgment by the court. It leaves it in every sense unchanged, so far as the action of the primary court is concerned. It is simply a preparatory step towards having that judgment reviewed in an appellate court. Second, that clause, by its very terms, gives to judgments of that court, after the 10 days have expired, the properties of a final, unalterable judgment, only to the extent and for the purposes mentioned in the statute. It does not adjourn the court in fact, and it makes no change whatever in the law affecting the reservation of exceptions to rulings of the court which would not other-

wise appear. *Harrison v. Hamner*, (Ala.) 12 South. Rep. 917.

The motion to strike the bill of exceptions from the transcript must be overruled. The statute creating said court (section 5) enacts that "regular terms of said court shall be held on the first Mondays in January and July in each year, and shall continue open until thirty days before the first day of the next term thereafter." This case was tried at the regular term of the city court commencing on the first Monday in January, 1892, to wit, on March 30, 1892. That term of the court continued in session until 30 days before the next regular term of that court, the first Monday in July, 1892. Such was and is the statutory mandate. The first Monday in July, 1892, was the fourth day of that month, a legal holiday in this state; and if we exclude it from the computation, Tuesday, July 5th, would be the day on which the July term would open. Thirty days before that time would necessarily be not earlier than June 5th,—five or six days after the bill of exceptions in this case was signed, as shown by the agreement accompanying the record. It follows that the bill of exceptions must have been signed during the term of the court at which the trial was had. The motion to strike the bill of exceptions from the transcript is, therefore, disallowed. We have been referred to *Stein v. McArdle*, 25 Ala. 561, as expressing views different from those announced above. The language of the two statutes is somewhat different; but if that difference is not enough to require the application of a different principle, we do not hesitate to pronounce that decision wrong, and to overrule it. This ruling, however, is unimportant in this case, as the rulings on demurrer present the same question as that shown in the bill of exceptions.

Defendant interposed three pleas in bar, to each of which plaintiff demurred. Each of these pleas sets up substantially the same defense, though varied somewhat in phraseology. The cause of action declared on is a bond or bill single for \$100, bearing date July 30, 1890, payable to Ed. Ashley, or order, on the 25th of December next after its date; "which bond or bill single is now the property of plaintiff." Plea No. 2 avers "that the note sued on was made payable to Ed. Ashley or order, and at the time said note was made payable it was agreed that it should not be transferred, except to W. P. Shahan; and afterwards by consent of the parties to said note, in pursuance of said agreement and to carry out the same, said agreement not to transfer except to W. P. Shahan was indorsed on said note, and the indorsement was made while said Ashley was still the owner of said note." As we have said, this plea was demurred to. The court overruled the demurrer, and this is assigned as error. We hold that there is

nothing in this defense, either as pleaded or proved.

First. The plea itself does not negative the fact that the bill single was traded first to Shahan, and afterwards by him to Johnson, who brings this suit. There is nothing in the agreement set up in defense which would or could prevent such subsequent transfer or invalidate the title or right of such second transferee to maintain a suit in his own name under our statute. Code 1886, § 2594.<sup>1</sup>

Second. The alleged oral agreement, made contemporaneously with the execution of the bond, not to transfer it except to Shahan, would, if it could have any binding force, vary the writing, in this: The bond binds the maker to pay to Ed. Ashley or order, or, as expressed in the writing, "to the order of Ed. Ashley." To allow such proof would be to violate a fundamental law of evidence, that written contracts cannot be varied by oral agreements made at the same time. 1 Brick. Ala. Dig. p. 872, §§ 969, 970; Id. p. 867, § 905 et seq.; 3 Brick. Ala. Dig. 413; *Jones v. Trawick*, 31 Ala. 253; *Land Co. v. Dromgoole*, 89 Ala. 506, 7 South. Rep. 444; 1 Greenl. Ev. § 275. The subsequent indorsement on the bond was without consideration, and imposes no binding obligation.

Third. If such promise was in fact made, and if it was binding, we are not able to perceive how it can be urged in defense of an action on the note. The plea does not deny that defendant owes the money the bond expresses and binds him to pay. It sets up no defense to the debt sued for which could be made available if the suit had been by Ashley or by Shahan. If by the agreement Ashley imposed on himself a binding obligation not to transfer the bond except to Shahan, there is nothing stated in the plea which shows that Washburn was cut out of any defense, or otherwise injured, by Ashley's alleged breach of that agreement. Would such agreement, under any circumstances, arm the promisor with any right to defend a suit on the bond? We do not hesitate to affirm that, presented as it is in this case, the plea opposes no bar to a recovery. Possibly, if damage were averred and shown, and the agreement were embodied in the writing, the defendant might defend, or maintain an independent action, dependent on the particular nature of the injury. *McNair v. Cooper*, 4 Ala. 680; *Standifer v. White*, 9 Ala. 527; *Patrick v. Petty*, 83 Ala. 420, 3 South. Rep. 779. See, also, *Butler v. Gage*, (Colo. Sup.) 23 Pac. Rep. 462, *Perry v. Insurance Co.*, 25 Ala. 355.

Reversed and remanded.

<sup>1</sup>Code 1886, § 2594, provides that actions on bonds for the payment of money must be prosecuted in the name of the party really interested, whether he has the legal title or not; subject to any defense the payor may have had against the payee, previous to notice of assignment or transfer.

(9 Ala. 381)

**TENNESSEE & C. R. R. CO. v. DANFORTH  
et al.**

(Supreme Court of Alabama. April 27, 1893.)

**RAILROAD CONSTRUCTION CONTRACT — ACTION ON  
— DAMAGES — EVIDENCE — INSTRUCTIONS — IDENTIFICATION OF DEPOSITION — BILL OF EXCEPTIONS.**

1. Act Feb. 18, 1891, (Sess. Acts 1890, pp. 1092-1103,) creating the city court of Gadsden, provides (section 27) that, 10 days after the rendition of final judgments, they shall be "as completely beyond the control of the court as if the term of the court at which such judgments are rendered had ended." *Held*, that the signing of a bill of exceptions is not limited to 10 days after the rendition of the judgment, as this is not a taking of control of the judgment by the court, within the statute. *Johnson v. Washburn*, 13 South. Rep. 48, followed.

2. Depositions do not require the same identification, to make them part of a bill of exceptions, as documentary evidence, or other private writings used on a trial.

3. Where a party has been notified to produce certain writings, and the same are shown not to be within the state, copies may be introduced.

4. Written estimates, made by engineers after the letting of a railroad construction contract, and which therefore could not have been considered in making the contract, cannot be placed before the jury, in an action by the contractors for an alleged breach preventing completion, to disprove the amount of profits plaintiffs would have realized had it not been for such breach.

5. The contract, in such case, required removal of a large quantity of solid rock on the margin of a navigable stream. To blast this rock into the river would be less expensive than to remove it to a greater distance. There was evidence, however, that blasting into the river might obstruct navigation. *Held*, that an instruction that no one had the right to obstruct navigation was not abstract, in view of such evidence, nor objectionable in assuming that blasting would necessarily cause an obstruction.

6. An instruction that plaintiffs could not recover any profits for rock which they had intended to blast into the river, if any, and that plaintiffs had no right to blast rock into the river, was properly refused as assuming that the rock so blasted would cause an obstruction to navigation.

7. An instruction that profits which would certainly have been realized but for defendant's default were recoverable, but not those which were speculative, contingent, probable, or remote, was faulty in use of the word "probable," since profits reasonably probable might be recovered.

8. And so, also, an instruction confining plaintiffs to the recovery of profits which were "certain," reasonable certainty alone being required.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Danforth & Armstrong against the Tennessee & Coosa Rivers Railroad Company to recover damages for the alleged breach of a contract. Judgment for plaintiffs. Defendant appeals. Reversed.

The contract which is the basis of the action is as follows:

"Articles of agreement made this 25th day of May, in the year 1888, between O. B. Danforth, of New York city, and R. T. Armstrong, of Rome, Ga., under the firm name and title of Danforth & Arm-

strong, party of the first part, and the Tennessee & Coosa Railroad Company, a corporation organized under the laws of the state of Alabama, party of the second part, witnesseth, that for and in consideration of the payments hereinafter mentioned, to be made by the party of the second part; the said party of the first part doth hereby covenant and agree to construct and finish, in a substantial and workmanlike manner, to the acceptance of the chief engineer of the party of the second part, and subject to all of the provisions of the specifications hereto annexed and indorsed, 'The Tennessee & Coosa Railroad,' the work on that part of the said Tennessee & Coosa Railroad extending from Littleton, in Etowah Co., Alabama, to Huntsville, in Madison Co., Alabama, which work is contained in two general divisions known as 'Division A' and 'Division B,'—Division A being understood to extend from Littleton to a point on the old grade of the Tennessee & Coosa Railroad near Guntersville, where the line of the extension of said road to Huntsville leaves the old grade as now constructed, and Division B being understood to extend from said point on the old grade near Guntersville to a junction with the tracks of the Memphis and Charleston R. R. in Huntsville,—as the same may be located by the chief engineer, and approved by the said Tennessee & Coosa Railroad Company. It is hereby mutually agreed and understood that the work to be done on Division A shall consist of making all excavations of rock and earth required in the unfinished cuttings from section one to section four, inclusive, and from section twenty-one to section twenty-four, inclusive, and of all the masonry, timber work, drain pipe, culverts, on the whole of Division A, and does not include the clearing and trimming, repairing, or finishing of the old cuttings and embankments. It is also hereby mutually agreed and understood that the work to be done on Division B shall consist of constructing and performing all the work required to be done for completing the substructure ready for the track, except the work connected with the Tennessee river bridge, and excepting the ironwork, where iron bridges shall take the place of wooden bridges. Wherever the word 'contractor' is used in this agreement it refers to and indicates the party of the first part. Wherever the word 'company' is used the party of the second part is designated. The contractor hereby agrees to complete the work contracted to be done on Division A, on sections one to four, inclusive, by September 1st, 1888; and on the whole of said Division A by November 1st, 1888; and on Division B, from its point of beginning with the old grade, on Division A, to the Tennessee river, at Guntersville, by December 1st, 1888; and from Aldrick creek crossing to a junction with the Memphis & Charleston R. R. tracks in Huntsville by September 1st, 1888; and the whole of Division B by December 31st, 1888. The

work shall be commenced within ten days after the contractor shall have been notified by the chief engineer that the same has been staked out, and is ready, and shall progress in such parts of the work, and at such times, as the said engineer may direct. The party of the first part agrees to perform the work specified according to the prices named within the following schedules, and in full compliance with all requirements of the contract and specifications:

"Schedule of Prices on Division A.

Earth excavations	per cubic yard....	\$ 17
Loose rock	" " " " " "	88
Solid " "	" " " " " "	65
First class masonry	" " " " " "	9 00
Second " "	" " " " " "	8 00
First class arch masonry	" " " " " "	11 00
Second " "	" " " " " "	9 00
Box culvert	" " " " " "	8 00
Coping	" " " " " "	15 00
Slope wall	" " " " " "	2 00
Riprap	" " " " " "	1 50
Concrete	" " " " " "	2 50
Drain pipe, 15 inch, per lin. foot.....		2 00
" 18 "	" " " " " "	2 40
" 24 "	" " " " " "	2 75
Piles	" " " " " "	80
Timber in foundations per B. M.....		20 00
" " wooden trestles " " " " " "		25 50
" " " girders " " " " " "		21 00
Wrought iron, per pound.....		05
Cast " " " " " " " " " " " "		04

"Schedule of Prices on Division B.

Earth excavations	per cubic yard....	\$ 18
Loose rock	" " " " " "	89
Solid " "	" " " " " "	78
First class masonry	" " " " " "	9 00
Second " "	" " " " " "	8 00
First class arch masonry	" " " " " "	11 00
Second " "	" " " " " "	9 00
Box culvert	" " " " " "	8 00
Coping	" " " " " "	15 00
Slope wall	" " " " " "	2 00
Riprap	" " " " " "	1 50
Concrete	" " " " " "	2 50
Drain pipe, 15 inch, per lin. foot.....		2 00
" 18 "	" " " " " "	2 40
" 24 "	" " " " " "	2 75
Piles	" " " " " "	80
Timber in foundations per M. B. M.....		20 00
" " wooden trestles " " " " " "		27 75
" " " girders " " " " " "		21 00
Wrought iron, per pound.....		05
Cast " " " " " " " " " " " "		04

"In consideration of a faithful performance of the conditions of this agreement by the party of the first part the party of the second part hereby agrees to transport all men, materials, machinery, and supplies required by the contractor in the performance of his work, free, over the tracks of the Tennessee & Coosa Railroad, and to pay, on or about the tenth of each month, for ninety per cent. of the work estimated by the engineer to have been done in the previous month, at the rates named in the foregoing schedule; the remaining ten per cent. to be retained by the company till the completion of the work. [Signed]

"The Tennessee & Coosa R. R. Co.

"By E. A. Quintard, Prest.

"Danforth & Armstrong."

As is stated in the opinion, the pleadings and the rulings thereon are sufficiently shown

in the report of the case when it was here on a former appeal, and is found in 11 South. Rep. at page 60. Such rulings of the court upon the evidence as is passed on in the opinion are sufficiently stated therein. Among the charges given at the request of the plaintiffs, and to the giving of each of which the defendant separately excepted, are the following: (2) "The court charges the jury that if they believe from the evidence that the estimates made by W. H. Case, the engineer of defendant, on preliminary survey, as to the character of the contents, whether more or less of earth loose or solid rock, still, if the jury further believe from the evidence that any portion of the line of the defendant's road has since been completed, or partially completed, and that said line so completed, or partially completed, was substantially on the preliminary line, then the jury can look to any evidence before them showing how much earth, loose and solid rock, were moved in such completion, if there be such evidence before them, to determine how much of each kind, whether in earth, loose or solid rock there were in said preliminary estimates." (3) "The court charges the jury that they can find a verdict for the plaintiffs for damages or profits if the preponderance of the evidence be on the side of the plaintiffs, if such evidence reasonably satisfies the minds of the jury of such damage or profits, although upon all the evidence there may be some uncertainty as to the amount of such damages or profits." The defendant requested the court to give the following written charges to the jury, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe from the evidence in this case that Danforth & Armstrong have failed to give such data or standard by reference to which the profits claimed of the defendant can be satisfactorily established or ascertained, then such profits would not be allowed, and your verdict on the matter of profits claimed would be for the defendant." (3) "The court charges the jury that if the profits claimed by Danforth & Armstrong of the defendant by reason of the breach of defendant's contract are probable, uncertain, speculative, and such as might be conjectured would be the probable result if Danforth & Armstrong had complied with their contract, then the plaintiffs cannot recover such profits." (5) "The plaintiffs must establish the amount of their loss by evidence from which the jury will be able to estimate the extent of their injury, excluding all such elements of injury as are incapable of being ascertained to a reasonable degree of certainty by the usual scales of evidence, and, if the evidence fails to do this, then your verdict must be for the defendant on the matter of the profits claimed by the plaintiffs." (7) "The court charges you that it is a well-established rule of law that damages to be recovered for a breach of contract must be shown with



certainty, and not left to speculation or conjecture. Profits which would have been realized but for the defendant's default are recoverable; those which are speculative, contingent, probable, and remote are not recoverable. If the jury believe from all the evidence that the profits claimed by the plaintiffs are based upon probabilities, and uncertain, and a matter of speculation, then such profits are not recoverable, and your verdict should be for the defendant." (12) "Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative, contingent, probable, or remote are not recoverable." (15) "If the jury believe from the evidence that Danforth & Armstrong, in carrying out their contract with the defendant, intended or proposed to blast rock from Deposit bluff, on the bank of the Tennessee river, into the river, then the court charges you that Danforth & Armstrong could not recover any profits for the quantity of rock that the jury believe from the evidence would have been blasted into the river." (16) "If the jury believe from all the evidence in this case that the profits in this case constituted an element of the contract, then said profits cannot be recovered unless the jury can estimate such with reasonable certainty,—such certainty as satisfies the mind of a prudent and impartial juror. If the jury believe from the evidence that the profits claimed are contingent, speculative, and probable, then they are not recoverable, and your verdict should be for the defendant as to profits." (19) "The court charges you that the law is that Danforth & Armstrong had no right, in carrying out their contract, to blast rock from Deposit bluff, on the north side of the Tennessee river, in such quantities as would obstruct the river, and endanger the navigation of the river." (22) "The court charges the jury in this case that the plaintiffs had no right, under the law, to throw the rock or other material into the Tennessee river."

W. H. Denson, R. C. Brickell, and Thos. H. Watts, for appellant. J. M. Chilton, James Aiken, J. A. Bilbo, and Durtch & Martin, for appellee.

STONE, C. J. This is the second appeal in this case. 93 Ala. 614, 11 South. Rep. 60. The Tennessee & Coosa Rivers Railroad Company was a corporation extending from Gadsden, on the Coosa river, by or near Gunter'sville, on the Tennessee river, to Huntsville. Part of the grading and other work preparatory for the superstructure had been done, but a very large part of the work remained to be done. On May 25, 1888, Danforth & Armstrong, contractors, entered into a written contract with the corporate authorities of said railroad company to "construct and finish their said railroad, with certain specified exceptions." A copy of the contract is set out in the statement of

facts accompanying this report of the case. It will be seen that the work undertaken by the contractors was of considerable magnitude. The contract specifies the scale of prices to be paid for each description or class of work to be done, and of the materials to be furnished, and declares the time within which the work on each of the sections was to be completed. Payments were to be made to the contractors, about the 10th of each month, of 90 per cent. of the value of the work done and materials furnished during the preceding month. The estimates for these several payments were to be furnished, and were furnished, by the engineers of the defendant corporation. Except on a single question there is very little conflict in the testimony shown in the record. That excepted question presents the inquiry whether, if plaintiffs had completed, or been permitted to complete, their contract, they would have realized a profit, and the extent of it. We say this was the chief question of contest, for we are not informed by the record that the railroad corporation denied the making of the contract as set out, denied that the work was done in the months of June and July, as set forth in the estimates, or denied its default in making payment according to the estimates. As candidly stated by one of the counsel for appellant, "it is apparent the principal contention in the court below was as to the damages the plaintiffs were entitled to recover;" and, we may add, the brunt of this contention centered in the inquiry of profits the contract would have enabled plaintiffs to realize if it had been completed. The pleadings in this case, and the rulings upon them, are the same as were shown on the former appeal, (93 Ala. 614, 11 South. Rep. 60.) That report shows a sufficiently full account of the pleadings and proceedings up to the formation of the issue for the jury. It states erroneously that the defendant demurred to the ninth count. The record shows it was the eighth. The grounds assigned were that that count was in case, whereas the action was assumpsit. There was also a demurrer to the whole complaint for the misjoinder of counts. The trial court overruled the demurrer on all the grounds, and held the complaint good. If count No. 8 stood alone as a cause of action, and on its own specific averments, without other aid, it may be a grave question whether it presents a grievance for which assumpsit would lie. It may be that case would be the proper action, if any could be maintained. *Insurance Co. v. Randall*, 74 Ala. 170; *Williams v. Stillwell*, 88 Ala. 332, 6 South. Rep. 914; *White v. Levy*, 91 Ala. 175, 8 South. Rep. 563; *Capital City Water Co. v. City of Montgomery*, 92 Ala. 366, 9 South. Rep. 343. But that count does not stand alone on its specific averments. It adopts a large part of count No. 6, which sets forth a copy of the contract. It em-

plays this language: Plaintiffs and defendant "had entered into a contract, and performed work and labor, and furnished material as set forth in count No. 6 of this complaint, and the defendant had made the defaults therein stated." It is common knowledge that to perform and execute the contract set out in count No. 6 would require a large force of hands and teams, and large expense in their subsistence, and to have them suddenly thrown out of employment would necessarily entail expense. One of the breaches set forth in count No. 6 is as follows: "The plaintiffs further allege that about the 20th August, 1888, defendant further breached said contract in ordering the plaintiffs to cease their work on said road, and under said contract; and plaintiffs did then and there cease their work, and have performed nothing since." We may add that count No. 6 is an elaborate special count, and sets forth all that plaintiffs had done under the contract, all the breaches charged to have been committed by the defendant, and claims additional damages for being hindered and prevented in carrying out their contract. Considered in connection with the sixth count, and taking into the account the natural and necessary connection between the breaches charged and the injury complained of, and bearing in mind, also, the nature of the service undertaken to be performed, we hold that the damages claimed in this count are so much a consequence of the breach charged that they can be recovered in an action of assumpsit. In thus holding we only follow what was said when the case was formerly before us. 93 Ala. 614, 11 South. Rep. 60; Culver v. Hill, 68 Ala. 66; Pollock v. Gantt, 69 Ala. 373; Vandegrift v. Abbott, 75 Ala. 487; Brigham v. Carlisle, 78 Ala. 243; Horton v. Miller, 84 Ala. 537, 4 South. Rep. 370.

A motion is made to suppress the bill of exceptions on the alleged ground that it was not signed in time. The judgment was rendered September 12, 1891, and the bill of exceptions was signed November 30, 1891. That session of the court was opened July 6, 1891, and continued in session until 30 days before the next term. The next term commenced its session January 4, 1892, and 30 days before that time would be December 5, 1891,—five days after the bill in this case was signed. See act creating city court of Gadsden, (Sess. Acts 1890-91, p. 1092,) § 5. It is contended, however, that under section 27 of the act, p. 1102, the session of the court must be regarded as closed at the end of 10 days after the judgment was rendered, and that consequently a bill of exceptions cannot be sealed after that time, without a legal order of the court extending the time. Stein v. McArdle, 25 Ala. 561, is relied on in support of this contention. In Johnson v. Washburn, 13 South. Rep. 48, (at this term,) we considered this question in connection with Stein v. McArdle, *supra*, and

refused to be governed by that authority, or to follow it. We adhere to what we there said, and overrule the motion to suppress the bill of exceptions.

Depositions taken in a cause and filed in court stand on a very different footing from documentary evidence, or other private writings used on the trial. They belong to the file, are in the custody of the clerk, and it would seem to be next to impossible for him to mistake their identity. It would appear to be as unlikely that the clerk would commit a mistake in the matter of a deposition taken and used in the cause as that he would miscopy the pleadings. If it were a chancery suit, no evidence of identity would be required other than the register's entry, on the note of the testimony, that the deposition of —, naming the witness, was offered in evidence for complainant or defendant, as the case might be. They are not of the class of writings which were the subject of adjudication in *Parsons v. Woodward*, 73 Ala. 348; *Pearce v. Clements*, Id. 256; *Moore v. Helms*, 77 Ala. 379; *Stapp v. Wilkinson*, 80 Ala. 47. We will treat the depositions as parts of the bill of exceptions, because we consider them sufficiently identified.

Very many questions were reserved during the introduction of the testimony, and to charges given and refused. We do not propose to notice in detail all the questions raised. We will endeavor to state principles which are decisive of every point reserved, so far as we consider there is any merit in them. Plaintiffs were allowed to produce in evidence certain estimates proven to have been made by the engineers in the service of defendant. Some of these were estimates of work done and performed under the contract. Others were estimates of work which plaintiffs would be required to do and perform under their contract if fully complied with. As we understand the language of the record, this latter class consisted of the engineers' estimates made prior to the letting of the contract, and made as part and parcel of the controlling factors in determining the location of the line of the road. It was objected to the testimony last mentioned that it was left in doubt whether the testimony offered was the original, or merely a copy. In reply to this objection it was shown—First, that defendant had been notified to produce the originals; and, second, that said originals were out of the state. The city court did not err in the rulings on this question. 1 Greenl. Ev. § 560; 3 Brick. Dig. p. 440, § 510. Testimony of witnesses for defendant was offered, for the purpose, it would seem, of disproving the amount of profits plaintiffs would have realized, if they had performed, or been permitted to perform, all the stipulations of their contract. This testimony consisted in part of estimates made by civil engineers experienced in railroad construction. Their estimates were offered in evidence by defendant, and were

excluded on motion of plaintiffs. There was an exception reserved to this ruling. The question raised by this ruling is entirely different from that last above considered. The estimates then under consideration were those made in locating and finally establishing the line of the railroad. They were the act of the defendant itself, done in its service, as aids in the selection of the best, most practicable, and least expensive route on which to locate and construct the road. They were manifestly a material factor, alike in letting and undertaking the construction of the road. They were specifications made by the defendants of the quality and probable quantity of the work and labor they were contracting to have done, and no doubt they entered largely into the terms of the contract agreed on. They were the defendant's description, as near as was then practicable, of the subject of the contract and its dimensions. The testimony offered by defendant had none of these qualities. It did not, and could not, enter into the making of the contract. It was *ex post facto*. It was, at most, a foundation for the differing opinion and judgment of experts, bearing on the inquiry of profits plaintiffs could have realized from a completion of their contract. It was simply reducing their oral testimony to writing, and having it placed in the hands of the jury, to aid them in understanding and utilizing it in making up their verdict. Now, while it is clearly the privilege of the jury, or any member of it, to take notes of the oral testimony as aids to memory, there is no provision of the law which authorizes the witness' memoranda of calculations, made to assist his own memory, to be placed before the jury, if objected to. It does not fall within any recognized rule on the subject. *Acklen v. Hickman*, 63 Ala. 494; *Jacques v. Horton*, 76 Ala. 238; *Stoudenmire v. Harper*, 81 Ala. 242, 1 South. Rep. 857; *Hancock v. Kelly*, 81 Ala. 368, 2 South. Rep. 281; *Hart v. Kendall*, 82 Ala. 144, 3 South. Rep. 41; *Billingslea v. State*, 85 Ala. 323, 5 South. Rep. 137.

The contract which Danforth & Armstrong entered into with the railroad company required them to remove a large quantity of solid rock on the margin of the Tennessee river. The testimony shows that this rock constitutes an abrupt or perpendicular bluff of considerable height, extending quite up to the water's edge, and that the survey and location of the railway, contracted to be built by Danforth & Armstrong, required that the roadway should be excavated through that rock for a considerable distance. The testimony shows without conflict that this service would require that the rock should be blasted, and that to blast it into the river would be greatly less expensive than to remove it to a distance. The estimates and testimony tended to show that the quantity of rock necessary to be gotten out of the way to construct the roadbed at this point

would equal 100,000 cubic yards or more. In estimating the profits Danforth & Armstrong could have realized from the completion of their contract, some of the calculations were based on the postulate that this 100,000 yards of solid rock could and would be blasted into the Tennessee river, and that the contractors would in that way be relieved of the burden and expense of removing it further. There was testimony tending to show that casting this rock, in the quantity proposed, into the river at that point, would tend to produce an obstruction to navigation. The Tennessee river is a navigable water course. Under our constitution (Declaration of Rights, § 25) it is declared "that all navigable waters shall remain forever public highways, free to the citizens of the state and of the United States." See also, Code 1886, § 1459. In section 4136 it is declared that "any person obstructing a navigable water course in this state must, on conviction, be fined not less than fifty dollars." There were three charges asked by defendant bearing on this question, and they were severally refused. Charge 13 is in the following language: "Under the law and constitution of the state of Alabama no one has the right to obstruct a navigable stream in the state of Alabama." There was, as we have said, testimony tending to show that the quantity of rock necessary to be removed in preparing the roadbed at the point under discussion, if cast into the river, might obstruct navigation. The charge requested was, therefore, not abstract. Neither was it objectionable on the score that it assumed, as a fact, that blasting the rock into the river would necessarily obstruct navigation. It left that question to the jury. It is manifest, alike from the testimony and from common knowledge, that to remove the rock entirely away would entail greater expense than to blast it into the river. It might safely be said that the expense of removal would be much greater. This, if found necessary, would inevitably reduce the profits Danforth & Armstrong could have made by the completion of their contract. We hold that charges 13 and 19 asked by defendant ought to have been given, because they presented an element which properly entered into the inquiry of profits the plaintiffs could have realized from the full performance of their contract. And it would not vary this question, even if the chief engineer instructed the contractors that they could blast the rock into the river. This, because, first, all men are bound to know the law, and, in the second place, it does not appear that the engineer was authorized to make such declaration, and thereby bind the corporation. Charges 15 and 22, as asked, were properly refused. They assume, as matter of law, that to blast the rock into the river would obstruct navigation. That was an inquiry of fact which should have been submitted to the jury. In actions for the

recovery of damages which it is alleged would have been realized by plaintiff but for the tort or breach of contract on the part of defendant, no absolute, unbending rule can be laid down which will be applicable to every class of cases. Respect must be had to the violated duty or breach of contract obligation, which is the subject of complaint in the particular action. In *George v. Railroad Co.*, 8 Ala. 234, it was said: "It is perhaps impossible to ascertain any one rule that will cover all classes of contracts, in regard to the damages that may be awarded to the injured party." So, in a class of actions brought to recover for a breach of contract, or stipulation in a contract, "the measure of recovery is the actual injury caused by the breach." *Culver v. Hill*, 68 Ala. 66. That would seem to be the proper measure in this case. But many difficulties will present themselves in the application of this principle, and in the introduction of testimony in proof of such injury. "Among the general rules for the recovery of damages are the following: That they must be the natural and proximate consequence of the wrong done; not the remote or accidental result. And special damages can be recovered only when they are not too remote, and are specially counted on and claimed in the complaint. What are termed 'speculative damages'—that is, possible, or even probable, profits, that it is claimed could have been realized but for the tortious act or breach of contract charged against defendant—are too remote, and cannot be recovered." *Pollock v. Gantt*, 69 Ala. 373. In passing on the case last cited, the nature of the wrong there complained of must be kept in view. It was charged in that case that, in consequence of an attachment wrongfully sued out and levied on a stock of merchandise, the business of the store was broken up, and the plaintiff thereby prevented from realizing profits from the continued business which he could have realized if permitted to pursue his line of trade. Such possible, or even probable, profits, we held were too speculative and remote to be a basis of recovery in an action for damages. "Possible" is that which may happen, or come to pass, while the preponderance of chances may be against its happening. We say of an event that it is "probable" when the chances of its happening preponderate. Each of these categories, when predicated of a mercantile adventure and its prospective success, must, in the nature of things, be simply conjectural or speculative. Such mere speculation or conjecture is too unsubstantial, too uncertain, to become a basis of judicial determination. The case we have in hand rests on different principles. The gravamen of this feature of the present suit is that plaintiffs were prevented from completing their contract by the wrongful act of the defendant, and that, if they had been permitted to carry it out, they would have real-

ized the profits claimed. Of course, the success or failure of this contention—this demand—must depend on the inquiry whether the materials could have been furnished, and the work done, for less money than the prices specified in the contract. Any testimony of facts bearing directly on this pivotal inquiry would be competent testimony; and if, on a due consideration of all the evidence, the jury were reasonably convinced that plaintiffs would have realized a profit, then, to the extent they were so convinced, their verdict should have been for the plaintiffs, provided they had made good their charge that defendant had broken its contract. But the measure of recovery would be, and was, a different inquiry. Its extent would not necessarily be any particular sum. It would be that sum—no more—which the testimony reasonably satisfied the jury they would have realized as profits by completing the contract; and, if the testimony reasonably satisfied the jury that some profits would have been realized, then, to the extent they were so satisfied, but no further, they should have allowed the plaintiffs' damages on this feature of their complaint.

Of charges asked by defendant and refused, those numbered 3, 7, 12, and 16 were faulty, in that they sought to make an improper use of the word "probable." Probability is enough to found a verdict on in a case like this, if it be supported by sufficient testimony to reasonably convince, and does reasonably satisfy, the minds of the jury of the truth of the proposition contended for. Mere probability, by itself, is not sufficient. These charges were calculated to mislead, and were rightly refused for that reason, if for no other. Several of the charges asked were correct in their main features, but, taken in their entirety, they were misleading. Charge 14 is in the following language: "The plaintiffs in this case cannot recover profits for having been prevented from fulfilling their contract, unless the jury believes from the evidence that the profits claimed are certain, both in their nature, and in respect to the cause from which they proceed." This charge is subject to criticism. The word "certain" has many shades of meaning in the law. Reasonable certainty is sufficient to found a verdict in a civil suit. This charge was liable to mislead in another respect. Some of the counts claim very large damages,—\$100,000 or more. Under the rules we have declared, if the defendant violated its contract, and thereby prevented plaintiffs from realizing profits by its completion, the latter can recover all, or any part, of the sum claimed, provided their proof reasonably satisfies the jury of the fact of such lost profits, and the amount of profits so lost. It is not necessary to prove that their loss equaled the amount claimed. These remarks apply equally to charges 1 and 5, asked by

defendant. Their tendency was to mislead.

A few words in reference to charges given at the instance of plaintiffs. Charge 2 is probably miscopied, and we confess we do not understand it. It appears to be somewhat involved in some of its hypotheses. The record affirms that it contains substantially all the evidence, and we find no testimony in support of some of its postulates. We will not comment further on it, lest we do injustice. We decide nothing in regard to it. Charge 3 is somewhat involved, and may need explanation. What we have said above, in reference to the measure of proof and the extent of the right of recovery, will enable the court to lay this principle properly before the jury on another trial.

Reversed and remanded.

(96 Ala. 298)

**KANSAS CITY, M. & B. R. CO. v. SANDERS.**

(Supreme Court of Alabama. April 26, 1893.)

**CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE—DEATH BY WRONGFUL ACT—INSTRUCTIONS—REVIEW ON APPEAL—CHANGE OF VENUE.**

1. The action of the trial court in denying an application for change of venue in a civil case will not be reviewed on appeal.

2. Where, in an action against a railroad company for wrongful death, defendant withdraws its pleas, and suffers judgment *nihil dicit*, contesting only the amount of damages under a writ of inquiry, the jury may consider, in assessing such damages, any negligence on the part of defendant or its employes which is set forth in the complaint, and which tended to produce the injury.

3. Deceased was a passenger on defendant's train. While the train was waiting at a certain station for the arrival of a train from which it was to receive a sleeper, the station master signaled the engineer to "pull out," and make room for the incoming train. The station master wore the same uniform as the conductor, used a similar lantern, and gave the signal given by the conductor when about to leave a station. The engineer, thinking he was his conductor, started on the trip without the latter, or the extra sleeper. The mistake was not discovered until the next station was reached. There being no night operator at such station, the engineer, without placing lights on the rear car, attempted to back his train to the last station to get the conductor and the sleeper. While on the way the train collided with the engine of a freight train, whereby deceased was injured. *Held*, that though the negligence which caused the engineer's mistake at the first station, and the absence of a night operator at the second station, were not the immediate cause of the injury, still the jury, in assessing the damages on writ of inquiry, could consider the same as productive of the immediate cause.

4. An instruction that, if defendant was negligent in not having a night operator at the second station, the jury were not authorized to give plaintiff damages by reason thereof, was properly refused, since it was based on the theory that if such failure was negligence it was too remote to be considered.

5. It was negligence for defendant to furnish the station master and the conductor similar uniforms, and to give them similar signals, with different meanings.

6. Under an allegation in the complaint

that defendant negligently "conducted itself in and about the carrying" of deceased, it may be proved that defendant was negligent in the employment of the engineer, or in retaining him in its service.

7. An instruction that less punishment should be inflicted on a corporation for the negligence of its agents than for "corporate negligence" was properly refused, since, where the injured person is a third party, and not an employe of the company, there is no negligence of a servant which is not negligence of the master.

8. It was not error to refuse an instruction that the jury, in assessing the damages, should consider that other actions against defendant, by persons injured in the same collision, were pending.

9. Under Code, § 2589, (the Homicide Act,) a recovery in such case is not limited to the actual damages sustained by the surviving relatives, although the jury fail to find that the injury was the result of willful negligence.

Appeal from circuit court, Walker county; James B. Head, Judge.

Action by Bell Sanders, as administratrix, against the Kansas City, Memphis & Birmingham Railroad Company, for the wrongful death of R. E. Sanders. Judgment for plaintiff. Defendant appeals. Affirmed.

Before proceeding to the trial of the cause the defendant made a motion for a change of venue, making affidavit that because of the facts set forth in the affidavit the defendant could not have a fair and impartial trial in the county of Walker, where the trial was then pending in the circuit court. There was a great deal of evidence introduced in support of this motion. On hearing the evidence and the arguments thereon, the court overruled this motion. To this ruling the defendant duly excepted. The material facts gathered from the bill of exceptions may be summarized as follows: Appellee's intestate was on a train of the appellant as a passenger. That, through a mistake of the defendant's engineer, he left the passenger station at Birmingham, leaving the conductor and a sleeper. The engineer did not discover the mistake until he reached Ensley, five or six miles from Birmingham. Upon discovering his mistake at Ensley, the engineer, after waiting about a minute or two, started to back his train to Birmingham. There was no light on the rear coach, and he was backing at the rate of 15 to 30 miles an hour. That when they had gone back about two miles and a half in the direction of Birmingham the train on which plaintiff's intestate was a passenger collided with the extra freight, which was ordered to move out in rear of the passenger train, and by this collision the plaintiff's intestate was so injured that he died from the effects of his injuries. The testimony showed that the passenger train of the defendant, going west, usually waited at night an hour for the Georgia Pacific passenger train, when it was behind time, in order to carry a sleeper which the Georgia Pacific train brought in. That on the night of the accident the Georgia Pacific was one hour behind time, and that as the Georgia Pacific train was coming into the

city, when about two or three blocks from the passenger depot, J. J. Mullins, night station master of the depot, signaled the engineer of the defendant's train, Russell, to pull down out of the shed. This signal was given by Mullins in order that the Georgia Pacific, coming in, could come in on the same track; but the engineer of the defendant mistook the signal for that of its conductor, and pulled out, leaving the conductor and the sleeper behind. Mullins and the conductor of the defendant were dressed alike, and the signal given by Mullins was the same kind of a signal that the conductor would have given, to pull out. Upon the examination of Slade, who testified that he was foreman in the mechanical department of the defendant road, and that he had charge of the locomotives, engineers, and firemen, and had authority to employ, suspend, and discharge engineers, the plaintiff asked him the following question: "State whether or not Russell was discharged from the service of the Kansas City, Memphis & Birmingham Road for drinking, or was ever suspended for drinking." Defendant objected to this question because it was illegal, irrelevant, and immaterial. Upon the counsel stating that they expected to connect the evidence with evidence tending to show that Russell was drinking at the time of the accident, the court overruled the objection, and allowed the evidence, and the defendant duly excepted. The witness said, "Yes, sir; he was." The witness further testified that after Russell was suspended by him he reported it to Briggs, the master mechanic of the defendant, who was his superior, and that Briggs reinstated Russell within 24 or 36 hours. After this witness had testified that he had known Russell three years prior to the time he was suspended, and knew his habits as to drinking, the plaintiff asked him the following question: "What were his habits?" The defendant objected to this question because it was illegal, irrelevant, and immaterial, and duly excepted to the court's overruling his objection. The witness answered: "He was a regular drinker. I cannot say he drank to excess, but he was a man who could stand a great deal of whisky." Upon Joe Spanier being called as a witness for the plaintiff he testified that he remembered reading about the collision at Ensley the next day. The plaintiff then asked the witness the following question: "Did you see Charles Russell the night of the wreck, or the evening of the wreck?" Witness answered he did, and then testified to seeing Russell take several drinks during the evening, and that he was somewhat under the influence of drink. The defendant moved the court to exclude the testimony of Joe Spanier in regard to the condition and whereabouts of Charles Russell on the night of the 21st of October, 1890, on the ground that the testimony of Spanier did not identify the said Charles Russell, about whom

he testified, with the Charles E. Russell who was the engineer of the defendant's passenger train on the night of the collision. The court overruled the motion, and the defendant duly excepted.

The defendant requested the court to give the following charges, and separately excepted to the court's refusal to give each of them, as asked: (1) "The only negligence for which the defendant is liable in this action is that of its engineer, Charles Russell, even if the jury believe that there was negligence on the part of any other employee of the defendant." (2) "If you believe the evidence in this case, you must find for the defendant." (3) "In assessing the damages in this case the jury cannot look to the fact that the defendant is a corporation." (4) "The jury, in considering the question of punitive damages, are authorized to take into consideration the fact, if they find such to be the fact, that the defendant was not guilty of any corporate negligence,—that is, negligence on the part of the defendant itself as a corporation, or of its governing officers." (5) "There is no evidence in this case of any corporate negligence,—that is, negligence of the defendant itself, as a corporation, or of its governing officers." (6) "It was not negligence on the part of the defendant to provide the conductor on its passenger train with signal lamps and uniforms of the same or similar color with those furnished to the station master, J. H. Mullins." (7) "The only negligence of the defendant's engineer, Charles Russell, for which the defendant is chargeable in this action, is in his backing up the passenger train from Ensley without lights, and without having sent a flagman fifteen telegraph poles in front of the advancing passenger train, and in running at a negligent rate of speed while so backing, and at the time of the collision, if the jury believe that he did so run." (8) "There is no evidence of any negligence upon the part of the witness J. H. Mullins in regard to the questions involved in this suit." (9) "There is no evidence that the defendant's master mechanic, R. R. Briggs, had any notice before the time of the accident that the defendant's engineer, Charles Russell, was not a sober and competent engineer." (10) "The jury are only authorized to award nominal damages in this case." (11) "It was not negligence on the part of the defendant, of which the plaintiff can complain, for the defendant to provide the conductor on its passenger train with signal lamps and uniforms of the same or of similar color with those furnished to the station master, J. H. Mullins." (12) "The jury are not authorized to award the plaintiff punitive damages because of the negligence of defendant's engineer, Charles Russell, in leaving the Union Depot in Birmingham without his conductor, and without his sleeper." (13) "The defendant is not liable for damages in this case

because of the act of its engineer, Russell, in leaving with his train the Union Depot in Birmingham without his conductor, and without his sleeper." (14) "The jury are not authorized to award punitive damages in this case unless they believe that the defendant was guilty of willful, wanton, or reckless negligence." (15) "The fact that the defendant used due care in the selection and retention of the engineer, Charles Russell, if the jury believe such to be the fact, and the fact that it provided and promulgated rules suitable for the reasonable safety of its employes and passengers, if the jury believe such to be the fact, may be considered by the jury in mitigation of that amount of damages awarded by way of punishment." (16) "Unless you shall believe from the evidence that the witness Joe Spanier has told you the truth, you ought to find that the engineer, Russell, was neither drunk nor drinking on the night of, and at the time of, the collision." (17) "The jury, in considering the amount of punishment to be awarded in this case, are authorized to take into consideration the fact, if they believe such to be the fact, that there are pending three other cases in which damages by way of punishment against the defendant for the same negligence may be awarded." (18) "That, if the evidence in this case shows to the satisfaction of the jury that defendant corporation was not guilty of any corporate negligence in this case, they may look, and should look, to such fact, in determining the amount of damages they assess in the way of punishment to the defendant in this case." (19) "That if the jury believe that Slade removed Russell on account of Russell's reporting Slade to Briggs for drunkenness, and not for his having taken a drink with Walter Moore, then I charge you that the fact of his suspending Russell is not a circumstance to be considered by the jury against the defendant in this cause." (20) "That if the jury believe from the evidence that Slade suspended Russell without reasonable cause therefor, and on account of Russell having reported Slade to Briggs for drunkenness, then I charge you that there has been proven no corporate negligence in this cause." (21) "The jury are not authorized to award the plaintiff punitive damages because of the engineer, Russell, mistaking the signal of the station master for that of his conductor, even if the jury believe that such mistake was caused by the drunkenness of Russell." (22) "That if the jury believe from the evidence that the plaintiff's intestate's death was caused alone from the negligence of defendant's engineer, Charles E. Russell, and that the said Russell had borne the reputation of a good, safe, prudent, and competent engineer down to the time of the accident causing said death, then I charge you that you may look, and should look, to this latter fact in determining the amount of dam-

ages you should assess in the way of punishment to the defendant in this case." (23) "The jury are authorized to consider, in mitigation of the amount of damages they may award against the defendant in this case by way of punishment, the fact that the defendant may be subsequently again punished for the same act of negligence in the other suits pending in the other courts for the death of other persons killed in the same collision, if the jury believe that the defendant may be so punished." (24) "Even if the jury believe that the defendant was negligent in not having a night telegraph station at Ensley at the time of the accident to plaintiff's decedent, they are not authorized to award plaintiff any damages because of such failure." (25) "I charge you that the complaint in this cause presents no substantial cause of action, and you must find for the defendant." (26) "There is no evidence in this case that the defendant's foreman, Charles Slade, knew while in the service of defendant that the defendant's engineer, Charles E. Russell, was not a competent and sober engineer." (27) "It was not negligence on the part of the defendant, to which the jury can look in their assessment of damages in this case, that the defendant provided its conductor on the passenger train on which plaintiff's decedent was riding at the time of his injury with a signal lamp and uniform of the same or similar color to that of the station master, J. H. Mullins." (28) "It is not negligence, to which the jury can look in their assessment of damages in this case, that the defendant's engineer, Charles Russell, left the Union Depot at Birmingham with his train, without his conductor, and without his sleeper." (29) "It was not negligence, to which the jury can look to their assessment of damages in this case, that the defendant's engineer, Charles Russell, mistook the signal of the witness J. H. Mullins for that of his conductor."

Hewitt, Walker & Porter and Wallace Pratt, for appellant. Altman & McQueen and E. W. Coleman, for appellee.

McCLELLAN, J. Under statutes of force prior to the act of February 17, 1885, (Code, § 4485,) it was many times decided that the action of a nisi prius court, denying an application for a change of venue, was not revisable on appeal to this court. It is true that those adjudications were made in criminal cases, but there is no ground for a distinction in this regard between civil and criminal causes. The same considerations which led to the conclusion that an appeal would not lie from a refusal to grant a change of venue in a criminal case fully obtain in respect of, and would necessarily have led to the same conclusion in, civil cases, had the question arisen on appeals therein. The act referred to has no bearing upon civil cases whatever.

Its sole reference is to cases involving the trial of an indictable offense, and with respect to these alone it provides that the refusal of an application for a change of venue may be reviewed and revised on appeal. This leaves the rule which obtained before the statute as to all cases still applicable to all civil cases; and we will not review the action of the trial court, in this case, in denial of the defendant's application for a change of venue.

2. The complaint contains seven counts. They each aver that the death of plaintiff's intestate was caused by a collision of a passenger train, on which deceased had taken passage from Birmingham to Jasper, with a freight train. It is averred in each that the passenger train started on its journey without its conductor, and without a sleeping car which it should have carried; that upon reaching Ensley city, seven miles from Birmingham, the engineer undertook to return to the latter city for the conductor and sleeping car, running his train backwards, and that in doing so the passenger train collided with the engine of a freight train going in the opposite direction. The first count ascribes the casualty to the negligence of the engineer of the passenger train in backing his train towards Birmingham; the second, to his negligence in so backing his train without a conductor, and without a light on its front, as it was being run at the time; the third, to the negligence of the engineer of the freight train; the fourth, to the negligence of the conductor belonging to the passenger train in giving notice to the train dispatcher that his train was out of the way of other trains, in consequence of which the freight train was sent out; the fifth, to the negligence of the train dispatcher in sending out the freight train; the sixth, to the negligence of the defendant and its employees in so running the passenger train that it collided with the engine of the freight train; and the seventh, to the negligence of the defendant, in so conducting itself in and about carrying plaintiff's intestate, and in and about the management and control of the train upon which he was being carried, and in and about the management of said freight train, that the two trains collided, etc. On a former trial the defendant withdrew all its pleas, and suffered a judgment *nisi* dictit, contesting only the amount of damages to be assessed by the jury under a writ of inquiry. The verdict then returned—for \$44,500—was set aside by the court as excessive; but the judgment *nisi* dictit, with leave to execute a writ of inquiry, was not, and has never been, disturbed. The last trial—that upon which arose the questions presented by this appeal—was had solely upon the writ of inquiry, the only matter in issue being the measure of damages to be assessed by the jury. In discharging that duty the jury were authorized to look to any negligence on the part of the defendant or its employees which is counted on in the com-

plaint, and which conduced to the injury complained of, or added to the culpability of the alleged acts and omissions which immediately produced the disastrous result; the real and only inquiry being the degree of culpability of the defendant or its employees in respect of the casualty, as averred, and the consequent meed of punishment that should be inflicted for the wrong done.

3. It is to be observed that the averments of the complaint, and especially of the sixth and seventh counts, are sufficiently broad to cover, and they do cover, all negligent acts and omissions of the defendant, or of any of its employees, in respect of the movements, the running, the management and control, of both the trains which were in collision, from and including the starting thereof from Birmingham to the time of, and including, the collision between them. If the defendant or its employees were negligent in respect of the signal given the engineer of the passenger train, Russell, in response to which he proceeded on the regular run of his train, when the signalman intended only that he should move out of the way of an incoming train, or if Russell was negligent in wrongly interpreting the signal, or if the company was negligent in failing to have a night operator at Ensley, so that Russell could have gotten orders, and run his train accordingly in safety, etc., all this was negligence in the management, control, and running of the passenger train on the occasion in question, and is covered by the averments of the complaint. Whether all the negligence thus charged in or covered by the complaint, conceding all of it to find support in some aspects of the evidence, was negligence which proximately contributed to the injury, or was so connected therewith as to be proper for the consideration of the jury in the assessment of damages, is another question. In approaching its consideration it is to be borne in mind that it was defendant's duty to carry deceased safely from Birmingham to Jasper; that this duty involved the highest degree of care, skill, and diligence on the part of defendant's employees; and that the company was liable for the injurious consequences of the slightest negligence on their part. It cannot be doubted that had the passenger train been, through the negligence of the company or its servants, prematurely sent out of Birmingham, and a collision had occurred anywhere along the line, without any other negligence than that of the untimely starting of the train, *prima facie*, injuries resulting therefrom to passengers would be ascribable to that negligence, and the corporation would be responsible. It is equally clear that if the negligence of premature departure of the train from Birmingham furnished the occasion, not to say necessity, for its return after reaching Ensley city, the defendant would have been liable for injuries suffered by passengers in consequence of the



train's returning, or attempting to return, even though the effort to return was made with the greatest circumspection, care, and diligence. It is virtually conceded in this case that it was necessary for Russell to carry his train back to Birmingham after he arrived at Ensley city, and found that the conductor and sleeping car had been left at the former place. Rules of the company, indeed, were adduced in evidence, without objection, as showing that it was his duty to return, and pointing out the manner in which he should do so. If he had exercised due care in so doing, and the defendant, or others of its employees, had not been guilty of any negligence except in respect of the original departure of the train from Birmingham, and, notwithstanding all this, plaintiff's intestate had come to his death from some unforeseen and unavoidable accident incident to the return of the train, it cannot be questioned that defendant would be liable solely for the original negligence in starting the train on its journey, and the damages would be assessed with reference to the culpability of that negligence. But the engineer, Russell, was lacking in requisite care in the manner of backing his train towards Birmingham, and but for this the casualty, probably, would not have happened at all, so that the original negligence would have been innocuous but for this secondary want of care on the part of the engineer. Should these facts take from the jury the right to consider the first negligence in determining the degree of defendant's fault in the premises? Should the jury, in their effort to find the degree of defendant's culpability, for the purpose of meting out commensurate punishment upon the corporation, be confined to a consideration of the negligence which supervened, and immediately produced the damning result, to the exclusion of the prior negligence, which produced the occasion for the immediate negligence, and but for which there would have been no necessity for the passenger train's being in a position where the collision was possible? We think not. While the original negligence did not directly cause the injury, it was productive of the immediate cause; and, at least in this character of case, where the question is entirely as to the degree of culpability of the defendant,—the amount, so to say, of its fault,—we think the jury should be allowed to look to the chain of causation, to successive careless acts or omissions, (the earlier conducing to, and furnishing occasion for, the later,) in reaching their conclusion as to the sum of the defendant's culpability in respect of acts which should not have been committed, and wrongful omissions to act, which led up to the wrong actually done, and for which they are to inflict a just measure of punishment, the deterrent and preventive purpose of which would cover as well the original and conducing negligence as the final and immediate failure to observe due

care. And the foregoing observations, and our conclusion thereon, are equally applicable to the failure of the defendant to have a night operator at its Ensley telegraph office. If defendant's duty was to have an operator there for the uses of its passenger trains, it was guilty of negligence, of course, in failing so to do. The evidence tends to show that Russell would have telegraphed to Birmingham for orders, had there been an operator at Ensley city, and thus have avoided the necessity of going back there, or been so advised of the situation as that he might have gone back without meeting the freight train. Assuming the absence of the operator to have been negligence on the part of the defendant, it was but another link in the chain of causation producing the final result, another item of wrong on the part of the defendant conducing to the death of plaintiff's intestate, and adding to the culpability, by reference to which the jury were to inflict punishment for the death of the deceased.

4. Whether the failure to have a night operator at this place was negligence on the part of the defendant is a question not presented by this record, and which we do not decide. The only ruling made in this connection, at all, consisted of the court's refusing to give the following charge requested by the defendant: "Even if jury believe that the defendant was negligent in not having a night telegraph station at Ensley at the time of the accident, they are not authorized to award plaintiff any damages because of such failure." It is obvious that this charge proceeded solely on the theory, which we have held untenable, that, conceding the omission in question to have been negligence, it was too remote for consideration in the assessment of damages.

5. The question whether there was negligence on the part of the defendant or its employees, on any aspect of the evidence, in the movement of the passenger train out of Birmingham, is presented by the record. The evidence in this connection tended to show—indeed, it did show without conflict—that the train started on its journey at the signal of a watchman, which the watchman intended to mean that the train should pull up out of the station so as to allow another train—that for which this train was waiting, and from which it was to get a sleeping car—to come in on the same track, and then to stop. This, the evidence tends to show, was the proper signal to be made by the watchman for that movement. It was also the proper signal for the conductor to make for the purpose of starting this train on its course to Memphis, Tenn. The conductor and watchman were supplied with the same uniforms, the same kind of lanterns for signaling purposes, and the signal made by the watchman for the train to move out of the way was made in the same way that the conductor would have signaled for the train

to proceed on its way to Memphis. The engineer, it was open to inference, in consequence of the similarity of the uniforms, the lanterns, and the manner of making the signal, mistook the watchman's signal for the conductor's, and, in response to it as such, went out on and along the line, not discovering his mistake until he reached Ensley city. This evidence, in our opinion, tends to show negligence. The facts of this case demonstrate that much depends upon the correct interpretation of signals given by watchmen and conductors, respectively, to engineers, in the station at Birmingham, in respect of moving their trains; and it would certainly be the part of even ordinary care and prudence—much more, of that highest diligence, skill, and care which were due in this case—for the railroad company to provide some means by which the watchman and his signal could be distinguished from the conductor and his signal, when there is such an important difference between the orders intended to be conveyed by them. The charges requested on this part of the case are either directly opposed to this view, or involve such a tendency to mislead the jury to the contrary conclusion as to render their refusal proper.

6. As has been stated, the seventh count avers, among other facts, that the defendant negligently "conducted itself in and about the carrying of plaintiff's intestate." This averment is sufficiently broad to cover the omission of any duty which the carrier owed to the passenger, whether in respect of the care necessary in the act of transportation, —the management and control of the train, —or of the use of suitable and safe means of carriage,—vehicles, appliances, roadway, and the like,—or in respect of the employment of competent, skillful, and careful servants in the transportation. Therefore, it was competent, under this allegation, to prove that the defendant was negligent in the employment of the engineer, Russell, or in his retention in its service. There was evidence which tended to show such negligence. Of this character was the testimony of the witnesses Slade and Briggs that the former had suspended Russell a month or two before the collision, for drinking, and reported the fact of suspension, and the ground of it, to the latter, who had immediately reinstated the engineer, and continued him in the service of the company, and the further testimony of Slade that Russell was a man of intemperate habits. It was the duty of Briggs to employ engineers, and discharge them when found to be incompetent, or addicted to inebriation; and it was, of course, a part of this duty to be on the alert; to be careful and diligent; to keep himself advised of habits and courses of life which tended to unfit an otherwise competent man for the exacting service and grave responsibilities of engineers. He was put on notice of the charge

that Russell was a drinking man. It was open to the jury to find that the engineer's habits were intemperate, and that he was drunk at the time of the collision. Notice of the charge imposed the duty of inquiry on Briggs. This inquiry, it is to be presumed, would have disclosed Russell's unfitness, if indeed he was unfit, for the post of engineer. And there was room on all this testimony for an inference, on the part of the jury, either that Briggs had been negligent in failing to make proper investigation, or that, having made it, and ascertained the facts to be in line with these tendencies of the evidence, he was negligent in allowing Russell to continue in the service of the company. The exceptions to this evidence are untenable; and charge 9, requested for defendant, to the effect that there was no evidence that Briggs had any notice before the accident that Russell was not a sober and competent man, was properly refused. Subsequent to this action of the court, however, the defendant requested another charge, which was, in substance, the same as charge 9. This the trial judge also declined to give, "and wrote thereon the word 'Refused,' and signed his name thereto; and the defendant excepted to the refusal of the court to give said charge to the jury. The counsel for plaintiff thereupon stated in open court that they would consent that said charge be given to the jury, and the court thereupon erased from said charge the word 'Refused,' and wrote in lieu thereof the word 'Given,' and read said charge to the jury." The defendant thereupon moved the court to exclude from the jury the argument of plaintiff's counsel with reference to the negligence of Briggs in retaining Russell in the service of the company after he had notice that the latter was an incompetent, and not a sober, engineer. The court overruled this motion, and the defendant excepted. The refusal of this charge in the first instance was, as we have seen, proper. The consent of the plaintiff that it might be given, whereby defendant lost the exception to its refusal, did not on this account prejudice the defendant, since the exception was without merit. There was evidence tending to show that Briggs had notice of Russell's incompetency, and that he was not a sober man. This evidence the jury, abstractly, had the right to look to in their assessment of damages. The court, by plaintiff's consent, in effect, instructed them not to consider this evidence; that there was no such evidence. But acting without consent, on its own responsibility, so to speak, the court, in refusing to exclude the argument of counsel based on this evidence, in effect said to the jury that they might consider that argument, and, of necessary consequence, the evidence upon which it proceeded. These attitudes taken by the court were inconsistent with each other. The jury could not

comply with both these diverse directions of the court. If, however, they acted upon the charge, and eliminated the evidence in question from their deliberations upon the case, the defendant, of course, could not complain. The charge was requested by it, and obedience to the instruction was beneficial to it. If, on the other hand, the jury took into consideration this evidence, and the argument of counsel upon it, as the refusal of the court to exclude that argument tended to allow them to do, it is clear that the defendant sustained no legal injury from their so doing, since the evidence, in point of fact, was in the case, the argument was a legitimate one upon it, and, abstractly considered, the jury had a right to look to it in the light of its proper exposition in argument, in their assessment of damages. The refusal of the court to exclude the argument was not even technically erroneous, except by reference to, and because of, the erroneous instruction in defendant's favor as to the nonexistence of the evidence upon which the argument was based. And to hold that such refusal involved reversible error would be to decide the case for the defendant because the court had, at its request, given an erroneous charge in its favor; to reverse the judgment against the defendant really for no other reason than that the trial court had ruled more favorably to it than the law warranted; and to deprive the plaintiff of her judgment, not for any error prejudicial to defendant, not because the jury possibly considered matters which were not properly before them, but because of an error prejudicial to her, which tended to exclude from the jury the evidence which it was proper for them to consider in the determination of the issue submitted to them. Another view: To put the case in the strongest light for the defendant, here are two instructions on the same point, inconsistent with—in fact diametrically opposed to—each other. The one is favorable to the plaintiff, and free from error. The only error involved is that favorable to the defendant, and of course it will not be heard to complain.

Charge 8, requested by defendant, to the effect that there was no negligence on the part of the watchman, Mullins, shown by the evidence, was properly refused. There was room for inference to be drawn by the jury that he was not sufficiently careful in giving the signal to the engineer, from the fact that the signal given did not convey to the latter the meaning it was intended to convey.

While it is very true that, in the assessment of damages in this case, no influence should have been accorded by the jury to the fact that the defendant is a corporation, it was not the court's duty to have so instructed them, though, had such instruction been given, no error would have been committed. The court cannot assume that

the jury will make an insidious and unauthorized discrimination against either party because of corporate character, or of any other personal attribute, status, or characteristic, and is under no obligation to go into the field of speculation respecting extraneous and illegitimate considerations that may by possibility operate on the minds of the jury, and guard them against such considerations. Instructions of this kind are in the nature of arguments, and may well be refused.

Charges 4, 15, 18, 20, and 22, requested by defendants, are, in substance, that different measures of damages should be assessed, in this class of actions, according as the evidence shows negligence on the part of the corporation itself, or merely on the part of its employees; the contention being that less punishment should be visited on the corporation for the fault of its servants, merely, than would be proper where what is called "corporate negligence" is shown. It might be a sufficient reply to this proposition to say that the statute makes no such distinction between a defendant corporation, on the one hand, and the defendant's servants or agents. The fault of either entails the same liability. Code, § 2589. But perhaps a more satisfactory reply may be rested on the consideration that in this class of actions, where the wrong complained of produces the death of one who is not an employee of the defendant corporation, there can be no such thing as negligence of a servant which is other, for all practical purposes, than the negligence of the master and, e converso, no such thing as corporate negligence which is not essentially the negligence of its agents or servants. The distinction between corporate negligence and negligence of servants of a corporation belongs to another branch of the law. It is a part of the doctrine of the common law that employees assume the risks of the service they enter upon, and, among the rest, the dangers incident to the negligence of fellow servants. This doctrine involved a determination as to who were fellow servants, and who were not, in passing on the question of the master's liability for the negligence of one agent, resulting in injury to another; and where the negligence complained of was committed by an agent or servant charged with the performance of a duty which rested on the master, as such, it was said that this was the master's negligence, though in fact committed by a servant,—not that of a fellow servant,—and hence that, notwithstanding the exemption of the master generally from responsibility for the negligence of his servants, resulting in injury to another servant, he would in such case be liable. And so, where the master is a corporation, the negligence of a servant in discharging a duty which rests on the master is called "corporate negligence," solely in contradistinction to "fellow-servant negligence;" that is, it is negligence for which the corporation is liable,

although in all cases that of an agent of the corporation, and by this fact distinguishable from "fellow-servant negligence," for which the corporation is not liable at common law. But these distinctions, and the phrases in which they are expressed, as "corporate duty," "corporate negligence," and the like, have never been recognized, and have never obtained, in the law applicable to the rights and remedies of strangers to the corporation, or of passengers being transported by a common carrier corporation, for injuries suffered through the negligence of corporation servants. In these cases there is no question as to fellow servants. The corporation is as much liable for the negligence of one servant as any other. Each servant is discharging the duties of the corporation in the same sense as every other one. The negligence of the company's highest agent is no more that of the corporation, with respect to strangers and passengers, than that of the manual laborer in its service. And since no corporation can act except through agents, and no negligence can be imputed to the corporation except in respect of acts or omissions of agents, there can, in the nature of things, be no corporate negligence which is not essentially the negligence of its agents. The giving of the instructions under consideration would have been, therefore, to tell the jury that they should punish the corporation less severely for the negligence of one agent than for that of another; that, for instance, the negligence of the corporation's agent whose duty it was to supply conductors and watchmen with uniforms and lanterns, (which would be a corporate duty under the law governing, *inter se*, the relation, etc., of the company and its employes,) justified the infliction of greater punishment than the negligence of the engineer in causing the terrible collision shown by the evidence, or that the mere inadvertence of a master mechanic in failing to discharge an engineer was more culpable than omissions of manifest duty on the part of an engineer, producing the death of several people. The argument in support of these charges seems to proceed on the idea that in one case the negligence would be, personally, that of the company, and that, therefore, greater punishment should be inflicted, and in the other it is the fault of an employe, merely, and therefore less punishment should be imposed. The fact is that in both cases—in all cases, indeed—the punishment is vicarious. The fault is the servant's, whether he be of high or low degree, and for his fault his employer, the corporation, is vicariously punished.

Charge 6, to the effect that there was no evidence in the case of corporate negligence,—"that is, of the defendant itself, as a corporation, or of its governing officers,"—was properly refused, on considerations last above adverted to, as well as others, not necessary to be gone into. It could make no possible

difference, in the assessment of damages, whether there was evidence of such negligence or not.

There was other negligence of the engineer, Russell, counted on in the complaint, and finding lodgment in the evidence, than that hypothesized in charge 7, and for this reason alone that charge was properly refused.

The charge numbered 16, to the effect that, unless the jury believe from the evidence that the witness Spanier told them the truth, they ought to find that Russell was neither drunk nor drinking at the time of the collision, was misleading, in that this witness testified to other facts than with reference to Russell's drinking, and the jury had the right to believe him in respect of the drinking, although they did not believe he had told the truth throughout his testimony. The tendency of the charge was to deny them this right. The charge was also argumentative.

Charges 17 and 23, refused to the defendant, were intended to have the jury consider the fact of the pendency of other suits against the defendant for deaths of other persons than plaintiff's intestate, resulting from the collision in which the latter was killed, in reduction of the damages they might otherwise assess in this case. We may put the case on the basis contended for by appellant's counsel, which, indeed, must be conceded to result from the fixed construction of section 2589 of the Code, the "homicide act,"—and consider this purely an action to punish the defendant for negligently causing the death of plaintiff's intestate, without subscribing to the proposition of these charges. So viewing the nature of the case, that proposition is that where a wrongful act produces the death of two or more persons, and the wrongdoer is proceeded against separately for each homicide, he may, on a trial for the homicide of one man, introduce the fact that he at the same time, and by the same act, killed another, or other men, and is being prosecuted, and will probably be convicted and punished, therefor, to lessen the punishment to be inflicted in the case being tried. This cannot be, and is not, the law. The charges were properly refused.

Several of defendant's requests for instructions proceed on the theory that a recovery, under section 2589 of the Code, is limited to actual damages sustained by the surviving relatives—distributees—of the deceased, unless the jury find that the casualty was the result of wantonness, willfulness, or the like, on the part of those against whom negligence is charged. This is not the law, as has been recently reaffirmed by this court. *Railroad Co. v. Freeman*, (Ala.) 11 South. Rep. 800.

The verdict of the jury was not excessive. Without undertaking to formulate any rule on the subject, we feel safe in the conclusion that the damages assessed in this case were not disproportionate to defendant's culpability in causing, as shown by the evi-

dence, the death of plaintiff's intestate. We find no error in the record, and the judgment of the circuit court is affirmed.

(98 Ala. 159)

**KANSAS CITY, M. & B. R. CO. v. PHILLIPS.**

(Supreme Court of Alabama. April 26, 1893.)

**OBJECTIONS TO EVIDENCE—WHEN MADE—CARRIERS—INJURY TO PASSENGER—PUNITIVE DAMAGES—QUESTION FOR JURY—JUDICIAL NOTICE—MORTALITY TABLES—INSTRUCTIONS—NEW TRIAL.**

1. An objection to evidence, by motion to exclude, comes too late when not made until the evidence is closed, and the case partly argued.

2. An instruction, in an action against a railroad company for personal injuries, that there is no evidence that defendant was guilty of "corporate negligence," is properly refused since when the injured person is a third party, and not an employee of the company, the negligence of any agent is the negligence of the company.

3. Where the evidence shows that, before the injury, plaintiff earned \$100 per month, and that he has been unable to do any work since, an instruction that only nominal damages for the difference in such earning capacity can be allowed is properly refused.

4. The evidence showed that the engineer through whose negligence the accident occurred was under contract not to go into a saloon, or drink whisky, while in defendant's "employ." *Held*, that he was in such employ during the interval from his arrival at a terminus of the road on one day until his departure therefrom, on the next day.

5. It appeared that, on the night of the injury, plaintiff was a passenger on defendant's train; that, while the train was waiting at a certain station for the arrival of a train from which it was to receive a sleeper, the station master signaled the engineer to "pull out," and make room for the incoming train; that the station master wore a uniform similar to the conductor's, carried a similar lantern, and used a signal similar to that given by the conductor when about to leave the station; that the engineer, thinking the station master was his conductor, left the station without him, or the extra sleeper, and did not discover his mistake until he reached the next station; that, there being no night operator at such station, the engineer, without placing a light on the rear car, attempted to back his train to the last station to get the conductor and extra sleeper; that while on the way the train collided with a freight train, whereby plaintiff was injured. *Held*, that the question of punitive damages was for the jury.

6. The court will take judicial notice of mortality tables showing the natural expectancy of duration of one's life at a given age.

7. Where defendant requests certain instructions, which are refused, and so marked by the court, but afterwards plaintiff consents that they be given, and the court so marks and gives them, the defendant cannot complain.

8. A new trial on the ground of newly-discovered evidence will be denied, though such evidence is material, where it appears that, within a week after verdict, petitioner's counsel, by his own diligence, and not by accident or voluntary disclosure, discovered the same.

9. A new trial on the ground of misconduct of bailiff and jury will be granted where it appears that, after they had been out over eight hours, and were unable to agree, they asked the bailiff how long the judge would keep them together, to which he replied that he did

not know, but supposed until Saturday, or until the court adjourned; that some of the jury understood him to say eight days, and one made affidavit to that effect; and that within an hour a verdict was returned.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by M. M. Phillips against the Kansas City, Memphis & Birmingham Railroad Company for personal injuries resulting from defendant's negligence. Judgment for plaintiff for \$6,500. Defendant appeals. Reversed.

The accident out of which the present suit arose was the same as that stated in the case of Railroad Co. v. Sanders, 13 South. Rep. 57, and the material facts, as shown by the bill of exceptions in this case, are substantially the same. There was evidence introduced tending to show the plaintiff's earning capacity before the injury, and his condition after the injury. Upon the cross-examination of Briggs, who was the master mechanic of the defendant, he testified that "there is a clause in the blank application made by engineers for employment with the defendant in which he pledges himself not to go into saloons, or drink whisky, while he is in the employ of the defendant." Russell also testified that this pledge was in force when the accident occurred. It is not deemed necessary to notice in detail the rulings of the court upon the evidence. Upon the introduction of all the evidence the defendant requested the court to give the following written charges, and separately excepted to the refusal to give each of them as asked: (1) "There is no evidence that tends to show that the defendant has been guilty of any corporate negligence that contributed to the collision." (2) "Under the evidence in this case the jury are not authorized to award more than nominal damages for the difference in the earning capacity of the plaintiff before and after his injury, caused by his injury, even if you find there is such difference in plaintiff's earning capacity." (3) "The court charges the jury that when Russell turned his engine over to a hostler on the evening testified to by Slade, and came out on the street, went into Wise's saloon, and took a drink testified to by Slade, Russell was not in the service of the defendant, and his so doing was not a violation of the obligation which Russell took when he was employed by the defendant." (4) "The jury are not authorized to award punitive damages in this case." (5) "Although there are tables showing the present value of annuities, at eight per cent. interest, on a single life, at plaintiff's age, yet the court cannot take judicial notice of what such tables show; and, there being no evidence to enlighten you on this subject, I charge you that under the evidence in this case, you cannot award the plaintiff any damages for his future inability to work and earn money, even if you find there is such future inability." (6) "To determine the pres-

ent value of annuity for a period not longer than plaintiff's expectancy of life, considering the uncertainty of life, and that plaintiff may die at any time, estimating such annuity at what his power to labor and earn money has been lessened by reason of his alleged permanent injury, if it has been so lessened, involves an intricate and difficult calculation; and, if you cannot make such calculation, you cannot award the plaintiff any damages for his future inability to work and earn money, if you believe he has any such disability." The defendant also requested the court to give to the jury the five written charges which are hereinafter copied. Upon the court's refusal to give each of these charges, and after he had written in ink on each of them the word "Refused," the counsel for plaintiff stated in open court that they would consent that each of the charges that were refused should be given to the jury. Thereupon the court erased, by drawing a pencil through it, the word "Refused," and wrote upon each of the charges the words "Given by consent." The defendant separately excepted to the said action of the court in regard to each of said written charges so requested by the defendant. Said charges are as follows: (1) "If the jury should find for the plaintiff, in estimating the plaintiff's damages for his diminished capacity to earn a livelihood by reason of his injury, if the jury believe he is entitled to any such damages, the measure of such damages would be the present value of an annuity equal in amount to the amount the jury find to be the annual diminution in plaintiff's capacity to earn a livelihood by reason of his injury, for a period not longer than the expectancy of plaintiff's life; and unless the jury can determine from the evidence, or their own knowledge, what the present value of such an annuity would be, they are not authorized to award the plaintiff any damages arising from such diminished capacity to earn a livelihood." (2) "The court charges the jury that when Russell turned his engine over to a hostler on the evening testified to by Slade, and came out on the street, and went into the saloon of Wise, and took the drink testified to by Slade, Russell was not in the service of defendant." (3) "It is the duty of the jury, before they award plaintiff any damages for his diminished capacity to earn a livelihood by reason of his injury, if the jury believe from the evidence that the plaintiff is entitled to such damages, to calculate the present value of an annuity equal in amount to the amount the jury may find from the evidence to be the amount which would compensate plaintiff for his diminished capacity to earn a livelihood for a period of one year, and continuing during a period not greater than the plaintiff's expectancy of life, considering the uncertainty of life, and the fact that plaintiff may die at any time; and if the jury are unable from the evidence, and their own

knowledge, to calculate the present value of such an annuity, they are not authorized to award plaintiff any damage for such diminished capacity to earn a livelihood." (4) "The measure of damage for plaintiff's diminishing capacity to earn a livelihood, if the jury believe the plaintiff is entitled to such damage, is such a sum as, if put out at compound interest at the legal rate, would just suffice to pay the plaintiff an annuity equal in amount to the amount the jury may find from the evidence would compensate the plaintiff for one year for his diminished capacity to earn a livelihood, and for a period of time not greater than the plaintiff's expectancy of life, considering the uncertainty of life, and the fact that the plaintiff may die at any time." (5) "If you should find for the plaintiff, in estimating the damages the plaintiff would be entitled to for his future inability to work and earn money, I charge you he would be entitled to the present value of an annuity for a period not longer than his expectancy of life, estimating such annuity at what his power to labor and earn money has been lessened by reason of his alleged permanent injury; and, there being no evidence showing what the present value of such an annuity is, you cannot award the plaintiff any damages for his future inability to work and earn money." After the rendition of the judgment the defendant moved the court for a new trial, assigning several grounds therefor. The principal grounds for the motion for a new trial are sufficiently stated in the opinion. The court overruled this motion, and the defendant duly excepted.

Wallace Pratt and Hewitt, Walker & Porter, for appellant. Bowman & Harsh, for appellee.

HEAD, J. This is an action for damages for personal injuries sustained by appellee, as a passenger, by a collision of trains on appellant's road. On the main case the questions arising for decision grow out of exceptions to testimony and charges given and refused. Appellant's counsel insist specially, in argument, upon one only of the objections to testimony, and we will not comment on them in detail. We have carefully examined and considered them all, and find none well taken. If it was illegal for plaintiff to prove by the witness Dr. Wilson, on cross-examination, that he was the employed physician of another railroad company, no objection was made to it until after the evidence was closed, and the case partially argued, when defendant moved to exclude it. We think it was then too late to insist, as a legal right, upon its exclusion. If it was illegal its exclusion rested in the discretion of the court, at that stage of the trial. 1 Thomp. Trials, § 715.

The first charge requested by the defendant was that there was no evidence

that tends to show that the defendant has been guilty of any corporate negligence that contributed to the injury. For a disposition of this question we refer to what we said in reference to a similar charge in the case of *Railroad Co. v. Sanders*, 13 South. Rep. 57, (at the present term.) The charge was properly refused.

There was evidence tending to show that plaintiff, prior to injury, was capable of earning \$100 per month and that his services were worth that much, and that after the injury he was unable to attend to any business, or do any work, up to the time of the trial, wherefore the second charge requested was manifestly bad.

The testimony of the witness Briggs tends to show that Russell, the engineer of defendant, who was charged with negligence causing plaintiff's injury, was under a contract and duty not to go into saloons, or drink whisky, while in the "employ" of defendant. The defendant's third charge would construe this to mean that Russell was not in the employ of defendant during the interval from his arrival in Birmingham,—a terminus of the road,—on one day, until his departure therefrom, on the next, in the service of the company. Obviously, such is not the meaning of the contract.

Under the facts of this case, it was, at least, a question for the jury whether punitive damages should be awarded or not. It has been too long and well settled to be now overturned that punitive damages may be awarded against the master for the acts and omissions of the servant, although the master, aside from the conduct of the servant, may be entirely blameless. We are not unmindful of the forcible argument of appellant's counsel in opposition to this view. We have duly considered the argument, but cannot follow it without departing from the general current of the law, as it is declared everywhere, so far as we are advised. The fourth charge was therefore properly refused.

In *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. Rep. 120, we held that the court will take judicial notice of the mortality tables showing the natural expectancy of duration of one's life at a given age. On that authority, charge 5 was bad, and properly refused.

We ruled charge 6 bad in *Railroad Co. v. Davis*, (Ala.) 12 South. Rep. 786, (at the present term,) and have no doubt of the correctness of that ruling.

We have carefully examined charges numbered 1, 2, 3, 4, and 5, which the court at first refused, and afterwards gave, by consent of the plaintiff, marking thereon "Given by consent," and find that each of them was properly refused. The defendant cannot complain, therefore, that they were afterwards given by consent, and so marked. We do not declare what our ruling would be if a

good charge had been so refused, and then given, and so marked.

The defendant moved the court for a new trial on several grounds specified in the motion, among them, newly-discovered evidence, and misconduct of the jury, and the bailiff having them in charge.

1. The newly-discovered evidence relied on, as set out in the affidavits in support of the motion, is certainly very material to the inquiry of the extent of plaintiff's injury, and it is not cumulative of other testimony introduced by the defendant. The real question upon this branch of the motion is whether that degree of diligence which the law exacts to discover and produce the evidence at the trial was exercised. The law is very strict in this regard. Trials and judgments will not be set aside, and litigation revived, to let in new evidence, except upon a clear showing of the importance of the evidence, and a high degree of diligence on the part of the movant to discover and produce it on the trial. The new evidence consists in the testimony of several persons, going to show that the plaintiff suffered, long before the railroad collision, with the urinary troubles which he claimed, in the lawsuit, resulted from injuries received by that collision. The affidavit of diligence is made by one Crater, an attorney and claim agent of the defendant, who states that almost continuously since the accident, on the 25th day of October, 1890, to the time of the trial, in June, 1891, he and others employed by him were diligently engaged in investigating the claims and demands of the various persons claiming to have received injuries in the collision, and diligently inquired into and investigated as to the injuries plaintiff claimed to have received, whether actually received at said time, or at all, or were injuries and complaints or ailments with which he had been suffering or afflicted long prior to the date of said collision; that about 60 days prior to the date of the affidavit he first learned (except such information as given by the complaint in the cause) that plaintiff would testify, and attempt to prove, he had urinary diseases on account of said collision,—such as inability to retain urine in his bladder, and uncontrolled dribbling therefrom,—but was unable to, and did not, ascertain what he would claim or testify concerning said diseases, in the full detail thereof, until he heard him testify on the trial; that for about 60 days prior to the trial he had been continuously engaged in investigating, personally and by employing others, the truth or falsity of plaintiff's claims, and interviewed, and inquired of, a large number of citizens of Walker county, neighbors of plaintiff, and was unable to find, prior to the trial, any one who had or would admit that he had any information as to said urinary diseases; that he has been continuing his investigations, personally and

through others, since said trial, and on June 25, 1891, was informed for the first time that plaintiff had been for the past 10 years, and longer, at times, suffering from urinary diseases, and involuntary dribbling of the urine, and inability to retain the same in his bladder, and loss of sexual power; that he is now informed and believes and states that defendant can now prove by 6 or 8, or more, reputable and creditable persons, that plaintiff had been afflicted as above stated. He also states that before the trial he inquired of about 21 citizens of Walker county concerning said urinary diseases. Crater procured the affidavits of two persons,—J. R. Martin and T. W. Washington,—who are neighbors of plaintiff, and who made oath as to the urinary troubles with which plaintiff had long suffered, and states that he has not been able to procure the affidavits of the others for the want of time. It will be observed the complaint, which was filed January 10, 1891, alleges that plaintiff was rendered incapable of controlling his urine, and that his virile power was greatly lessened or destroyed. On that subject he testified on the trial to no more than this. The trial was concluded on the 19th day of June, 1891. The motion for a new trial was heard June 30, 1891. The dates of the affidavits are not given, though they were in possession of counsel when the motion was docketed,—June 27, 1891. It thus appears that within the space of a week, or probably less, after the verdict, Crater was, by means of his own diligence, enabled to find six or eight credible witnesses who will testify to the facts stated, and to obtain the affidavits of two of them. It is expressly shown that he discovered this testimony by his diligence, and not by accident, voluntary disclosure, or other fortuitous circumstance, after all diligence on his part had been exhausted. It is very clear to our minds that he was stimulated by the verdict to a point of effort which he ought to have reached, but did not, before the trial. In such cases new trials will not be awarded to let in the newly-discovered evidence.

Misconduct of the bailiff and jury. When the jury had been out eight or nine hours, considering of their verdict, there was a knock at the door of the jury room, and Thomas F. Parker, who had charge of the jury, as one of the sheriff's deputies, went and unlocked the door, and opened it from 12 to 18 inches, when one of the jurors inquired of him where the judge was, saying the jury could not agree; and, when told by Parker that the judge was not in the courthouse, the jury, or some of them, asked that he be sent for, as there was no chance for them to agree upon a verdict. Parker replied he could not send for the judge; that the judge had ordered him to keep them together, and carry them to supper, and if they could not agree by 10 o'clock he would carry

them to the hotel for the night. Some of the jury then asked Parker how long the judge would keep them together if they did not agree on a verdict, whereupon Parker said he did not know, and had nothing to do with it, but that he supposed the court could keep them together until Saturday night, or that he might keep them together until the adjournment of court. This conversation took place after night, about 8 o'clock. There was no one in the court room but Parker and the clerk, the jury being in the jury room, but some of them could be seen at the door. One of the jurors, as shown by his affidavit, understood Parker to say that if they did not agree on a verdict the judge would keep them together until Saturday, if not longer. Others understood that he said the judge would keep them together eight days; and it was reported by those who were at or near the door, to the body of the jury in the jury room, that the bailiff or clerk had said they would be kept together eight days unless they agreed on a verdict. Between 9 and 10 o'clock the jury agreed on a verdict, and returned it to the clerk. They had been engaged in the trial of the cause eight days, and during that time one of the jurors had a very sick daughter about two years old. An uncle of the child was also a member of the jury. Several of the jurors make oath that, prior to said conversation, there appeared no prospect that the jury would agree on a verdict.

The question now is, do these facts entitle the defendant to a new trial? It is stated as a rule in 16 Amer. & Eng. Enc. Law, 519, that "'misconduct,' as the term is used in connection with the subject under discussion, [new trials,] is any unlawful behavior of those intrusted, in any degree, with the administration of justice, by which the rights of the parties, and the justice of the case, may have been affected. It need not be shown, necessarily, that the misconduct relied on as ground for a new trial actually controlled or determined the verdict, if it is made apparent that the verdict might have been affected by it." This text is sustained by the authorities cited in its support. In *Johnson v. Root*, 2 Cliff. 108, it is said: "Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved in order to lay the foundation for the interposition of the court; but when the irregular conduct is established it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings. Such was the rule laid down in *Commonwealth v. Roby*, 12 Pick. 520, and it appears to be correct." In *Johnson v. Witt*, 138 Mass. 79, it was said that the law will not inquire what was the effect of intermeddling



with the jury, if it was of such a nature as to have any tendency to affect the verdict injuriously to the party against whom it is found. See, also, *Read v. Cambridge*, 124 Mass. 567. In *Thompson & Merriam on Juries*, (section 362,) it is stated as a general rule: "Whether communications between members of the jury and the officer having them in charge will avoid the verdict will depend upon the nature of the communications. Where they are such that it is obvious that no prejudice could have resulted from them, they will not afford ground for a new trial, but if the communications were such that prejudice may have resulted the rule is different." The same author also lays down as a general rule in section 349, citing many authorities, the following: "The courts generally agree that where the interference of strangers with the jury has not been promoted by the prevailing party, has not been attended with corruption, and it does not reasonably appear that substantial prejudice has resulted to the party complaining, the verdict will not be disturbed for this reason, whether the cause be civil or criminal, capital or otherwise." In *Thompson on Trials*, (section 2556,) it is said: "Communications between the jurors and officers having them in charge rest on much the same grounds as communications with strangers, though possibly viewed with greater jealousy. Such communications will not afford ground for new trial where it is obvious that no prejudice resulted; otherwise, where prejudice may have resulted." In *Thompson & Merriam on Juries* (section 349, subd. 3) it is said: "In civil cases the courts generally hold that, in order to set aside a verdict because improper communications have been had between members of the jury and third persons, the affidavits must do something more than raise suspicions that improper influence might have been brought to bear on the jury. A verdict which twelve men have rendered under the solemnity of their oaths is certainly entitled to some consideration; and it would not only be unjust to the party who has obtained it to set it aside for some irregularity which has happened without his fault, unless prejudice clearly appear, but it would be entirely opposed to the policy of the law, which favors the ending of litigation, and the quieting of controversies." The cases wherein the application of these general principles has been attempted are inharmonious. In *Slater v. Mead*, 53 How. Pr. 57, the jury, after being out a long time, reported that they could not agree. The judge said to them: "You must agree upon a verdict. I cannot discharge you until you agree upon a verdict." The verdict was set aside as induced by constraint. But in *White v. Calder*, 35 N. Y. 183, it was held not to be error for the judge to refuse to discharge the jury until they had agreed upon their verdict, and that it was wholly within his discretion when to discharge them. In *Obear v. Gray*, 68 Ga.

182, the bailiff who had the jury in charge, after they had been out for some time considering of their verdict, being very restive and impatient, and while they were standing about five to seven, told them that in his opinion the judge would keep them out a week, or compel them to agree. The court said: "According to the recorded judgment of this court in the case of *Gholston v. Gholston*, which was a libel for divorce, and reported in 31 Ga. 625, it was held that a jury was improperly influenced by the sheriff's telling them that unless they speedily agreed upon a verdict the judge would carry them to Elbert county, and that he was making preparations for that purpose. The deliberations of a jury are not to be interfered with whilst they are considering the law and the testimony, which must alone control their verdict. They are by no means to be influenced by the fear of a week's confinement, to alarm them into an agreement. Such a suggestion, even by the very officer in whose custody they are placed, would be highly improper; and especially so in view of the fact that they are thus placed to prevent every outside influence, by word, sign, or speech, from affecting unlawfully their finding." And it seems the court deemed the action of the bailiff in this case alone sufficient ground for a new trial, but there were other concurrent causes, and the ruling in favor of a new trial was based upon all. In *Leach v. Wilbur*, 9 Allen, 212, the jury had retired about 5 P. M. on Thursday, and on Friday morning, between 4 and 5 o'clock, one of them asked the bailiff how long the court was going to keep them there, to which the officer replied that he did not know, but they would have to stay there till Saturday night; and a little after 5 o'clock they agreed, sealed up their verdict, and separated. Motion for a new trial overruled. The court said: "That an irregularity occurred must be conceded, as the more proper course for the officer would have been to decline giving any answer to the inquiry of the juror. But there was no officious intermeddling on the part of the officer, nor any attempt or previous purpose on his part to hasten the jury to an agreement as to their verdict. His answer to the inquiry of the juror affirmed nothing but his want of knowledge how long the jury would be required to remain together. The defendant may properly object to the motion to set aside this verdict, there being no evidence of any design on the part of the officer to favor either party, or that any such effect was produced by this reply." In *Wiggins v. Downer*, 67 How. Pr. 65, it appeared from the affidavits of three of the jurors that, after the jury had deliberated for about 15 hours, they sent word to the court, by the officer in charge, that they could not agree; that the constable retired for a moment, and upon returning stated that the judge said "they must agree, or he would keep them until tomorrow noon."

One of the three jurors said the substance of the statement of the constable was that "the judge said he would not discharge them; that they must agree." The court said: "Assume that the constable did make the alleged statement, and that the jury thought it was a message from the court. The impropriety of such a proceeding is conceded. But would it be such an irregularity as should avoid the verdict? Would it amount to an illegal constraint? For there must always be some constraint, but abuse should not be permitted." The case of *Erwin v. Hamilton*, 50 How. Pr. 32, (decided in 1875,) was cited, wherein the jury, after announcing their inability to agree, were told, in effect, by the judge, that he could not discharge them, but would return after supper, and wait a reasonable time for a verdict, and if they failed to agree by that time the court would adjourn until the following Monday at three P. M., then distant nearly 70 hours, when they could bring in a sealed verdict. Held no ground for a new trial. In *Pope v. State*, 36 Miss. 121, the officer in charge told the jury, while deliberating, in a case of felony "that unless they decided the case one way or the other they would have nothing more to eat, and no water to drink." Some of the jurors understood him to say this by direction of the court, yet it was held no ground for a new trial. But in *Cole v. Swan*, 4 G. Greene, 32, the officer informed the jury that unless they agreed on a verdict they would be kept from Saturday till Monday evening without anything to eat, whereby one of the jurors was induced to consent that a verdict might be returned, and a new trial was granted; the court saying that *in case of any conversation between the officer and the jury the verdict ought to be set aside the moment the fact comes to the knowledge of the court*. The words we have italicized certainly express an extreme view, opposed by the great weight of authority, and tend to weaken the force of the decision as an authority. Moreover, the fact that one of the jurors made oath that he was induced to agree seems to have been considered, when its consideration was unlawful.

After giving the question extended discussion and consideration, we reach the conclusion that this ground of motion for a new trial ought to have been sustained. We deduce from the authorities, as a sound proposition, that where misconduct on the part of the jurors, or the officer having them in charge, is shown, and it reasonably appears, from the nature of the misconduct, and the attendant circumstances, that the verdict may have been unlawfully influenced thereby, a new trial ought to be granted. The remarks actually made by the bailiff, Parker, to some of the jurors, in response to inquiries, were in themselves the mere honest and innocent expressions of his opinion of what the judge could or might

do in reference to keeping the jury together; but the affidavits show, undeniably, that as the result of the interview the jurors, or most of them, were made to understand and believe that the bailiff had declared absolutely that the judge would keep the jury together for the space of eight days unless they sooner agreed upon a verdict. The influence wrought upon their minds was therefore precisely the same as if the bailiff had in fact declared as they understood. It was improper, and therefore unlawful, in the first instance, for the jurors to institute such an investigation and interview with the bailiff. An inquiry how long the court would compel the jury to be kept together unless they agreed upon a verdict had a direct bearing upon the discharge of their duties as jurors. No communication with an outsider, whether officer or stranger, having such a bearing, is lawful. To hold such communication is misconduct on the part of the juror who does it, as well as the officer or stranger who engages in or tolerates it; and if the verdict is produced or affected by such misconduct, whether the improper influence which entered into it was justified by anything said or done by the officer or stranger, or not, the mischief effecting injustice to the party litigant has been accomplished, for the redress of which there is no remedy but to set aside the verdict. The misconduct in this case consisted in holding any interview at all on the subject. The evil result was that the jury, whether justifiably or not, was made to believe that the judge would keep them together eight days longer. There is no room for doubt that this interview may have unlawfully influenced the verdict that was rendered. The jury had been engaged upon the trial about a week or more. They had been out, considering of their verdict, about eight hours, without being able to agree. They had appealed to the bailiff to send for the judge at night to discharge them, on the ground that it was impossible for them to agree, and one or two of the jurors make oath that there appeared no prospect that they would ever agree. Yet within two hours after the interview they returned a verdict, and were discharged. Upon these facts the court should have granted a new trial, and for the error in refusing it the judgment is reversed, and the cause remanded.

(38 Ala. 647)

ALABAMA MIDLAND RY. CO. v. BROWN et al.

(Supreme Court of Alabama. April 26, 1893.)

REFORMATION OF DEED—DEFENSES—BREACH OF PAROL CONTRACT.

The reformation of a deed conveying a right of way to complainant railroad company, which admittedly contains a mistake in the description of the land through which the right of way runs, cannot be resisted on the ground that complainant has violated a parol agree-

ment as to the manner of constructing its road through defendants' land, which agreement entered into the consideration for the deed, but which is not mentioned therein, and is not claimed to have been omitted therefrom by mistake.

Appeal from chancery court, Pike county; John A. Foster, Chancellor.

Bill by the Alabama Midland Railway Company against P. H. Brown and others to reform a deed. From a decree for defendants, complainant appeals. Reversed.

The instrument sought to be corrected was executed on January 28, 1889. The granting portion of the said deed is in the following language: "Doth grant and sell unto the said the Alabama Midland Railway Company and its successors and assigns, the right of way over which to pass at all times by said company, its officers and employees, and particularly for establishing and running thereon a railway, with the requisite number of tracks when completed, and to extend in length the following described tract or tracts of land situate, lying, and being in Pike county, said state, to wit, the N. W.  $\frac{1}{4}$ , sec. 12, township 10, range 21; said right of way extending in such direction through the tract of land herein granted as said company, by its engineers, shall think best suited for the purpose of locating and establishing their work, and connecting with said right of way. The said company shall have the right to cut down and remove all such trees, underwood, and other growth and timber on said right of way, and on each side of said road, as, in the opinion of the engineers, it is necessary to remove in order to prevent injury to the road, together with all and singular the rights, members, and appurtenances to said strip or parcel of land belonging, or in any wise appertaining, and more especially the right of way over the same." The defendants filed their answer, and asked that it be taken as a cross bill, resisting the relief prayed, and setting up in support of their contention certain facts, which are sufficiently stated in the opinion. On final submission of the cause the chancellor ordered and decreed "that, before complainant shall be entitled to have the deed reformed, it shall be necessary that it be referred to the register to ascertain the damages caused by these trespasses, and that complainant must pay the same before relief is granted to it." Thereupon the chancellor ordered the register to hold a reference in accordance with the decree. Complainant assigns this decree of the chancellor as error.

Gardner & Wiley and A. A. Wiley, for appellant. Parks & Gamble, for appellees.

COLEMAN, J. The bill was filed to reform an instrument which was intended to convey the right of way over certain lands of the respondents. The bill avers that "in the deed the lands over which the right of

way passes are described as being the N. W.  $\frac{1}{4}$  of section 12, when it should have been the N. W.  $\frac{1}{4}$  of section 13." It is agreed by the parties that there was a mistake in the description of the land, and that the averment of the bill in this respect is true. The reformation of the instrument is resisted upon the ground that respondents were damaged by the breach of a parol agreement made at the time of the execution of the conveyance, and which entered into its consideration. It is averred in the answer and cross bill that by the parol agreement the right of way was to include no more land than was necessary for the roadbed; that, in building embankments, the complainant was not to "borrow" earth from lands adjacent to the line of the track, but to use only that obtained from the excavations or "cuts;" and that no earth was to be "dumped" on respondents' farming lands. The cross bill avers a violation of the agreement in these respects, to the damage of complainant. The consideration expressed in the deed is "in consideration of running its contemplated road on and along their lands, as well as the sum of one dollar." The answer avers, and the proof sustains this averment, that no money was paid, or other compensation made, for the right of way, except that of running the road at the place contemplated and agreed upon. The deed itself does not specify the width of the right of way granted, but describes it simply as a right of way for complainant's railroad. There are no covenants or stipulations in the deed of conveyance for the right of way which required the complainant to use the earth taken from "cuts" or excavations to construct embankments, or prohibited the "borrowing" of earth when necessary, adjacent to the track, for this purpose. A fair construction of the deed as executed would lead to the conclusion that the parties contracted, as to the right of way conveyed, with reference to the statute which limits the width "of the way and right of way" to what may be necessary, not exceeding 100 feet, that a railroad corporation may acquire by condemnation proceedings. Code 1886, § 1580, subd. 8. Lands or earth used in the construction of the roadbed outside of this limit, either for waste of earth taken from excavations or for borrowing for embankments, would not be included in the right of way conveyed by the deed. It is not pretended in the cross bill that the covenants and agreements set up in the answer were, by mistake or otherwise, omitted from the deed of conveyance. The averment is that it was a parol, contemporaneous agreement, and which was the real consideration of the deed conveying the right of way. We hold, under the pleadings, parol proof was not admissible to prove such a contemporaneous parol agreement as that set up in the answer as a defense to the reformation of the deed. It would impose

restrictions, burdens, and duties inconsistent with the consideration expressed, and the intention of the parties as expressed in the deed itself. Different principles of law apply to executory and executed contracts. In many cases, when the contract is executory, the courts will refuse relief by compelling specific performance, where, under similar circumstances, the courts would reform an instrument. As was said in *Parker v. Parker*, 88 Ala. 364, 6 South. Rep. 740, reformation of an instrument does not "establish and effectuate rights, nor have the effect of the deed adjudged, but rather to declare the status which the parties intended to create, and upon which such rights as they would have acquired under a correct instrument may be asserted. The question is, not what the deed was intended to mean, or how it was intended to operate, but what it was intended to be." The purpose intended, and the effect of the remedy by reformation of an instrument, are very fully considered in the case of *Gardner v. Moore*, 75 Ala. 394. Reformation of the deed under consideration, as to the numbers of the land, would in no way affect or impair the rights of the respondents, or protect the plaintiff from any liability. The effect would be simply to give to both parties the same rights and protection as if there had been no mistake in the instrument. We need not, and do not, decide the question as to whether the damages claimed by defendants are of that character which, if considered in the nature of the purchase money for the right of way, would entitle them to a vendor's lien, and bring their case within the influence of the decision in *Connor v. Armstrong*, 86 Ala. 262, 5 South. Rep. 449. On this point see *Bridgeport Land & Imp. Co. v. American Fire-Proof Steel Car Co.*, (Ala.) 10 South. Rep. 704. Under the evidence and pleading the complainant was entitled to a reformation of the deed. A decree will be here rendered to that effect.

Reversed and rendered.

(101 Ala. 304)

**BIRMINGHAM TRUST & SAV. CO. v. EAST LAKE LAND CO. et al.**

(Supreme Court of Alabama. April 27, 1893.)

**DEBT OF STOCKHOLDER—LIEN OF CORPORATION ON STOCK.**

Code, § 1674, providing that "all private corporations have a lien on the shares of its stockholders for any debt or liability incurred to it by a stockholder before notices of a transfer or of a levy on such stock," applies to a debt or liability incurred prior to its enactment.

Appeal from city court of Birmingham; Henry A. Sharpe, Judge.

Bill by the Birmingham Trust & Savings Company against the East Lake Land Company and others. From a decree for defendants, complainant appeals. Affirmed.

E. J. Smyer, for appellant. Hewitt, Walker & Porter, for appellees.

**HARALSON, J.** One of the original stockholders of appellee transferred his stock to appellant, as collateral security for a debt owing to him, after the Code of 1886 (where section 1674 first appears) went into operation. The stockholder at that time owed the corporation whose stock he held an indebtedness which was contracted prior to the adoption of the Code and the enactment of said section 1674. The appellant gave notice to appellee of this transaction, and demanded a transfer of said stock, on its books, to appellant, which appellee refused to make, claiming that it had a prior and superior lien on the stock to that claimed by appellant, which lien of appellee was conferred by said section 1674 of the Code. The bill is filed to have appellant's lien on said stock declared superior to appellee's lien on it, and to compel the transfer to appellant, on the books of appellee, of said shares of stock. A demurrer to the bill having been sustained, and the bill dismissed, this appeal is to reverse that decree.

The question for our determination is whether the lien created by section 1674 of the Code, in favor of a corporation against its stockholders, "for any debt or liability incurred to it by a stockholder before notice of transfer or of a levy on such shares," must be confined to debts of the stockholder to the corporation created after the enactment of that section, or if it does not apply, as well, to debts contracted before its enactment.

1. We said in *Insurance Co. v. Cullom*, 49 Ala. 561, that "the common law regards the shares composing the capital stock of an incorporate company as personal property, capable of alienation or succession in any of the modes by which that species of property may be transferred. Thus regarding such shares, a lien or equity, in favor of the corporation, to charge them with a debt due from the shareholder, could not be implied." It is not to be doubted that a lien of the kind may be created by law. As Mr. Cook expresses it: "Such a lien as this, in favor of the corporation, may be created by statute, by charter; and the weight of authority holds that it may be created by by-law." *Cook, Stock, Stockh. & Corp. Law*, § 522; 1 *Jones, Liens*, § 377; *Cunningham v. Trust Co.*, 4 Ala. 652.

2. The statute (section 1674 of the Code) under which the lien of the appellee is claimed reads: "All private corporations have a lien on the shares of its stockholders for any debt or liability incurred to it by a stockholder before notice of a transfer or of a levy on such stock." This is, in substance, the language by which liens on stock are generally conferred by statute, whether in the original acts of incorporation or by separate special act afterwards, or by by-laws of

the corporation, authorized by statute. It is a general rule, says Cook, "that a lien upon stock is a lien for all debts of the shareholder, due to the corporation, and it is not necessary that the debt be due and payable at the time when the lien is sought to be enforced. It covers debts which are not due, as well as those that are due, and all indebtedness to the corporation, whether payable presently or at a future time." Cook, Stock, Stockh. & Corp. Law, § 527, and authorities there cited. "The word 'indebted,' in statutory provisions for liens in favor of corporations, applies as well to debts to become due as to those actually due and payable." 1 Jones, Liens, § 393. In construing the words "any debt or liability," in a statute giving a lien on stock, we held, in *Insurance Co. v. Cullom*, 49 Ala. 562, that "the object in creating the lien is the security of the corporation. That security is extended to 'any debt or liability' of the stockholder, not distinguishing between the character or consideration of the debts. We can perceive no good reason for such a distinction; but, on the contrary, we perceive a good reason for embracing any debt properly contracted with the corporation." 1 Jones, Liens, §§ 394, 395; *Insurance Co. v. Goodfellow*, 9 Mo. 149.

3. Mr. Cooley, in his work on Constitutional Limitations, referring to retrospective statutes, says: "It is a sound rule of construction that a statute should have a prospective operation, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley, Const. Lim. § 370. And this rule has received the sanction of our own adjudications. Ex parte Buckley, 53 Ala. 54; *Smith v. Kolb*, 58 Ala. 646; *Warten v. Matthews*, 80 Ala. 429. But this strictness of construction is not to be applied to all retroactive statutes. In commenting on this language, taken from Cooley, this court used this language: "The statutes excluded from judicial favor, and subjected to this strictness of judicial construction,—statutes which may properly be denominated 'retrospective,'—are such as impair vested rights, acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past. Such statutes are offensive to the principles of sound and just legislation, and it is of these the authorities to which we have been referred use the term 'odious' and other epithets, expressive of judicial opprobrium. There are other statutes which, when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction for the consummation of the just and beneficial purposes in view has been fully accorded. Such statutes are intended to remedy a mischief, promote public justice, correct innocent mistakes into which parties may have fallen, cure irregularities, or give ef-

fect to the acts and contracts of individuals fairly done and made. These are remedial statutes, conducive alike to individual and public good." Ex parte Buckley, 53 Ala. 54, 55. The question is, at last, "do they establish substantial justice and subvert injustice?" End. Interp. St. §§ 273, 277, 278. In *Hoffman v. Hoffman*, 26 Ala. 545, it was said: "Whenever a statute is leveled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most reasonable application; and in such cases it may fairly be presumed that it was the intention of the legislature that the boon of the statute should be extended to every case which its words could properly include." It is a sound policy of law to give a liberal and generous construction to this statute, to the end that a corporation may enjoy that just and equitable right of set-off, accorded to natural persons, of not being required to pay its creditor—the stockholder—before he accounts for his debts to the corporation. The supreme court of Mississippi, in construing an amendment to section 1255 of their Code, which gave a lien which did not exist before, held that said act, which gives a plaintiff suing at law, for the purchase money of personal property sold by him to the defendant, a lien on such property while in the latter's hands, and provides for a writ of seizure upon the filing of the declaration, in addition to a personal judgment against the defendant, is in its character remedial, and hence may be applied in cases where the causes of action existed at the time of its passage. *Manufacturing Co. v. Keyser*, 62 Miss. 155. In still another case in that court, in which the question was presented whether an attachment law, which went into effect after the alleged fraudulent act complained of was committed, had a retroactive effect, it was held "that the language [of the statute] is general and unrestricted, and it must be presumed the legislature intended to extend it to all cases, whether then existing or to arise thereafter, embraced within the terms presented." *Green v. Anderson*, 39 Miss. 363.

The foregoing authorities justify us in holding that this statute (section 1674 of Code) was designed by the legislature to confer the lien therein provided, to secure debts which had been contracted before its enactment, as well as those contracted afterwards. Jones, in his work on Liens, lays down the doctrine that such a lien may be conferred by statute, as was done here, upon a corporation already organized, as here, in respect of shares already issued, for debts already incurred, as is the case here; that in such case "the lien is created by the statute immediately upon its going into effect, so that an indebtedness as to the corporation from a shareholder existing at the time will be secured in preference to a

pledges to whom the shareholder has delivered the certificate, with a power of attorney for its transfer, provided the corporation has received no notice of such pledge of the certificate." 1 Jones, Liens, § 382. And Cook on Stocks and Stockholders (page 579, § 531) holds that when a lien is given to the corporation by the charter or the articles of association, or by statute, there is constructive notice to all persons dealing with the corporation that they must, at their peril, without reference to what the certificate recites, inform themselves as to any debts to the corporation that may affect the shares they propose to buy. If there is a lien, they are held to have known it, whether the certificate declares it or not. To the same effect is section 379, 1 Jones, Liens; First Nat. Bank v. Hartford L. & A. Ins. Co., 45 Conn. 85. Our conclusion is the court below committed no error in sustaining the demurrer to the bill, and its decree is affirmed.

(70 Miss. 340)

**CRAWLEY v. RICHMOND & D. R. CO.**  
(Supreme Court of Mississippi. Oct., 1892.)

**NEGLECTANCE OF PASSENGER.**

An intending passenger, who waits at a place 250 feet behind the station house till after his train has whistled, and then runs around the station house, where there is no platform, just in front of the train, and is knocked over by the engine, himself causes his injury, though the train is being run at an illegal rate of speed.

Appeal from circuit court, Webster county; O. H. Campbell, Judge.

Action by Mary Crawley against the Richmond & Danville Railroad Company for damages for the death of her son. Deceased, intending to go on defendant's train, was at the time the train whistled near a beer saloon some 250 feet from the station. He ran round the depot when the west-bound train was about 10 feet therefrom, and running, in violation of law, at the rate of 12 miles an hour. Being told to "look out," he stopped short, turned round, was knocked down by the projecting pilot beam of the engine, and killed. Witnesses for plaintiff testified that deceased, when struck, had just stepped on the platform; that the pilot beam projected over the platform. Witnesses for defendant swore that deceased ran so fast that his momentum took him close to the rails where he fell or was struck. Others stated that they saw deceased when he was struck, as they could not have done had he been on the platform. The court peremptorily instructed for defendant. Plaintiff appeals. Affirmed.

Rush & Gardner, for appellant. A. F. Fox, for appellee.

**CAMPBELL, O. J.** It is so clear that the unfortunate man who was killed contributed directly to his own death by his incautions

and reckless action that the court properly told the jury the plaintiff was not entitled to recover. It is true that defendant was guilty of a violation of law, in the rate of speed at which the train was run, but this was causa sine qua non, while the causa causans was the imprudence of the person killed, so unmistakable as to authorize the assertion that he was the cause of his death. We sympathize tenderly with the mother, who, in the death of her son, lost her means of support, but have no authority to serve her by permitting any relaxation of the rules of law in her favor. Affirmed.

(99 Ala. 516)

**BALDRIDGE et al. v. EASON.**

(Supreme Court of Alabama. April 27, 1893.)

**JUDGMENT AGAINST PARTNERSHIP.**

A complaint was framed against "B. M. & H., a firm composed of certain named persons 'defendants.'" The judgment was stated as against "B. M. & H.," "defendant." Held, that the judgment was against the firm only, and was binding, therefore, under Code, § 2605, only on the firm property.

Appeal from chancery court, Madison county; Thomas Cobbs, Chancellor.

Bill by William F. Baldridge and Charles H. Halsey against John Thomas Eason to enjoin the sheriff from levying an execution on a judgment recovered by said Eason against the firm of Baldridge, Murray & Halsey. Defendant demurred to the bill, and moved to dismiss the same for want of equity, and also moved to dissolve the temporary injunction. The chancellor sustained the demurrer, and granted each of the said motions. Complainants appeal. Affirmed.

Complainants allege that defendant sued the firm of Baldridge, Murray & Halsey, and recovered judgment by default; that the sheriff, under an execution, is about to levy upon the property of complainants individually; that they had no notice of the suit, never having been served; and that they have a complete legal defense to the same.

Wm. Richardson, for appellants. D. D. Shelby and S. Pleasants, for appellee.

**COLEMAN, J.** One of the main questions presented by the record is whether the judgment recovered by appellee, Eason, in the circuit court, against the firm of Baldridge, Murray & Halsey, was joint and several in its legal effect, as provided in section 2604 of the Code, or a judgment against the firm only, as provided in section 2605 of the Code. We are of the opinion that the pleading and the judgment entry show that the judgment was rendered against the partnership only, and by its partnership name. In the caption of the complaint, the parties are stated as follows: "John Thomas Eason, Plaintiff, vs. Baldridge, Murray & Halsey, a Firm Composed of W. F. Baldridge, Charles

<sup>1</sup>Under this section a judgment against the firm only, and by the firm name, binds the firm property.

H. Halsey, and A. F. Murray, Defendants." There is nothing in the body of the complaint to show that the members of the firm are sued. The summons is as follows: "You are hereby commanded to summon Baldrige, Murray and Halsey, a firm composed of," etc. Under our statutes a suit against William F. Baldrige, A. F. Murray, and Charles H. Halsey, constituting the firm of, or doing business as partners under the name of, Baldrige, Murray & Halsey, is very different from a suit against Baldrige, Murray & Halsey, a partnership composed of, etc. The character of the summons to be issued, and the effect of service of summons, is quite different. A service of the summons issued in this case, served upon either member of the firm, authorized the rendition of judgment against the partnership, under section 2605 of the Code; but to authorize the recovery of a several, as well as joint, judgment, as provided in section 2604, it was necessary to frame the complaint against them individually as members of the firm, and to direct the summons as set out in the complaint, and to execute a copy of the summons and complaint upon each of the defendants. Where the complaint is filed against the defendants as members of the firm, no judgment can be rendered against those not served. Although sued as members of the firm, any evidence of debt by contract which would be admissible in a suit against the firm by its common name would be admissible against them. *Mill Co. v. Smith*, 78 Ala. 108; *Shapard v. Lightfoot*, 56 Ala. 506. The judgment itself, in terms, in this case, is a judgment against the partnership only. The style of the case on the docket is: "1961. John Thomas Eason vs. Baldrige, Murray & Halsey." The judgment entry is as follows: "Comes the plaintiff, by attorney, and the defendant, being solemnly called into court, came not, but made default. \* \* \* It is considered by the court that the plaintiff have and recover of the defendant," etc. Very different results follow when the members of the firm are sued, and judgment recovered, and when the firm is sued by its firm name only, and the judgment is against the firm. In the former, upon proper service of summons and complaint, both the joint and individual property of the members is subject to execution issued upon the judgment. In the latter only the joint or firm property is subject to execution. The statute (section 2605) is rather peculiar, but such has been its uniform construction. *Comer v. Reid*, 93 Ala. 391, 9 South. Rep. 620; *Haralson v. Campbell*, 63 Ala. 278; *Yarbrough v. Bush*, 69 Ala. 170; *Watts v. Rice*, 75 Ala. 289; *Shapard v. Lightfoot*, 56 Ala. 506.

The execution which issued upon the judgment follows the judgment. Its mandate to the sheriff is "that of the goods and chattels, lands and tenements, of Baldrige, Murray & Halsey, defendants, you cause to be

made," etc. The bill charges that the sheriff is about to levy the execution upon the property of the complainants. It denies that they, or either of them, were served with notice of the suit in the circuit court, or that they had notice of the pendency of that suit; denies laches; and sets out facts, for the purpose of showing they have a meritorious defense to the action at law. The bill prays for an injunction. It admits service of copy of summons and complaint upon Murray, the other member of the firm of Baldrige, Murray & Halsey, and the return of the sheriff shows this to be true. The fraud or undue advantage is alleged in the recovery of the judgment at law. Service on one member of the firm was sufficient to authorize the rendition of the judgment. Code, § 2605, and authorities supra. The ground of relief, as stated in the bill, is that plaintiffs were not served with notice. This was unnecessary. The bill is filed under a misapprehension of the character of the judgment rendered in the circuit court. Under this judgment, and under the execution in the hands of the sheriff, no levy can be made on other than the property of the firm. The simple fact that the sheriff threatened or is about to commit a trespass on their property is not cause for equitable interference. The circuit court is invested with full authority to prevent an abuse of its process. *Id.* § 2864. Under the facts of the case, the courts of law afford ample redress. There is no equity in the bill, and the court did not err in so holding. Affirmed.

(99 Ala. 397)

STRINGER v. ALABAMA MIDLAND R. CO. et al.

(Supreme Court of Alabama. April 28, 1893.)  
RAILROAD COMPANIES — ACCIDENT TO PERSON ON TRACK—EVIDENCE—QUESTION FOR JURY.

In an action against a railroad company for personal injuries caused by a locomotive while running in a city, defendant's evidence was that the statute and city ordinances as to speed and signals were duly observed, and that plaintiff was standing or walking on the track, while plaintiff testified that he was merely crossing the track, and that before doing so he had looked and listened, but did not hear any signal; that he could see the track, towards the east, 200 yards, and, towards the west, whence the engine causing the accident came, 40 yards, to a place where a jet of steam obstructed the view; and that he would have heard the signals, if given. A train was momentarily due from the east, while the train which caused the accident was behind time. *Held*, that the question of defendant's negligence, as well as that of plaintiff's contributory negligence, was for the jury.

Appeal from circuit court, Talladega county; Leroy F. Box, Judge.

Action by E. G. Stringer against the Alabama Midland Railroad Company and the Louisville & Nashville Railroad Company for personal injuries caused by a locomotive of defendants. From a judgment for defendants, plaintiff appeals. Reversed.

The assignments of error only go to the ruling of the court upon the charges given and refused. Upon the introduction of all the evidence the court, in its oral charge, among other things, instructed the jury as follows: "The agents who were running the train—the engineer and fireman—were not bound to keep a lookout for trespassers or persons upon the track at that place." The plaintiff excepted to the giving of this part of the oral charge, and also separately excepted to the court's giving each of the following written charges, which were requested by the defendants: (1) "The court charges the jury that there is no evidence in this case showing that the injuries to the plaintiff were caused by the gross negligence of the defendant or its agents." (2) "The court charges the jury that there is no evidence in this case to show that the injuries to plaintiff were caused by the defendant, or its agents, wantonly, recklessly, or intentionally." (3) "The court charges the jury that although they may find from the evidence that Coffee street was a public street in the city of Talladega, and was frequently used by travelers on foot, and occasionally used by travelers in vehicles, and that this fact was known to the defendant's engineer and fireman in charge of the engine at the time the plaintiff's injuries were received, still the defendant would not be guilty of gross negligence, even though its engineer was running at an undue rate of speed, or faster than required by the ordinance of the city of Talladega, and without the statutory signals." (4) "The mere fact that the defendant's train was being run through Coffee street, in the city of Talladega, over which defendant's track was laid by permission from the city, at a faster rate of speed than required by the ordinance of the city of Talladega, and without giving statutory signals, is not sufficient to show gross negligence on the part of the defendant. The undisputed evidence in the case sufficiently shows that at the time the injuries were received the engineer and fireman in charge of the defendant's train did not, and could not, see plaintiff on the track; the view of him being obscured by the steam from the steam drill which was operating near the track." (5) "The mere fact that defendant's train was being run through Coffee street, in the city of Talladega, over which defendant's track was laid by permission from the city, at a faster rate of speed than required by the ordinance of the city of Talladega, and without giving statutory signals, is not sufficient to show gross negligence on the part of the defendant. The undisputed evidence in the case sufficiently shows that at the time the injuries were received the engineer and fireman in charge of the defendant's train did not, and could not, see plaintiff on the track; the view of him being obscured by the steam from the steam drill which was operating near the track." (6) "The court charges the jury that although the defendant's railroad is

constructed through Coffee street, which is a public street in the city of Talladega, by permission from the city, that the plaintiff was trespassing, and unlawfully on said track, if at the time he was injured he was standing on the track, or walking up the track, with his back towards the engine. The undisputed evidence in this case shows that there was sufficient room for plaintiff to walk in the street, without walking up defendant's track; that the railroad track is a known place of danger; and it was inexcusable in plaintiff, if he unnecessarily walked up defendant's track, returning to his place of business, or if he was standing upon the track, looking at the operation of the steam drill, or for whatever purpose. If the evidence in this case shows to your satisfaction that the plaintiff, at the time he was injured, was walking up the defendant's track, with his back or side to the approaching engine, he was guilty of contributory negligence, and cannot recover." (7) "The court charges the jury that notwithstanding they may believe from the evidence that Coffee street was a frequently traveled street in the city of Talladega, used frequently by foot passengers, but not by travelers in vehicles, and, notwithstanding these facts may have been known to the defendant and its employees, this is not sufficient to charge the defendant with actual notice that there were persons, or any person, on the track at the time the accident happened. The circumstances of this case are not sufficient to charge defendant with notice, or with what is equivalent to notice, that there were any persons on the track. The fact that the street is frequently used by passengers on foot, which is known to defendant's employees, and that they occasionally cross and recross the track, is not equivalent to actual notice, under the circumstances of this case, to defendant, or its agents, that there were persons, or any person, on the track at the time the accident happened." (8) "The court charges the jury that if you believe from the evidence that the engine on the defendant's track was being operated at a speed not exceeding eight miles per hour, and that the bell was being rung from the time the engine left West street until it passed the platform where the accident happened, your verdict must be for the defendant." (9) "The court charges the jury that they will consider all the testimony, and will endeavor to arrive at the truth of the matter, as revealed to them from the mouths of the witnesses, or by the physical facts in the case, and by all the circumstances shown by the testimony in the case, and in construing the evidence they must adopt the evidence which seems to them most reasonable, and they must reconcile all the evidence, if they can; and, if they find it impracticable to do this, positive evidence is regarded, in law, as of more weight than negative, and ordinarily, where the witness testifies that he saw the train, or heard the sounds, his testimony is



entitled to more weight than the person who stated that he did not see, or that he did not hear. If, from the testimony, the jury are reasonably convinced that the engine was running at a speed not exceeding eight miles per hour, and that the bell was being rung from West street, where the engine started, to the platform, where the accident happened, then the verdict must be in favor of the defendant." (10) "The court charges the jury that even if the jury should find that the defendant or its agents failed to run the engine as prescribed by the ordinance of the city of Talladega, within eight miles per hour, and failed to give the statutory signals, by ringing the bell and blowing the whistle, while passing through Coffee street, this would be but 'simple negligence' on the part of the defendant; and notwithstanding this, if the plaintiff himself was negligent in entering on the defendant's track without stopping, and looking and listening for the approach of a train, and his negligence contributed proximately to the injuries he received, he cannot recover." (11) "The court charges the jury that, while the law requires of the defendant or its agents reasonable diligence in the operation of its train, it also requires of the plaintiff reasonable diligence for his own protection, and if he entered upon defendant's track at a time when his vision was obscured by the steam from a steam drill, when, by walking but a few steps down the track, he could have had an unobscured view of the track for two hundred or more yards, which would have insured his safety, then he cannot recover." (12) "The court charges the jury that it is not unreasonable that the plaintiff be required to exercise reasonable diligence for his own protection. Every one is bound to know that the track of the railroad company is a known place of danger, and foot passengers, as well as passengers in vehicles, are charged with notice of this fact, and when crossing, or attempting to cross, a railroad track, are required to stop, and look and listen for a train, before entering upon the track, and if they fail to do so, and receive injuries, they cannot recover. And if the view of the track is obstructed, or if the noise of the approach of the train is deadened by other noises, it is all the more incumbent upon the plaintiff to be careful, and see that the crossing is free from danger. If his view is obstructed, and if, as in this case, by taking a few steps, the plaintiff can avoid the obstruction, or get a clearer view of the track for such a distance as will insure his safety, he is guilty of such negligence, in failing to do so, as will preclude his recovery." (13) "The court charges the jury that the plaintiff had no right to walk up defendant's track, or to stand on the track, and if the evidence in this case shows that at the time the injuries were received the plaintiff was walking up defendant's track, returning to his place of business, or was standing upon the track, noticing or watching the operation

of the steam drill, then he cannot recover."

(14) "The court charges the jury that in order to find a verdict for the defendant it is wholly unnecessary that the jury, from the facts in this case, should determine that the plaintiff has testified falsely, or that any of his witnesses have done so. If the testimony of the plaintiff is in conflict with the testimony of other witnesses who saw the accident, and is irreconcilable with their testimony, and with the physical facts in the case, the jury may be authorized to conclude that he was mistaken in his recollection of the circumstances of the accident, and that the injuries he received, to some extent, affect his memory of matters occurring just prior to the accident."

The plaintiff requested the court to give the following written charges, and separately excepted to the refusal of the court to give each of them as asked: (1) "If the jury believe from the evidence that Stringer was injured by the defendant's engine being run against him, and throwing him against the timbers of the platform, and in the ditch, as he was crossing the track, and that just before he went on the track, and when in three or four feet of it, he stopped and looked down, and then turned and looked up the track, and that there was no engine in sight, and that the drill was making so much noise that an approaching engine could not be heard, and if they believe from the evidence that he had time to cross, and would have crossed, the track, safely, if the engine had been running only 8 miles an hour when it struck him, then the jury must give their verdict for Stringer." (2) "To run a train at a high rate of speed, and without signals of approach, at a point where trainmen have reason to believe there are persons in exposed positions on the track, and where the public are accustomed to pass on the track with such frequency and in such numbers (facts known to those in charge of the train) as they will be held to a knowledge of the probable consequences of running at such rate without warnings, will impute to them reckless indifference, and will render their employer liable for injuries resulting from so running said train, and notwithstanding there was negligence on the part of the person injured, and no fault on the part of the servants after they saw, or ought to have seen, him." (3) "If the jury believe from the evidence that Stringer was injured by being run against by defendant's engine, on Coffee street, in the city of Talladega, while passing across or along said street at a point where the trainmen had reason to believe there were persons in exposed positions on the track, and where the public are wont, constantly, to pass on the track in large numbers, and where there was a public warehouse, in use, fronting on said street, from and into which freight was loaded and unloaded across the track on which the engine was being run; that such

point on Coffee street was in a populous district in the city of Talladega, and at such point there was at that time a large force of hands engaged in putting down a sewer in said street, and that there was a dense cloud of steam across said street, which could not be seen through, and that these facts were known to those in charge of said engine, and that such facts were sufficient to give those in charge of the engine reason to believe there were persons in exposed positions on the track, and that when the engine struck Stringer it was running at from 10 to 20 miles an hour, and that the bell was not being rung, nor the whistle blown, and that Stringer's injuries were caused by the running of said engine at such rate of speed without warning,—then such persons in charge of the engine are held, in law, to a knowledge of the probable consequences of so running without warning so as to impute to them reckless indifference, which renders the defendant liable for Stringer's injuries, and it is liable notwithstanding there was negligence on the part of Stringer in so being on the track, and no fault on the part of the engineer and fireman after they saw, or ought to have seen, him, and the jury should render a verdict for Stringer."

(4) "When a railroad runs on or along a public street of a large city, which street is in constant use by the citizens, and where there is a cotton warehouse which fronts on said street, and into and from which all kinds of freight is constantly being loaded, and on and from cars left standing on another track on the other side from the warehouse of such railroad, and where many people are in the habit of rightfully being in exposed conditions on such track at such place, and where these facts are known to those in charge of an engine running on such track at such place, it is wantonness, recklessness, and gross negligence to run such engine at the rate of 15 to 20 miles an hour, without ringing the bell or blowing the whistle; and if one of such persons on the track is injured by such running of the engine he is entitled to recover damages, notwithstanding he may have been guilty of simple negligence by being on such track."

(5) "If the jury believe from the evidence that Stringer was hurt by being run against, and thrown under the platform, by defendant's engine, while he was walking on the track on Coffee street, and that immediately behind Stringer there was a cloud of steam about 15 or 20 feet high, and the same width, which could not be seen through, and that the engine ran through the steam at about 12 to 20 miles an hour, and that the bell was not being rung, nor the whistle blown, and that the platform was used in connection with Stringer & Jackson's warehouse, and that they were constantly engaged in loading and unloading freight from the B. & A. Railroad on skids across the defendant's track to and across the platform, and that

that part of Coffee street was a public street, in constant use, and that a great many people traveled it, then it was gross negligence to so run the engine, and the jury should find their verdict for Stringer, if they so believe that such gross negligence was the proximate cause of his injuries." (6) "It is negligence to run an engine on Coffee street, in the city of Talladega, without keeping a lookout for travelers on such street when there is nothing else requiring the attention of the engineer and fireman." (7) "To run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, and where the public are accustomed to pass on the track with such frequency and in such numbers, and where there is an ungraded crossing in a populous district of a city, (facts known to those in charge of the train,) as that they will be held to a knowledge of the probable consequences of running at such rate without warnings, will impute to them reckless indifference, and will render their employer liable for injuries resulting from so running such train, and notwithstanding there was negligence on the part of the person injured, and no fault on the part of the servants after they saw, or ought to have seen, him." (8) "If the jury believe from the evidence that Stringer was injured by being run against by the defendant's engine on Coffee street, in the city of Talladega, while passing across or along said street at a point where the trainmen had reason to believe there were persons in exposed positions on the track, and where there was a public warehouse in use, fronting on said street, from and into which freight was loaded and unloaded across the track on which the engine was being run, and that such point on Coffee street was in a populous district of the city of Talladega, and that at such point there was at that time a force of hands engaged in putting down a sewer in said street; and that there was a dense cloud of steam across said street, which could not be seen through, and that these facts were known to those in charge of said engine, and that such facts were sufficient to give those in charge of the engine reason to believe there were persons in exposed positions on the track, and that when the engine struck Stringer it was running at from 10 to 20 miles an hour, and that the bell was not being rung, nor the whistle being blown, and that Stringer's injuries were caused by the running of said engine at such rate of speed without warnings, then such persons in charge of the engine are held, in law, to a knowledge of the probable consequences of so running without warnings, so as to impute to them reckless indifference which renders the defendant liable for Stringer's injuries, and it is so liable notwithstanding there was negligence on the part of Stringer in so being on the track."

and no fault on the part of the engineer and fireman after they saw, or ought to have discovered, anything which indicated probable danger to human life, and the jury should render a verdict for Stringer." (9) "When a suit is brought against any corporation it cannot be permitted to deny the right of the person suing to bring and maintain his suit against the corporation by the name in which it keeps its books and accounts, gives receipts and takes receipts, and transacts all of its other business, and by which it is generally known." (10) "If the evidence shows to the satisfaction of the jury that Stringer was injured by defendant's engine running against him upon Coffee street, in the city of Talladega, under such circumstances as does not make him guilty of contributory negligence, then, if the jury believe from the evidence that if the bell had been ringing, or the whistle blown, Stringer would have heard it, and gotten out of the way, the burden is on the defendant to prove that the bell was being rung, or whistle blown; and if the testimony on this point leaves its doubt and uncertainty in the minds of the jury, as to whether or not the bell was being rung, or whistle blown, then the jury should find for Stringer."

Cecil Browne, for appellant. Knox & Bowie, for appellees.

COLEMAN, J. The action is in case, to recover damages for personal injuries. There are two counts in the complaint,—the first, averring simple negligence, as the cause of the injury; and the second, that it was caused "by the gross carelessness, wantonness, or recklessness" of the defendants. The first plea of the defendants presented the general issue of not guilty; the second plea, that of contributory negligence on the part of plaintiff. No question is reserved as to the sufficiency or irregularity of any of the pleadings. No recovery could be had upon the second count, except upon proof that defendants were guilty of having wantonly inflicted the injury, or of such reckless negligence as to be the equivalent of having wantonly or intentionally inflicted the wrong. The place where the injury occurred was within the corporate limits of the city of Talladega, but not at a public crossing, or other place of such character, or under such conditions, as that defendants were chargeable with notice, in the absence of proof of actual knowledge, that there were persons on the track at the time and place where the injury occurred, or a knowledge that the probable consequences of any mere neglect of duty would result in injury. *Railroad Co. v. Webb*, 12 South. Rep. 374; *Railroad Co. v. Lee*, 92 Ala. 262, 9 South. Rep. 230; *Pipe-Works v. Dickey*, 93 Ala. 420, 421, 9 South. Rep. 720; *Railroad Co. v. Chewning*, 93 Ala. 29, 9 South. Rep. 458. The defendants

were entitled to the general affirmative charge upon the second count. *Railroad Co. v. Johnston*, 79 Ala. 436; *Railroad Co. v. Jacobs*, 92 Ala. 192, 9 South. Rep. 320; *Railroad Co. v. Winn*, 93 Ala. 308, 9 South. Rep. 509.

There was no error in refusing the charges requested by plaintiff which were predicated on the assumption that there was evidence sufficient to authorize a finding by the jury that defendants were guilty of wanton injury, or that reckless negligence which is its equivalent, and which would entitle the plaintiff to recover notwithstanding he may have been guilty of contributory negligence.

There was no error in refusing charge No. 2, which seems to have been copied from the opinion in the *Lee Case*, supra. As an abstract proposition of law the charge was correct, but the facts of the case did not admit of the application of the principles of law invoked, and to have given the charge, probably, would have misled the jury.

The evidence is in conflict as to whether the defendants were guilty of simple negligence. That offered by the defendants tended to show due observance of the statute requiring signals to be given when passing through cities and towns, and city ordinances regulating signals and speed of trains, and the evidence of the plaintiff tended to show that both the statute law and city ordinances were disregarded. The weight of testimony and credibility of witnesses present questions to be determined solely by the jury. If the jury should believe the testimony of the defendants on the question of defendants' negligence, there is an end of the case, and plaintiff could not recover. On the other hand, if the jury come to the conclusion that defendants were guilty of negligence which proximately caused the injury, then the question arises as to whether plaintiff was guilty of proximate contributory negligence. On this question the evidence is in conflict. The evidence of the defendants tends to show that at the time plaintiff was injured he was standing on the track, or walking along the track. On the other hand, plaintiff himself testified that he was attempting to cross the track, and, before stepping upon the track, he both looked and listened; that, towards the east, he could see up the track for some 200 yards, and, towards the west, he could see over 40 yards, and to a place on the track where a jet of steam from a drilling machine was thrown upon and across the line of track, which shut off any further vision of the track. Plaintiff further testified that he could have heard the ringing of the bell, or blowing of the whistle, if defendant had complied with the statute requiring signals to be given; and he further testified that he could and would have crossed in safety if the train had obeyed the ordinance of the city limiting its speed while running within its corporate limits. Here, again, the jury

must determine what facts are true. At the place where the plaintiff was injured he had no right to stand upon defendant's track, or walk along the track. His only right was the right of crossing. If he was standing on the track, or walking along it, he was a trespasser. If he was merely crossing the track,—a right he undoubtedly had in the transaction of business,—and had exercised due caution, had looked and listened, and thus assured himself he could with safety venture across, and while in the exercise of the right to cross was injured by the negligence of the defendant, the plaintiff would be entitled to recover. This is the rule, as declared in the case of *Glass v. Railroad Co.*, 94 Ala. 587, 10 South. Rep. 215, and we think it a sound rule, and adhere to it.

It is contended that plaintiff ought to have gone on the west side of the steam jet, so that he could have seen along the track, in that direction, a sufficient distance to have made sure that he could cross with safety. The soundness of this contention depends upon the credibility of other evidence in the case. If, as testified to for plaintiff, the passenger train from the east was momentarily expected, and, according to schedule of time, none was expected from the west, and he had no information that the freight train from the west was delayed, and plaintiff took the precaution to attempt a crossing far enough on the east side of the jet, at a point where he could see the passenger if it was approaching, and far enough away from the jet of steam to safely cross if the trainmen complied with the statute and city ordinances as to speed and warnings, and he both looked and listened for approaching trains, and neither stood upon the track, nor walked along the track, but across the track, only, then it could not be said he was guilty of contributory negligence which proximately contributed to his injury; and if defendants were guilty of negligence in running at an unauthorized rate of speed, or failed to give the proper signals of warning, and their neglect in these respects caused the injury, then plaintiff would be entitled to recover. The rules of law, and city ordinances, regulating warnings and speed in cities and towns, were intended to prevent the infliction of injuries in such and similar cases. On the other hand, if plaintiff was standing on the track, or walking along the track, and, while thus unlawfully using defendants' right of way, was injured, he could not recover, although defendants may have been guilty of negligence in the failure to give warnings of their approach, or to comply with the rate of speed fixed by the ordinance of the city. The evidence shows, without conflict, that defendants were not derelict in duty after a knowledge of plaintiff's peril. The words "gross," "reckless," when applied to "negligence," per se, have no legal significance which imports other than simple negligence, or a want of due care. Our deci-

sions recognize but two grades of negligence, if, indeed, one, strictly and technically speaking, can be regarded as negligence. There is simple negligence, or want of due care, which, when it is the proximate cause of injury, will support an action, and authorize a recovery; the party injured not being guilty of contributory negligence. Then there may be such reckless or wanton disregard of probable consequences, known to the person guilty of the wrong, or under circumstances that knowledge of the probable consequences of his wrongdoing will be imputed to the wrongdoer, as to be the equivalent of a willful and intentional injury, or there may be a negligent omission of preventive effort after knowledge of danger. Proof of the latter character of negligence will authorize a recovery, although the party injured may have been guilty of contributory negligence, unless the contributory negligence on his part is of the same character as that of which the defendant was guilty, in which event he would not be entitled to a verdict. The law, as declared in the headnotes of *Railroad Co. v. Chewning*, 93 Ala. 24,<sup>1</sup> is correct, but the definition of the term "gross negligence" therein given is not found in the text of the opinion, and is not to be received as a universally correct legal definition of the phrase. 16 Amer. & Eng. Enc. Law, pp. 426, 427. In some of the charges given at the request of the defendants the word "gross" was used in the sense of "willful" or "wanton," and in this respect the court erred. Charge No. 9, given for defendants, in which a rule as to positive and negative testimony is laid down, was perhaps misleading, in not predicated equal means of knowledge, and the credibility of the witnesses, but there is no error in giving the charge, which would require a reversal for this cause. *Railroad Co. v. Chewning*, 93 Ala. 81, 9 South. Rep. 458. We believe we have considered every question raised by the record, or which can possibly arise on another trial. Reversed and remanded.

(39 Ala. 411)

**FULLER v. WHITLOCK et al.**

(Supreme Court of Alabama. May 2, 1893.)

**HOMESTEAD—EVIDENCE—TEMPORARY ABSENCE—**  
**RES JUDICATA.**

1. On a bill to restrain a sale of property under execution against complainant's grantor, it appeared that the latter occupied the property as the home of himself and family till March, 1882, when he went to another town, renting a part of the house by the month, and keeping furniture in the other part, and seven months later he sold to complainant. His deposition and that of his wife, taken by defendants, the execution creditors, stated that he did not abandon his homestead rights till he sold to complainant, and that he went away merely temporarily. Another witness testified that the execution defendant claimed the property as his homestead at the time of the sale to complainant, and there was no evidence to the contrary.

<sup>1</sup> But see 9 South. Rep. 458.

*Held*, that the property was the homestead of complainant's assignor till it was conveyed to complainant.

2. The right to object to the proof of one's intention by his own testimony may be waived.

3. Creditors cannot attack a sale of homestead property as fraudulent.

4. Proceedings on a claim by an execution debtor for exemption under the homestead law are not evidence on a contest between a previous assignee of the debtor and the same execution creditor.

Appeal from chancery court, Cullman county; Thomas Cobbs, Chancellor.

Bill by E. L. Fuller against W. R. Whitlock, administrator, and others, to enjoin the sale of a property under execution, and to quiet title thereto. From a decree for defendants, complainant appeals. Reversed.

Brickell, Semple & Gunter and Geo. H. Parker, for appellant.

**HEAD, J.** In 1882, Charles A. Beckert owned and occupied, as his homestead, lot 403, in the town of Cullman, Ala. In March of that year he removed from Cullman to Decatur, Ala., and was there engaged in the service of the United States. On October 30, 1882, he and his wife conveyed the lot by deed to H. P. McIntire for the recited consideration of \$500. On April 20, 1883, McIntire conveyed the lot by deed to Mrs. Ida M. Beckert, who was the wife of said Charles A., for the recited consideration of \$500. On November 16, 1886, Mrs. Beckert and her husband, the said Charles A., conveyed by deed to the complainant, Mrs. E. L. Fuller, a part of said lot, for the recited consideration of \$400, and Mrs. Fuller went into immediate possession and occupation of the part so purchased, and so continued up to the filing of this bill. In November, 1881, the appellee W. L. Whitlock obtained a judgment in the circuit court of Cullman county against said Charles A. Beckert for the sum of \$437.60 and costs, upon which execution regularly issued, on December 23, 1881, to the sheriff of that county, and thereafter other executions were regularly issued, without the lapse of a term, until November, 1883, when one was issued and levied by the sheriff on the said lot No. 403, as the property of the defendant therein, the said Charles A. Beckert. On November 27, 1877, Beckert, who then owned and actually occupied the lot as his homestead, made his declaration in writing, verified by his oath and signed by him, wherein he described the said lot, and claimed the same as his homestead, and as exempt from levy and sale under execution or other process for the collection of debt, and filed the same in the office of the judge of probate of Cullman county for record, and on the 7th day of December, 1877, the same was duly recorded. Again, on the 28th day of February, 1882, he made, and filed and had recorded in the same office, another and similar declaration and claim of homestead in and to said lot. Whitlock, the

plaintiff in execution, contested these claims of exemption by affidavit duly made under the statute, and the matter of the contest depended in court until May 1, 1887, when, upon trial in the circuit court, judgment was rendered in favor of the plaintiff, Whitlock, condemning the lot to the satisfaction of the execution, which judgment, it seems, was subsequently affirmed by this court on appeal. *Beckert v. Whitlock*, 83 Ala. 123, 3 South. Rep. 545. Thereafter, on the 17th day of January, 1888, an order of sale and a *fiel facias* issued on said judgment to the sheriff of said county, who levied the latter on said lot, and was proceeding to advertise and sell the same under the processes in his hands, when this bill was filed by Mrs. Fuller to enjoin the sale of that portion of the lot she had purchased, and to protect and quiet her title to the same. At no time prior to the sale and conveyance of the lot to McIntire on October 30, 1882, nor at that time, was it worth more than \$2,000, the limit of value allowed under our homestead laws.

The case presents but a single question. Was the lot in question still the homestead of Charles A. Beckert when he conveyed it to McIntire, or had he theretofore abandoned it as a homestead? It is not denied that he actually occupied it as the home of himself and family up to March, 1882, and that during that month he left the place, and went to Decatur and engaged as a gauger in the service of the United States. Section 2843 of the Code of 1876, which was in force at the time of these transactions, reads as follows: "When a person has a right of homestead under this chapter or any other section relating to exemptions, a temporary quitting or leasing the same for a period of not more than twelve months, at any time, shall not be deemed to be an abandonment of it as his homestead; but if he shall make and file the declaration and claim, as herein provided, it shall remain subject to same right of homestead as if he had continued in the actual occupancy thereof." It is shown without dispute that Beckert did not lease the place for a period of more than 12 months, but, on the contrary, that he rented a part only of the house to a tenant, by the month, and kept his furniture and effects in another part of the house. It is shown, also, that he had not been absent from the place as long as 12 months when he sold to McIntire. The question then arises, was his quitting the premises temporary or permanent? which means, did he quit with the intention of returning within 12 months, and again occupying the place as a home, or did he intend his removal to be permanent, or to extend beyond a year? The respondents have relieved this question of difficulty of taking and introducing the depositions of Mr. and Mrs. Beckert, which are practically the only testimony in their be-

half touching the question. Directly responsive to interrogatories propounded by respondents, Charles A. Beckert testified as follows: "I did not abandon my homestead rights in that lot until the last portion of it was sold to H. P. McIntire by me. When I left Cullman in May, 1882, I went to Decatur, Ala., in the service of the United States government. I said that I should always consider Cullman my home. I rented a part of the lot containing the house to Otto Cullman. I rented to him by the month. I lived in Decatur something over a year, but was preparing my house in Cullman for a residence and reoccupation during that time." And on cross-examination he testified: "I did regard said lot as my home, and did have some property in the house even until after the sale to H. P. McIntire. I did say, when I went to Decatur in May, 1882, that I was going to stay there temporarily, and I considered Cullman my home. I do not remember now whether I so stated to Mr. Armbruster or not. It was my intention to return to Cullman, as shown by my return. I did so swear on the trial of the contest of exemptions in the circuit court of Cullman county." And Mrs. Beckert, responding to the respondent's interrogatories, testified as follows: "He did not abandon his homestead on said lot. He said that he should consider Cullman as his home, and would return there. The reason of his moving from said property in Cullman is a private family matter, and not connected with this suit. The part of the lot containing the house was rented to Otto Cullman. I do not know for what length of time it was rented. He lived in Decatur, Ala., over a year, in the service of the United States government, but during the latter part of the time he was preparing the house in Cullman for occupancy as a residence." S. L. Fuller, who was examined by complainant, testified: "On the 30th October, 1882, he [Charles A. Beckert] was also in possession, [of the lot in question,] holding and using it as his homestead, occupying a portion of it with his household goods, and William Emnel occupying another part of said lot as the tenant of said Beckert. I know that he occupied it as such tenant, for he was my barkeeper at the time. On or about this date, Charles A. Beckert told me in person that he claimed said lot as his homestead; that he had only left it temporarily, and was at the time having some repairs put on the same. \* \* \* On or about March 18, 1882, Charles A. Beckert got married, and left the same night on a wedding trip to Decatur, and, on account of some trouble with his grown children growing out of said marriage, he remained there some days, and while there received the appointment of United States gauger, and remained at Decatur for some time in that business, living in the house with O. C. Sheets, or kept

house for him, after which he returned to Cullman, and occupied the house and lot in question." Mrs. Fuller's testimony corroborated that of her husband, S. L. Fuller, above stated. What we have stated is practically all the evidence shedding light on the question under consideration. We have seen that the respondents themselves introduced the emphatic testimony of Beckert and his wife as to the former's intention when he left the place and went to Decatur. It is true, under our rulings, that evidence of one's intentions is not admissible against the objection of the party against whom it is sought to be introduced; the rule being that intention must be established as an inference from the conduct of the party and the circumstances surrounding him. It seems that nearly all the states of the Union hold the contrary doctrine. For a full discussion of the subject, see note to *Gardom v. Woodward*, (Kan.) 21 Amer. St. Rep. 310, 25 Pac. Rep. 199. But, whether our rule be the better one or not, we have no doubt that, where intention is the fact to be ascertained, objection to this mode of proving it may be waived, and the evidence, when so introduced, is legal and relevant. Taking this case, then, in the condition we find it, we are forced to conclude that Beckert did not intend to abandon and forfeit his homestead, and that his quitting the premises was temporary, within the meaning of the statute. Such being the case, the lot continued to be his homestead until he sold and conveyed it to McIntire, in October, 1882.

It is immaterial to inquire whether that sale was made with the intent to hinder, delay, or defraud creditors. Being exempt from the payment of debts, the owner could make any disposition of it he chose, and creditors could not complain. This is the well-settled doctrine of this court. *Fellows v. Lewis*, 65 Ala. 343; *Lehman v. Bryan*, 67 Ala. 558; *Wright v. Smith*, 68 Ala. 514; *Alley v. Daniel*, 75 Ala. 403; *Hines v. Duncan*, 79 Ala. 112; *Clark v. Spencer*, 75 Ala. 49, and cases there cited. Besides, if the property was subject to levy and sale at all, the lien of Whitlock's execution was in full force at the time of the sale to McIntire, and was thereafter preserved down to the filing of this bill. That lien, if it had existed, was all efficient to protect the rights of Whitlock, without considering the question of fraud. But the property was the homestead of the debtor, and there was neither execution lien upon it, nor a right in any creditor to attack its sale as fraudulent. It is obvious that the judicial proceedings in the matter of the contest of the claim of exemptions was *res inter alios acta* as to the complainant. *Beckert v. Whitlock*, 83 Ala. 123, 3 South. Rep. 545. The decree of the chancellor is reversed, and a decree will be here rendered granting the relief prayed by the bill.

(39 Ala. 526)

## TRUFANT et al. v. HUDSON et al.

(Supreme Court of Alabama. April 28, 1893.)

## ADVERSE POSSESSION—NOTICE.

1. In an action to quiet title, where the adverse possession of defendants and their grantor is not within the statutory period unless tacked onto that of a prior vendor, and there is evidence that he went into possession in 1852, and cultivated the land until he sold it, paid taxes, and scheduled it as assets of his insolvent estate, but in 1868 wrote letters to plaintiffs' ancestors tending to show that he held permissively under them, it is for the jury to say whether his title was in fact adverse.

2. After such recognition, though he was in open and continuous possession for 10 years, claiming the land as his own, and his possession was transferred to defendants' grantor, and she transferred it to defendants, his possession cannot be counted in computing the time if the party to be affected thereby had no actual notice of such adverse claim.

3. It is not reversible error to give instructions which are argumentative.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Ejectment by Jane Trufant and others against L. C. Hudson and others to recover lot No. 215 on the map of the town of Florence, Ala. There was judgment for defendants, and plaintiffs appeal. Reversed.

The plaintiffs sue as heirs of J. J. Hanna, deceased, and the defendants constitute the firm of J. B. White & Co. The plaintiffs rest their claim to the property sued for upon the following chain of title, which was shown by the bill of exceptions: In the year 1824 there was granted unto L. Pope and several others, as trustees of the Cypress Land Company, a patent from the United States government for the fractional section 14, in township 3, of range 11 W., a part of which was lot 215, now sued for. Upon the organization of the Cypress Land Company these trustees transferred to said company, together with other property, the patent to fractional section 14. By the articles of association it was provided that the property should be divided into lots, streets, alleys, etc., and that agents and attorneys should be appointed to sell and convey by deeds to the purchasers of said lots from the Cypress Land Company. Purporting to act under a power of attorney granted by the association, James Irvine and Peter Anderson sold and transferred unto Sarah Hanna and Thomas Childress lots 214 and 215, as laid down in the plan of the town of Florence. Thomas Childress and Sarah Hanna, by deed duly executed, conveyed the lots 214 and 215 to James J. Hanna by deed duly executed, and dated December 12, 1833. Said James J. Hanna remained in possession of the same up to the time of his death, which occurred in January, 1867. The plaintiffs are his heirs, and now claim in that capacity.

The plaintiffs introduced evidence tending to show that Thomas Childress had had possession of the lots sued for during his lifetime, until he conveyed the same to J. J. Hanna.

The plaintiffs introduced in evidence the deposition of Mrs. Mary Hanna, who was the wife of Alex. J. Hanna, son of James J. Hanna. In her deposition Mrs. Mary Hanna testified as to certain letters which she had found among her husband's papers. These letters were addressed to Alex. J. Hanna, and were written by John W. McAllister, from whom the defendants derive their title. These letters were attached as exhibits to Mrs. Hanna's deposition, and showed that John McAllister had control of the said lands as the agent of J. J. Hanna, and recognized the right and title of his heirs to the same. In one of his letters, dated April 3, 1868, John McAllister stated: "I have two lots under fence which your father, when last here, informed me belonged to him. I think he told me they belonged originally to his mother. They are like most other lots in the place,—of but little value. I am willing to give for them what they are worth." In response to the letter written by A. J. Hanna in answer to the above letter of J. W. McAllister, in May, 1868, McAllister again referred to the said lands as belonging to A. J. Hanna's father, and said that, not having found them among the deeds of his father, he would examine the records for the same. On July 17, 1868, A. J. Hanna received another letter from McAllister, in which he again acknowledged J. J. Hanna's title to the property. Plaintiffs introduced evidence tending to show that during his lifetime John W. McAllister had never renounced to any of them or disclaimed their title to said land, or had ever given them any notice of any adverse claim or possession on his part to said lot. It was also further shown that neither of the plaintiffs knew anything about the lands in controversy until the letters of McAllister were found among A. J. Hanna's papers, just before the suit, and that suit was brought immediately on finding the letters. The record shows that the present suit was instituted on May 3, 1888. The defendants, as is stated above, traced their title from John W. McAllister, and they introduced in evidence a deed from John W. McAllister to Kate W. McFarland, dated March 1, 1879, in which McAllister conveyed, among several other lots, the one here sued for. The defendants then offered in evidence a deed from Mrs. Kate McFarland and her husband to them, (J. B. White & Co.,) conveying the land here sued for. This deed was dated February 15, 1887. The defendants offered in evidence a petition of McAllister & Irvine, a firm composed of John W. McAllister and James B. Irvine, as partners, and of the individual members of said firm, praying to be adjudged voluntary bankrupts. In a schedule attached to this petition, in which petitioners claim property exempt to them, there was lot 215, the lot in controversy, scheduled as the property of J. W. McAllister. This petition and schedule were filed in March, 1877. In neither said

petition nor in said amended schedule was the name of any of the parties to this suit mentioned, reported as a creditor, or referred to in any manner. The plaintiffs objected to the introduction of said petition and schedule in evidence upon the grounds "that, none of the plaintiffs being parties to said proceedings in any manner, they could not be bound by said proceedings, or any matter or thing connected with or growing out of the same; that it being shown by the testimony that said McAllister had acknowledged the title of plaintiffs and those through whom they claimed, and admitted that he held said lot in subordination to said title, his possession of said lot could not become adverse to plaintiffs without notice brought home to them; that he renounced and repudiated their title; and that said bankrupt proceedings offered in evidence constituted no notice of such renunciation of any adverse holding by him; and that such evidence so offered was irrelevant to any issue in this cause." The court overruled these objections, allowed the same to be introduced in evidence, and the plaintiffs duly excepted. The defendants then offered in evidence, against the similar objections and exceptions of plaintiffs, a certified transcript from the district court of the United States for the northern district of Alabama, which showed that McAllister & Irvine, as a firm and as individuals, were adjudged as voluntary bankrupts, and that there was allowed them, among other exempt property, lot 215. The defendants then offered in evidence the state and county tax books of Lauderdale county from the years 1869 to 1879, showing that with the exception of the years 1875, 1876, and 1877, when said lots were not assessed to him nor any one else, John W. McAllister had given in for taxes in his own name several lots in the town of Florence, among which was lot No. 215. The plaintiffs objected to the introduction of said tax books in evidence upon the grounds "that the same were irrelevant to any issue in this cause and illegal; and that, it being shown by the evidence that said John W. McAllister had recognized and acknowledged the title of the plaintiffs and those through whom they claim to said lot, and admitted that he held said lot in subordination to their said title, his possession of said lot could not become adverse to plaintiffs without notice brought home to them, that he renounced and repudiated their said title; and that such assessments of taxes by him constituted no notice of such adverse holding or of said renunciation by him; and that it was incompetent to show by said assessments of lots to said McAllister, in his own name or by the assessment of other lots by him, in his own name as trustee or agent, that he held, or claimed to hold, the lot in this suit adversely or in hostility to the title of plaintiffs." The court overruled said objection, admitted said evidence alone to show the character of John

W. McAllister's possession, and for no other purpose, and so instructed the jury. The plaintiffs then and there excepted to this ruling of the court. The defendants then offered to introduce, against the similar objection and exception of the plaintiffs, the testimony of the tax collector of Florence that the municipal tax books of the city of Florence for the years 1861 to 1881 were lost, but that with the exception of the years 1875, 1876, and 1877, when said lots were not assessed to him, John W. McAllister had given in for taxes in his own name several lots in the town of Florence, among which was lot 215, here sued for. The defendants introduced several witnesses whose testimony tended to show that John W. McAllister had had possession of the lot involved in this suit from as far back as 1851 up to the time he sold it to Mrs. Kate McFarland, and that he had cultivated it, raising vegetables thereon, and had used it as his garden; that it was inclosed from 1861 to 1869; that he had offered to sell it to some of witnesses; that he spoke of the lot as his, and acted with respect to it as he did to lots which he owned. These witnesses further testified that he claimed this lot as his, but did not state how he claimed or held it; that his possession, after the month of July 1868, was just the same in character as it had been before 1868. The plaintiffs moved to exclude the testimony of these witnesses in relation to the possession of said lot by McAllister, and the fact that he claimed the same as his own, upon the ground that it had been shown by the evidence that said McAllister recognized and acknowledged the title of the plaintiffs, and those through whom they claimed, and that said evidence is not competent to show that McAllister recognized the superior title of the plaintiffs and those through whom they claim. The court overruled this objection, and the plaintiffs duly excepted.

At the request of the defendant, the court gave the following charges, to the giving of each of which the plaintiffs separately excepted: (2) "If the jury believe from the evidence that any time before the commencement of this suit John W. McAllister was in open, notorious, and continuous possession of the lot in controversy for ten years, claiming the same as his own, and that his possession was transferred to Kate W. McFarland, and her possession was transferred to defendants, then the defendants have established the defense of adverse possession of ten years, and are entitled to a verdict." (3) "If the jury believe from the evidence that the possession of John W. McAllister was transferred to Kate W. McFarland, and that the possession was transferred to defendants, then the said successive possessions may be counted together in computing the time; and if the jury find from the evidence that at any time said successive possessions together were open, notorious, adverse, and



continuous for ten years, claiming the lot as their own, then the defendants are entitled to a verdict." (4) "To constitute adverse possession, it is not necessary that the party to be affected thereby should have actual notice of the same." (5) "A nonresident is affected by the adverse possession of his landlord in this state to the same extent as a resident, and the same facts which would carry home to a resident notice of such adverse possession would carry such notice home to a nonresident." (6) "The statute of limitations is a statute of repose, and should be upheld and enforced by the courts and juries with a steady hand." (7) "Statutes of limitations are enacted in the interest of repose. Their remedial provisions are never construed narrowly. They rest on the presumption that meritorious (?) are not allowed to slumber until human testimony is lost or human memory fails. I charge you, therefore, that they should be upheld with a steady hand." (11) "If the jury believe from the evidence that John W. McAllister was in the open, notorious, and continuous adverse possession of the land sued for more than ten years after the letter of July 7, 1868, was received by Alex. J. Hanna, and before the bringing of this suit, claiming said land as his own, then I charge you that the plaintiffs' right of action is barred, and your verdict must be for the defendants." (12) "If the jury believe from the evidence that McAllister held open, notorious, and continuous adverse possession of the lot in controversy, claiming the same as his own, from 1852 till 1868, then the title of defendants had become perfect by the continuance of the adverse possession." (15) "If the jury find from the evidence that the letters of John W. McAllister to Alex. Hanna referred to 'two lots on the opposite corner towards the river,' and that the lot in controversy (lot 215) was not on the opposite corner towards the river, but was on Court street, beyond Limestone street, and that lots 214 and 215 were nearer to McAllister's residence than it, they have a right to take these facts into consideration in determining which lots McAllister referred to."

Emmet O'Neal and Thos. B. Roulhac, for appellants.

**McCLELLAN, J.** The only defense made to this action is that of adverse possession. It is not controverted that plaintiffs have a perfect chain of muniments of title to the land. The possession of the defendants, and of their immediate vendor, Mrs. McFarland, was for a less period than 10 years, before suit brought; hence the defense cannot be made out without tacking Mrs. McFarland's possession onto that of McAllister, from whom she purchased, which, of course, must have been adverse to the plaintiffs, and continued, impressed with that character, to the sale to, and putting in possession of, said vendee, or without proof that before such sale

McAllister's adverse possession had been continued for the statutory period, and thus ripened into a perfect title in him. So there were really but two questions in the case, the resolution of either one of which in defendants' favor entitled them to a verdict and judgment, namely: First, was McAllister's possession at the time of the sale to Mrs. McFarland adverse to the plaintiffs, and had it at that date been adverse for a length of time which, added to the possession of Mrs. McFarland and defendants, makes out the statutory period, the adverse character of the possession subsequent to McAllister's being confessed? and, second, if McAllister's possession was not at that time adverse, had he, for any prior period of ten years, had such adverse possession as vested him with the legal title which, in the absence of a conveyance by him, or a subsequent holding by him as tenant or agent for the plaintiffs, or in subserviency to them, for the statutory period, remained and was in him when he sold and conveyed to Mrs. McFarland?

The evidence for the defendants tended to show that McAllister went into possession of the land in 1851, and from that time till his sale of it to Mrs. McFarland he continued in the possession, exercising acts of ownership over it, treating and using it as if it belonged to him, and claiming to own it. On the other hand, certain letters written by him in April, May, and July, 1868, to the executors of plaintiffs' ancestor, were, together with a letter in reply to one of them, written by one of the executors in May, 1868, introduced by the plaintiffs, and tended to show that at that time—that is, at least from April 3, to July 17, 1868—McAllister recognized the title of plaintiffs as paramount, and held permissively under it. We say these letters tended to show the subserviency of McAllister's possession, because whether they did show it or not was a question for the jury. They amount merely to written admissions of fact for the consideration of the triers of the facts. They are not such writings as the trial court should have interpreted and declared the effect of as matter of law. These admissions were for the consideration of the jury, in two respects. On the one hand, they went to show that McAllister's possession from 1851 to 1868, though having all the visible indicia incident to ownership, was not in truth held under a claim of right in himself, and hence was not adverse to the title of the plaintiffs. Viewed in this connection, it was open to the jury to find either that McAllister's possession had not, up to that time, been of a character to vest the legal title in him, or that it had been adverse, and therefore that he had a perfect title when the letters were written. If they reached the latter conclusion, that title continued in McAllister, and passed by his conveyance through Mrs. McFarland into the defendants, unless from 1868 on he held possession for a period of 10 years as the ten-

ant at will, or agent or otherwise permissively, under the plaintiffs, the effect of which would be to revest the title in them. *Allen v. Mansfield*, 82 Mo. 688; *Unger v. Mooney*, (Cal.) 49 Amer. Rep. 100; *Echols v. Hubbard*, 90 Ala. 309, 7 South. Rep. 817; *Hoffman v. White*, 90 Ala. 354, 7 South. Rep. 816; *Atkinson v. Patterson*, 48 Vt. 750; *Williams v. Pott*, L. R. 12 Eq. 149. In determining whether the possession of McAllister after July, 1868, was that of the plaintiffs, in the sense necessary to divest out of the former, and invest in the latter, the title acquired by McAllister's possession prior to April 3, 1868, if they found that such prior possession was of a character and duration to ripen title in him, it was competent for them to look at the evidence introduced by defendants with reference to the payment of taxes on the land as if it were his own by McAllister, and to the fact that he scheduled this land among his assets in the bankruptcy proceeding, and claimed it therein as exempted to him; and it follows, of course, that the court did not err in overruling plaintiffs' objection to this evidence. The other aspect in which the admissions contained in the letters were for the consideration of the jury was this: If they found that McAllister's possession prior to April 3, 1868, had not for a period of 10 years been adverse to plaintiffs, it then became a matter of controlling importance, of course, to determine whether his subsequent possession was adverse, either of itself for the statutory period, or for a sufficient length of time next before the inception of Mrs. McFarland's possession as, with the term of her holding and that of the defendants, would amount to 10 years. The bankruptcy proceedings and the payment of taxes, we may remark incidentally, were also competent in this connection, as a part of the proof necessary to impress this subsequent possession with an adverse character. But it was only a part. If, in this event, the jury found from the correspondence between McAllister and Hanna that the former's possession at that time was held in subordination to, and in recognition of, the title of plaintiffs, or permissively under them, they could not find that McAllister's subsequent possession was adverse to the plaintiffs without proof—evidence satisfactory to them—that it was held in hostility to plaintiffs' title, and that the fact of such hostility, involving a repudiation of the permissive or subordinate character of the possession as it existed in 1868, was brought home to the plaintiffs 10 years before this suit was instituted. Being in the possession as the tenant or agent of plaintiffs, or holding in any way for them, and in recognition of their title, in July, 1868, they had a right to assume that the character then impressed on the possession by these facts continued so long as it was not disavowed or repudiated, and the disavowal or repudiation brought to their knowledge; and their failure to as-

sert their title under these circumstances is to be ascribed to their continued willingness that McAllister should hold for them and in their right, and not to their acquiescence in his wrongful disseisin, since knowledge is always an essential element in acquiescence, and knowledge of a wrong must always be shown before a party can be said to have lost his right to redeem it by delay in its assertion. Where there are no relations between the owner and the party in possession,—nothing upon which the possession can be referred to the owner's right,—he is presumed to know of its wrongful character, knowing, as he must, of the fact of possession; but where a relation does exist upon which the possession is referable to the title, the holder of that title is justified in assuming that the possession is subordinate thereto, and held in recognition thereof, until he knows to the contrary. No kind or degree of actual hostility will of itself convert such a permissive into an adverse possession; no sort of claim of ownership on the part of the party in possession will of itself have this effect; and while it may be open to the jury in some cases to find from the circumstances of the possession that the owner had notice of its hostile and exclusive character, no exclusiveness of possession, no hostility, no claim of right antagonistic to the title, will necessarily in any case take the place of direct proof of knowledge on the part of the owner that the possession is no longer held in subserviency to him. At most, in any case, the circumstances of hostility, exclusiveness, and claim of right are only for the jury to consider as tending to show knowledge on the part of the owner; the argument being that the circumstances of the possession were such as that he must have known them, and from them that the possession was no longer held under him, and in recognition of his title. *Iron Co. v. Roberts*, 87 Ala. 436; *Burrus v. Meadors*, 90 Ala. 140, 7 South. Rep. 469; *Baucum v. George*, 65 Ala. 259; *Railway Co. v. Davis*, 91 Ala. 619, 8 South. Rep. 349; *Bernstein v. Humes*, 78 Ala. 142; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 South. Rep. 570.

When brought to the touch of the foregoing views, charges 2, 3, and 4 given for the defendants are affirmatively bad. They each require the jury to find for the defendants if they should believe that McAllister's possession was open, notorious, and held under a claim of right in himself, though the jury might also believe that the plaintiffs had no knowledge whatever that he asserted any claim to the land except under and in subserviency to their title. Charge 11 given for defendants was misleading, and should not have been given. Of course, if McAllister was in the open, notorious, and continuous adverse possession for 10 years after the last recognition of plaintiff's title by the letter of July 7, 1868, he had title; but the jury would probably have understood the word

"adverse," as used in this charge, to mean a claim of ownership in hostility to the plaintiffs, when such claim, without proof of plaintiffs' knowledge of it, would not render the possession adverse to them. Charges 6 and 7 given for defendants are mere arguments. The court was under no duty to give them, but its action in so doing would not work a reversal of the case. Charge 12 was misleading; indeed, it was invasive of the province of the jury. If the jury had found that McAllister's possession between 1851 and April, 1868, had vested title in him, it would not necessarily follow that this title remained in him, and passed to Mrs. McFarland, and from her to the defendants, as the charge in effect declares. As we have seen, it was open to the jury to find that, if McAllister really had title in 1868, it had reverted in the plaintiffs before the deed to Mrs. McFarland was executed through 10 years' continuous possession by McAllister subsequent to July 17, 1868, under and in subordination to the plaintiffs. Charges 5 and 15 given for defendants are unobjectionable, except that the latter is argumentative.

Reversed and remanded.

(98 Ala. 241)

BEITMAN v. STEINER et al.

(Supreme Court of Alabama. May 2, 1893.)

NEGOTIABLE INSTRUMENTS — CONSIDERATION — FICTITIOUS ISSUE OF CORPORATE STOCK — AGREEMENT TO PURCHASE.

1. Though Const. art. 14, § 6, provides that all fictitious increase of stock by corporations shall be void, where a fictitious increase is authorized before any stock is issued, and all of the certificates are issued at the same time, and purport to represent a gross capital, double in amount to the actual capital, each certificate entitles the holder to share in the assets of the corporation in the proportions his certificate sustains to the whole issue, and the whole issue sustains to the actual capital, so that a note given for such certificates, at 50 cents on the dollar, by one with knowledge of the fictitious issue, is not void for want of consideration. *Williams v. Evans*, 6 South. Rep. 702, 87 Ala. 725, distinguished.

2. The contract to purchase the stock, though the latter was illegally issued, is not illegal.

3. It is not unlawful per se for a number of persons, by previous agreement, to buy stock of a corporation to control its policy, elect its officers, etc.

4. Corporate stock, though originally issued by the corporation without consideration, is not necessarily void.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

This was a suit brought by Steiner Bros. against J. Beitman to recover the amount alleged to be due on a promissory note given by defendant for certain shares of the capital stock in the Birmingham, Powderly & Bessemer Railroad Company. There was judgment for plaintiffs, and defendant appeals. *Affirmed.*

The defendant filed nine pleas. Demurrers were interposed to these pleas, and the present appeal presents for review the rulings of the court upon the demurrers. The demurrer was overruled as to the second plea, and issue was joined thereon. By the first plea the defendant set up, by way of set-off, the damages sustained by the alleged breach of a contract, or of the duty arising out of a contract, to the effect that Steiner Bros. should, with the defendant, so manage the Birmingham, Powderly & Bessemer Street Railroad Company as would benefit the defendant and plaintiffs; and that plaintiffs conspired with B. Steiner, who was the president of the corporation, to have the corporate property placed in the hands of a receiver, when there was no occasion therefor, in which they were successful; and that the stock which plaintiffs sold the defendant was valueless, as the result of such arrangement. The substance of the 3d, 4th, 5th, 6th, and 9th pleas is sufficiently stated in the opinion. The 7th plea sets up that the stock for which the note was given was a part of the stock purchased by plaintiffs, together with the defendant and others, under an agreement between the plaintiffs, the defendant, and others, to obtain the majority of the stock in the Birmingham, Powderly & Bessemer Street Railroad Company, in order that they might control the election of officers of said company, and to control and manage it for the benefit of the plaintiffs. The 8th plea sets up that, of the 53 shares for which the said note was given, 40 were issued by said company to one E. Lesser, without consideration, which fact was known to plaintiffs, or without money or anything else of value, and transferred by E. Lesser to plaintiffs, and by plaintiffs to defendant, as a part consideration of said note; and that the remaining shares, 13 in number, were originally issued to one Vincent Loveless, without consideration, which fact was known to plaintiffs, and by him transferred to the plaintiffs, and by plaintiffs to defendant, as a part consideration of said note; and that all of said shares of stock, as pledged by the defendant to plaintiffs, at the time of the execution of said note, were never in fact delivered to said defendant. The plaintiffs interposed several grounds of demurrer to these several pleas. Some of the grounds of each demurrer were sustained to each of said pleas. The grounds of demurrer to the first plea, which were sustained by the court, show that the act of plaintiffs in having said company placed in the hands of a receiver might have been for the best interest of said company and the stockholders thereof, for aught that appears in said plea, and that it did not appear that there had been any breach of the alleged agreement between the plaintiffs and the defendant. The grounds of demurrer to the 3d, 4th, 5th, 6th, and 9th pleas, which were sustained, were, in sub-

stance, that the facts set up in said pleas did not show either want of consideration or illegality in the contract, and that defendant had the right to buy of plaintiffs stock which had been fraudulently and fictitiously issued to them, if he chose to do so, and if there was no fraudulent misrepresentation of the facts to the plaintiffs. The grounds of demurrer to the 7th and 8th pleas were, in substance, that the transactions set up therein were not illegal in themselves; but, if they had been, the giving of said note was only collateral to the transaction; and that it appears that the defendant fully understood all the facts existing at the time the purchase of the stock was made.

Ward & John, for appellant. Cabaniss & Weakley, for appellees.

McCLELLAN, J. This is an action by Steiner Bros. against Beltman. The complaint, as amended, contains a count on a note executed by defendant to plaintiffs, and common counts for money paid, etc., for money due by account, and for money due by account stated. Of these only the first count is important, as the questions reserved for our consideration arose on the sufficiency of certain pleas which went to the cause of action laid specially therein.

The main question is presented on the following facts, which are set up in the pleas, and relied on as showing the absence of consideration for the promise sued on: The defendant purchased from the plaintiffs 53 shares of the capital stock of the Birmingham, Powderly & Bessemer Street Railroad Company, of the par value of \$50 per share, and executed to them the note sued on for the price thereof, which appears to have been about 50 per cent. of the face value of the shares. The authorized capital stock of the company was \$100,000, and this amount was subscribed by plaintiffs and others, but, before the certificates were issued, the stockholders met, and resolved to increase the capital stock of the concern to \$200,000, and to divide out the additional shares among the original subscribers, so that each subscriber to the original capital of \$100,000 would receive double the number of shares he had subscribed and (presumably) paid for, the increase being in the nature of a bonus, for which nobody paid anything. The certificates issued to plaintiffs and sold to defendant by them were of this, the only, issue of stock made by the company. Plaintiffs knew the foregoing facts—indeed, had participated in the proceedings by which the certificates of shares had been doubled, without any increase in the capital of the corporation—when they sold their shares to the defendant; and the latter also, it is to be presumed from the absence of any negation of knowledge in the plea, knew that the stock he purchased of

the par value of \$2,650 represented only half that sum in actual capital. There can, of course, be no doubt that the fictitious increase of the capital stock of the corporation, adding, as it did, not one penny to its capital, could not under our laws afford a predicate or basis for the issuance of certificates of shares beyond the capital actually subscribed and paid or to be paid in; and that, in so far as the certificates which were issued are rested upon or purport to represent capital beyond the \$100,000 actually subscribed and paid, they are utterly void. But, where there has been an excess of stock certificates over the real capital of a corporation attempted to be authorized and issued, our laws do not avoid the entire issue. The vitiating operation of the constitutional provision is confined to the fictitious excess. The language is: "All fictitious increase of stock or indebtedness shall be void." Const. art. 14, § 6. Where the excess of certificates beyond the actual capital is issued separately from the certificates which truly represent that capital,—where, in other words, subsequent to the issuance of certificates which are authorized, the stock is increased without a corresponding increase of the capital itself, and certificates therefor are issued,—such certificates are void, but the original certificates are as valid for all purposes as if the fictitious increase had not been attempted at all, and the holders of them are entitled to share in the business and assets of the concern accordingly. Nor can it be material that such holders have also subscribed for and taken the worthless certificates. The viciousness of the one would not impair the validity or value of the other. Where, however, as in this case, the fictitious increase is formally authorized before any stock is issued, and all of the certificates are issued and delivered to the subscribers at the same time, and purport to represent and rest on a gross capital, equal in amount to the actual and fictitious capital combined, it is, of course, impracticable to separate the good from the void certificates, or to say that any particular certificate of stock is solely based on actual capital, or on feigned capital only, and therefore is wholly good or wholly bad. Yet while, in such case, no certificate can be said to represent its face value, or to entitle the holder to share in the incomes and assets of the corporation to the full extent of the amount it purports to evidence, on the other hand it is equally clear that such certificate is in part based upon actual property, and represents in some amount actual capital in which the holder has a right to share in the proportions his certificate sustains to the whole issue and the whole issue sustains to the actual capital. It is certain, on the facts disclosed in these pleas, that \$100,000 had been paid in, and was held by the corporation as its capital. It is equally clear that this fund belonged to the holders of the \$200,000

of shares, to the same extent and in the same sense it would have belonged to them had no fictitious increase of shares been attempted to be authorized and actually issued. It is manifest, too, that the several interests of the stockholders in this fund are determinable by reference to the number of shares of stock they respectively hold, just as if the whole issue was in all respects valid. The sum of the shares held by each marks the extent of his interest, and is his muniment of title. Precisely double the number of authorized certificates having been issued to each subscriber for the stock, the relative share of each subscriber in the corporate capital is neither increased nor diminished by the duplication. Each has the interest he controlled and paid for, albeit it may appear by the face of the paper evidencing his interest that the fund is twice what it really is, and hence, nominally, that his aliquot share thereof is double his real interest. In other words, each subscriber agreed to receive, and did receive, two shares, worth 50 per cent. of their face value, instead of one share at par. It was so with the plaintiffs. The defendant knew all the facts relative to the fictitious increase of shares. He knew that the certificates plaintiffs offered to sell him were based on an actual capital amounting to only 50 per cent. of the nominal capital, represented in part by those certificates, and, in view of these facts, he purchased plaintiffs' stock at 50 cents on the dollar. There was no concealment, no misrepresentation. He received precisely what he contracted for and agreed to pay for; and the certificates which were transferred or were to be transferred to him entitled him to exactly the same interest in the corporate capital, as between himself and the other stockholders and the company, as if there had been no duplication of shares, and he had paid the sum of money he agreed to pay for one-half the shares of stock he received.

The facts alleged fall far short of showing that there has been any want or failure of consideration in whole or in part for the note sued on. Possibly the fictitious increase might afford grounds for a writ of quo warranto against the persons purporting to form and constitute this company; but, even in that event, the defendant would be entitled to the share in its property which is represented by the certificates he purchased. Possibly, also, creditors of the corporation might call upon the stockholders to make good the difference between the actual capital and that represented by the fictitious increase of its stock; but, if so, this is a liability which the defendant voluntarily and knowingly assumed, and exemption or freedom from it constituted no part of the consideration for the promise upon which this action is based. In any aspect of the facts, and in every contingency which may arise upon them, the whole consideration for defendant's promise

has moved to him, and he must pay therefor, unless, notwithstanding he has received what he bought, it would be against public policy to enforce his obligation to pay for it. And in this connection it is insisted that, inasmuch as the stock which constituted the consideration for the note was issued in violation of the constitution, it was an illegal consideration, and, though of the precise actual value contemplated by both parties to this transaction, it cannot support defendant's promise to pay. The position is not well taken. The contract sued on, neither in itself nor in its completest effectuation, involved any illegal act on the part of the plaintiffs or the defendant. The excessive issue of stock, which is the only illegal act brought to light in these pleas, was fully accomplished before this sale to the defendant. The plaintiffs' right to enforce defendant's obligation to pay for the property sold to him does not depend upon proof of this excessive issue or any other illegal transaction. The right is wholly apart from the alleged illegality. In such case the rule is that, notwithstanding the prior consummated illegal transaction, out of which may have resulted an infirmity in the subject-matter of the sale, going to lessen its value, though even that is not true as between these parties, the contract of sale and purchase will be enforced, since the right to do so does not rest upon the original illegality, and may be effectuated without proof of the previous transaction which the law forbade. The case is clearly within the test declared by this court for determining whether a contract attacked for illegality is capable of enforcement; of which it is said that the inquiry "is whether the plaintiff requires the aid of an illegal transaction to support his case. If he does not,—if he has rights originating in a transaction not offensive to law,—and has a right of recovery independent of an illegal transaction, such transaction, though he may have participated in it, cannot be employed to defeat him." *Ware v. Curry*, 67 Ala. 274, 283; *Smith v. Dinkelspiel*, 91 Ala. 523, 531, 8 South. Rep. 490. And the same doctrine is thus declared by Judge Story: "If any act in violation of either statute or common law be already committed, and a subsequent agreement be entered into which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid." Story, Const. § 760. And to the same effect, and illustrative of the principle, are the following authorities: 2 Kent, Comm. 588; *Buck v. Albee*, 26 Vt. 184; *Randon v. Toby*, 11 How. 493; *Thornburg v. Harris*, 3 Cold. (Tenn.) 163. This case is clearly distinguishable in the matter under consideration from that of *Williams v. Evans*, 87 Ala. 725, 6 South. Rep. 702. The enforcement of the contract there sued on necessitated and involved the doing of an illegal act. The plain-

tiff had subscribed for stock in a corporation which undertook to issue five dollars of stock for every dollar of its actual capital. Before the stock was issued, however, "plaintiff sold \$1,000 [or ten shares] of the original stock, and gave the defendant an order on the corporation to issue to defendant fifty shares of said company's stock, which was the amount called for by the \$1,000 of original subscription, and to transfer the same to the defendant on the books of the company." The sale of this stock to be issued, the illegal issuance being necessary to a consummation of the contract of sale, was held invalid, the decision being expressly put on this ground, and the court saying: "A contract which contemplates the violation of a statute or a constitution, as a mode of executing such contract, is illegal and void. It is based on an unlawful consideration, and, if executory, cannot be enforced." In the case at bar the contract is not executory. The defendant has received the certificates of stock which he bought. It did not contemplate the violation of any law as a mode of its execution, and no law was violated in its execution. It differs from the contract involved in the case referred to in the two matters upon which that case was decided; that is, it is not based on an unlawful consideration, and it was not dependent upon any act subsequent to its being entered into for consummation. The demurrers to the pleas which set up want and failure of consideration and illegality of consideration were properly sustained.

These pleas and the demurrers to them presented the main, if not the only real, issue which arose on the pleadings. Little need be said of the rulings on demurrers to other pleas. The first plea was patently bad, in failing to sufficiently aver a damnifying breach of the contract it attempts to set up. The seventh plea was bad, in that it does not appear from its averments that the agreement upon which reliance is had was an illegal agreement. It is not per se unlawful for a number of persons, by previous agreement, to buy shares of the stock of a corporation for the purpose of controlling its policy, electing its officers, etc. The carrying out of such agreement may, indeed, be most advantageous to the corporation and all its stockholders, and it does not appear by this plea that such was not the effect of this agreement. The eighth and last plea is bad, in that, notwithstanding the stock plaintiff purchased may have been originally issued to Lesser and Loveless by the company, without consideration, it may yet have not been fictitious stock in whole, or, indeed, to any extent, but, to the contrary, may have represented in some amount actual capital, and therefore have been of some real value, sufficient, at least, to support defendant's promise to pay for it, made, it is to be assumed, since there is nothing in the plea to the contrary, with full knowledge of all the

informative facts alleged in the plea. We find no error in the record, and the judgment must be affirmed.

(45 La. Ann. 706)

IMHOFF v. IMHOFF. (No. 11,137.)

(Supreme Court of Louisiana. May 23, 1893.)

HUSBAND AND WIFE—SEPARATION—COMMUNITY PROPERTY—ESTOPPEL—EVIDENCE—PRACTICE—APPEAL—JURISDICTIONAL AMOUNT.

1. There is a difference between "estoppels" which preclude the advancing of a claim at all and "admissions by conduct" or "presumptions arising from conduct," which only render difficult of proof pretensions inconsistent therewith.

2. Estoppels may be waived or renounced by permitting evidence covering the whole ground to be received without objection.

3. If a husband actually hold and possess as owner property at the date of his second marriage, the fact that he may hold it unduly does not preclude him, as between himself and his second wife, from claiming it was his own. The origin and source of the property does not concern her; it is enough that it does not belong to her and the second community.

4. If a plaintiff have documents in his possession legally admissible per se in behalf of the defendant, it is no good ground for not producing them that by reason of his incompetency as a witness he may not be able to give his own testimony in explanation of them.

5. A defendant who, during the progress of the trial, calls for books or papers in possession of the plaintiff, must conform to the requirements. Article 140, Code Pr.

6. A writ of fieri facias having issued to enforce the payment of alimony for one month, under an order of the district court, that plaintiff should pay defendant \$45 per month, a rule was taken by plaintiff on defendant to show cause why the same should not be set aside. After hearing had, the rule was made absolute, and the writ set aside. The defendant appealed. Held, that the matter in dispute was below the appellate jurisdiction of the supreme court.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Suit by Jacob Imhoff against Amelia Imhoff for separation and dissolution of the community. From the judgment entered, defendant appeals. Modified and affirmed.

Sambola & Ducros, for appellant. Charles F. Buck and Dinkelspiel & Hart, for appellee.

NICHOLLS, C. J. The plaintiff, in May, 1891, instituted, for reasons assigned against his wife, to whom he was married on the 16th November, 1876, a suit for a separation from bed and board and a dissolution of the community. He alleged there were no children, issue of their marriage; that he had in his possession and under his control some property, to wit, his business and appurtenances thereto belonging, which the law would hold as community property; that he had not been prosperous; that, in fact, he was seriously embarrassed, and said community is insolvent, and unable to refund to him a sum of \$10,000 separate property which he owned and possessed at the date

of his marriage, but which he desired to have recognized as against his said wife; that he was residing with her at No. 550 Canal street, which, however, he uses also as part of his business as a retail and wholesale grocery, keeping therein his wagon, horses, and other appurtenances necessary in the business, and he cannot remove them without great injury to his business and inconvenience in the management thereof; that it is necessary for him, pending the suit, to live apart and separate from his wife; that his wife is unwilling to accept a residence which he is ready to tender her, and that an order of court is necessary in this regard, and for the purpose of furnishing her with a separate domicile and residence and maintenance he is ready and willing to pay an adequate alimony per month in proportion to his means,—say, besides the dwelling, the sum of \$35 per month,—on condition that such separate domicile be assigned her, and she occupy same. He prayed for citation, for judgment decreeing a separation from bed and board and dissolving the community, and recognizing his claim against the community property for the sum of \$10,000. He further prayed that his wife be ruled to show cause why she should not be ordered to leave the matrimonial domicile, and have a domicile assigned her upon petitioner's paying rent therefor, and the sum of \$35 per month, or such other amount as the court might fix, according to the circumstances of the parties, after hearing. This application was granted on the 19th June, and the wife was ruled into court accordingly. The defendant answered June 5, 1891. She pleaded the general issue, charged plaintiff's petition to be a tissue of falsehoods and slanders, averred herself to have always been a dutiful and exemplary wife, and prayed that plaintiff's demand be rejected. Assuming, then, the position of plaintiff in reconvention, she attacked her husband's conduct very vigorously, and, alleging that she and her husband are owners in common of some movable and immovable property in the city of New Orleans; that one of the properties was occupied by them as their matrimonial domicile, where she is entitled to reside; that she had inherited from her parents, since their marriage, \$600, which her husband had used in his business, and that she feared her husband would dispose of the community property under his control to defraud her; that in fact he had already burdened and otherwise entangled the real estate with simulated mortgages, to her detriment; and that it was necessary for the preservation of her rights that an inventory and appraisal be made of the movables and immovables in his possession; that an injunction should issue restraining him from disposing of any part thereof in any manner to her prejudice,—she prayed for the taking of such inventory, for an injunction restraining her husband, and prohibiting him from disposing of

any of the property except in the transactions of the commercial business in which he is engaged; that she have judgment decreeing a separation from bed and board, and condemning her husband to pay to her the sum of \$75 per month from the 1st of June, 1891, as alimony. The court ordered an inventory to be taken, and that an injunction issue as prayed for.

By a minute entry of June 26th it appears the incidental rule to show cause of June 19th was taken up on that day, both parties being represented, and that, after hearing pleadings, evidence, and arguments, the matter was taken under advisement. A minute entry of the 29th June appears, to the effect that, the law and the evidence being considered, it is ordered that plaintiff's rule be made absolute, and that plaintiff be ordered to pay to defendant, his wife, the sum of \$35 per month alimony, to commence from the date she shall remove to the domicile hereinafter assigned her; further ordered, that defendant be ordered from the house now occupied by her, being the matrimonial domicile, No. 550 Canal street, to such place, to be hereafter definitely fixed, established, and approved by the court, the plaintiff to pay rent therefor, and pay expenses of removal; and that said judgment for alimony shall commence from the date of said removal. Defendant moved for a new trial, on the ground that the evidence adduced did not justify the ejectment of defendant from the common dwelling to another domicile, "to be hereafter definitely fixed, established, and approved by the court," and the court erred in giving such an order, inasmuch as mover never declared her intention to leave the said common dwelling, under article 147, Civil Code; that the execution of the order will endanger the life of defendant, who is lying in bed in a most critical condition; that she is entitled to \$75 per month as alimony under the evidence, and that the small sum allowed her, "to commence from the day on which she shall remove to the domicile, to be hereafter assigned her," will not avail her, as she is at the present time in necessitous circumstances, in immediate need, and depending upon the charity of her neighbors, although her husband has \$20,000 worth of property belonging to the community; that it was shown that her husband has never provided for her since the institution of this suit and since he abandoned the matrimonial domicile. On the 11th March, 1892, the case went to trial, and in the note of evidence an entry appears to the following effect: "It is agreed in regard to alimony (the condition of the original judgment never having been fulfilled) that judgment be rendered condemning plaintiff to pay alimony from the 1st day of January, 1892, at the rate of forty-five dollars per month until the settlement of the community, on condition that she vacates the house." The judgment rendered by the court was in favor of

plaintiff and against defendant. It decreed a separation from bed and board, and a dissolution of the community, ordered the matter of the settlement of the community to remain open for future adjustment, referred the parties to Marcel T. Ducros, notary, for the purpose of settling the community, and the adjustment of their opposing claims, and further ordered and decreed that the sum of \$45 per month be paid by the plaintiff to the defendant as alimony from the 1st day of January, 1892, and that the cost of the proceedings be paid by the community. The parties to the suit were not personally present at the trial, but were represented by their respective attorneys. On the 5th day of April, 1892, the parties and their attorneys appeared before Marcel T. Ducros, notary, for the purpose of settling the community, and adjusting their opposing claims, as directed in the judgment of the 11th March, 1892. The notary submitted to them an extract from the inventory, which he had made at the inception of the proceedings under the orders of the court. The parties then presented their respective claims and objections, of which the notary, as required by article 1368 of the Civil Code, made a proces verbal, suspended the proceedings, and referred the whole matter to the district judge for his decision thereon. On the filing of the notary's proces verbal in the district court, plaintiff's counsel, suggesting to the court that the parties had been unable to agree before the notary, and that the claims of plaintiff were well founded, and those of the defendant not well founded, and that the act of partition should be completed as contended for by him, obtained an order ruling the defendant to show cause why the act of partition should not be so completed. On the trial of this rule the court rendered a judgment, but, on motion of defendant, it was set aside, and a new trial granted. On the second trial the court made plaintiff's rule absolute in the following respects: Where not objected to or opposed by either party, it is to be approved as correct; that, accordingly, the contents of the store or the business carried on by the plaintiff, with outstanding assets and liabilities, be decreed to be part of the community; that all real estate acquired in the name of the plaintiff as described in the inventory on file and embodied in the proces verbal be decreed to be community property; that the real estate acquired by Jacob Imhoff on the 12th of July, 1875, fronting on Rampart street in the square bounded by Julia, Rampart, Delord, and Dryades streets, be decreed to be the separate property of Jacob Imhoff; that Jacob Imhoff be decreed to be a debtor of the community in the sum of \$1,500, part of the purchase price of said property, paid after his marriage with the defendant. It was further ordered that Jacob Imhoff do have judgment against the community, and be recognized as creditor

thereof, to be paid out of the assets for the payment of all his debts as against his wife in the sum of \$8,000, being the amount owned and possessed as his separate property at the date of his marriage with the defendant; that the defendant be decreed to be the owner of the piano claimed by her as her separate property; and that she have and recover judgment against the plaintiff, Jacob Imhoff, or against the community, for the sum of \$150, her separate property, intrusted to him, and by him used for the benefit of the community; that her claim for \$500 be rejected; and, it appearing that she has been in possession of the household furniture, belonging to the community, and which was stored in the matrimonial domicile, and that she has kept the same, or disposed of it for her own benefit, that she be made to restore the same, or account for the value thereof in the final partition. It was further ordered that the notary proceed with the act of partition of the community property between the parties on the basis of this judgment, and that all costs be paid by the mass. From this judgment defendant has appealed.

It will be remembered that in the judgment rendered on the 11th March, 1892, the court ordered and decreed that the sum of \$45 per month be paid by the plaintiff to the defendant as alimony from the 1st day of June, 1891. The plaintiff appears to have paid this amount monthly up to the 31st of May, 1892, but, failing to do so for the month of June, defendant, through her counsel, suggesting that fact to the district judge, obtained an order from the judge that a *fi. fa.* issue to secure the payment of that amount. The writ which issued thereunder was satisfied through a seizure. The plaintiff having refused to pay the \$45 which fell due on the 31st July, 1892, she again applied for and obtained a writ of *fi. fa.* to force payment. Plaintiff's counsel thereupon moved that the defendant show cause why the order authorizing the issuing of a writ of *fi. fa.* to collect alimony should not be rescinded, and all proceedings under the writ issued thereunder should not be stayed and quashed, for the following reasons: (1) That the judgment of separation from bed and board rendered between the parties is final, and the wife is entitled to no further alimony. (2) Even if this were not so, she is not entitled to alimony without proof that she has maintained a residence at a domicile assigned by the judge. (3) She is not entitled to alimony pending the proceedings for settlement of the community, which she obstructs and delays. On the 15th September, 1892, the judge rendered a judgment in the matter of this rule, in which he used this language: "I have looked in vain in the record for a valid judgment to sustain the writ of execution issued herein to collect alimony for any time after the rendition of the judgment.



It is true, in the note of evidence there is a sort of statement that to a certain extent, as far as the property affairs of the parties are concerned, the judgment is based upon consent, and said note of evidence shows that the judgment was intended to be that the husband pay alimony until the settlement of the community, but I find no warrant in law for any such judgment based upon consent between the husband and wife, or for its enforcement, even if it had been agreed to. I must therefore look to the scope of the judgment itself, and the only question that embarrasses me is whether or not, the judgment being subject to appeal, alimony may be recovered by the wife in any event pending the appeal or pending the delays allowed for prosecuting such appeal. The wife is the defendant in this case, and it is a serious question, and, in fact, has been adversely decided by the district court, that the wife, being defendant, cannot recover alimony at all. But, waiving this point, I am of the opinion that the parties, having proceeded actively to settle the community of acquets and gains, have thereby acquiesced in the judgment, and no appeal will lie from it. It has become final by acquiescence, and, being final, all incidental or interlocutory proceedings except such as might arise out of the care of children are at an end. The separation of the husband and wife is complete, subject only to the probation of the law, founded upon public policy, that neither shall be permitted to contract marriage until a full divorce shall have been granted. It is therefore ordered, adjudged, and decreed that the rule taken in this case on the 24th August last to set aside the order authorizing the issuance of the *fi. fa.* to collect alimony be made absolute and the *fi. fa.* quashed." From this judgment the defendant has appealed.

The first portion of the judgment appealed from which defendant attacks is that recognizing the community to be indebted to the plaintiff in the sum of \$8,000. On this subject she claims that the detailed inventory of his first community and of the succession of his first wife, taken only 14 days prior to the date of the second marriage, as well as his account of tutorship approved under the signature of the minor's undertutor, and homologated by the court on the 13th of January, 1877, prove that the stock was then worth only \$534, and that the appellee had no cash on hand and no outstanding bills against any of his customers, and appellee is estopped from impugning the verity of the facts of those judicial proceedings. There is no doubt that the mortuary proceedings taken in the matter of the succession of the first wife of the plaintiff are evidence tending to discredit, and strongly discredit, his present assertion that at the date of his second marriage he had property to the amount of \$10,000, but there

is a great difference between "estoppels," which preclude the advancing of a claim at all, and admissions by conduct or presumptions arising from conduct, which only render difficult of proof pretensions which are set up inconsistent therewith. The defendant in this suit was not a party to the proceedings which she invokes, and her rights and her course were in no manner controlled, injured, or affected by them, so far as the record shows. The mortuararia were admissible in evidence, but, when so received, they worked no "estoppel." Estoppel was not pleaded, and evidence covering the whole ground was introduced without objection. Estoppels resulting from the most solemn adjudications of courts may, as such, be waived or renounced, unless insisted upon when evidence adverse to them is sought to be introduced. We are of the opinion from the evidence that the inventory and account in the succession of plaintiff's first wife did not truly show the rights of parties at that time as between plaintiff and his children by first marriage, and the latter were not properly dealt with; but that fact by no means leads up to the result which defendant contends for. It in no wise follows that because the plaintiff may have retained out of the property of the first community a large amount belonging to his children, the amount so retained fell into the second community. If, in point of fact, plaintiff had in his possession and holding as owner \$10,000 at the time of his second marriage, the origin or source whence it was derived does not legally concern the defendant. It is enough for her to know it does not belong to her. He may have held it unduly, but that was a matter between himself and the person from whom it was withheld, and not between him and his second wife. His wrongdoing, if such there was, did not in law inure to her benefit.

The witnesses vary greatly in their estimates as to plaintiff's actual pecuniary condition at the date of the second marriage. We think it established beyond doubt that he was very well off at the time. The district judge reached the conclusion that he then owned property to the amount of \$8,000, exclusive of the real estate on Rampart street. We think he fixed the amount too high, and that the judgment as to that item should be reduced to the sum of \$5,000. If the plaintiff in reality owned more than this, he must suffer the penalty of having left uncertain that which should have been precisely fixed and ascertained when it was not only easy, but when it was his duty, to have done so. After the plaintiff had closed, the trial being in progress, and defendant taking testimony in her own behalf, her counsel called for the production of plaintiff's bank book from 1877 to that time, stating his object to be to prove the amount of money deposited by plaintiff during the community,

and what was his financial standing at the time the inventory was taken. Plaintiff objected to this demand, on the ground that the books called for were equivalent to testimony of plaintiff, which could not be admitted in the case. The court sustained the objection, ruling "that the books of plaintiff are nothing without explanations, and plaintiff cannot be permitted to testify in regard to them." In this connection it may be well to say that, while proving up his own case, plaintiff had offered himself as a witness on his own behalf, but, on objection made by defendant, he was not permitted to testify. We do not think the particular reason assigned by the court tenable. If a plaintiff have documents, in his possession, legally admissible per se in evidence on behalf of the defendant, the fact that, should he produce them, he may not be able to give his own testimony in explanation of them, would not justify their exclusion. *Williams v. Goss*, 43 La. Ann. 870, 9 South. Rep. 750. In the case at bar the identical information which defendant sought to elicit through plaintiff's bank book could have been procured directly through the testimony of the bank officers, and the fact that plaintiff might not be able to testify relative to the entries would not be good ground for keeping the testimony out. The situation is not changed in this special particular by the defendant having recourse to her husband's bank book for the information, instead of to the bank, but we do not find reversible error in what happened. Instead of seeking the testimony of the bank officials, as she could have done, she thought proper to depend upon a call on her husband, during the progress of the trial, and did so without laying the foundation required by law, and without following out its requirements. Code Pr. art. 140.

Defendant complains that judgment was not rendered in her favor against her husband for \$500 over and above the \$150 recognized by the court as having been received by her by inheritance, and turned over to her husband. We think it clearly established that the only money received by her from that source was the \$150 for which she has recovered judgment. The simple fact that, pending the community, \$500 were deposited in her name in a bank, which she drew out and delivered to her husband, would not justify a judgment in her favor against her husband as for so much money belonging to her separate estate, which he had received and converted to his own use. Without any explanation of the origin or source of the money, it is presumed, in spite of the deposit in the name of the wife, that the funds belonged to the community. A large part of defendant's brief is devoted to a discussion of the claims which the plaintiff presented as claims of the community. The persons who are stated to be creditors are not before the court, and we are not in a position to pass upon these claims, even if their verity

were a proper subject of inquiry in this proceeding. Both parties are represented by counsel, and we assume they will avail themselves of all the rights and remedies to which their respective clients will be entitled. The defendant will have the undoubted right to protect herself as against any attempt which her husband might make to get possession of and fraudulently hold the community funds under the pretext of paying claims which are merely nominal, and purely fictitious, should she have good grounds for believing he intended doing so, and to see to it that she will be paid exactly what is due to her. The circumstances under which she could act, and the method of action, we do not here discuss.

Defendant claims that plaintiff, since the institution of this suit, has received a large amount from rents of community property, and he should be held to account for them. In this she is right; but, on the other hand, the plaintiff will be entitled to any legal claims he may have for taxes, necessary repairs, etc., paid by him for and on account of these properties. Both parties are at liberty to set up claims they may have for matters arising since the institution of this suit.

The defendant has, by a separate order of appeal, appealed from the order or judgment of the district court setting aside the *fi. fa.* for \$45 for alimony for the month of July, 1892. No view which we can take of that order would justify our entertaining an appeal from it. See *Malony v. Malony*, 9 Rob. (La.) 116; *Fletcher v. Henley*, 13 La. Ann. 150. Whether we look at the direct and immediate issue raised and determined by the decree, which at that time only regarded a sum of \$45, or whether we consider it from the standpoint of practically determining that the defendant was and would be entitled to no further alimony, in neither case could we find "the matter in dispute" to be one within our constitutional jurisdiction as to amount. The evidence in the record establishes that (rightly or wrongly) alimony had been paid from January 1, 1892, to June 30, 1892, and the only question at the time before the court was in reference to alimony for one month,—that of July. It may be that the result of the view of the situation taken by the district judge will be to deprive defendant for months to come of what she evidently claims to be her right to alimony by express agreement until the affairs of the community are finally liquidated and closed; but we do not know, nor is defendant able to say, how short or how long that period will be. We cannot assume that matters could be so long prolonged as to bring a determination of the question within our appellate jurisdiction.

There are additional reasons for our not reviewing the action of the district judge. In plaintiff's original petition he offered to pay defendant \$35 a month on certain conditions, designating the money so to be paid as "all-

mony." In defendant's reconventional demand she claimed \$75 a month, referring to it as "alimony," and on both occasions where the district judge dealt with the matter he also did so as "alimony." A claim for "alimony" is not only an incident of the suit for a separation from bed and board, but any order rendered on that subject is an interlocutory collateral order, which, in the very nature of things, is indeterminate, both as to duration and as to amount, changing with varying circumstances, and shifting with different conditions. It is an order under the control of the judge, and subject to a very great extent, if not entirely, to his discretion. The fact that the last order in this case touching that subject was inserted in the final judgment was purely accidental, and did not change the character of the order from that which it would have had if rendered in a different manner. It was still an interlocutory order, subject to modification or revocation by the judge. *Elder v. Rogers*, 11 La. Ann. 606; *Hen. Dig.* p. 330, No. 3. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended so as to reduce the amount for which judgment was rendered in favor of the plaintiff against the community from the sum of \$8,000 to the sum of \$5,000, and, as so amended, it is affirmed, and the case is remanded for further proceedings in accordance with the views expressed in this opinion; appellee to pay costs of appeal.

(45 La. Ann. 214)

PURDY v. FORSTALL et al. (No. 11,223.)  
(Supreme Court of Louisiana. May 22, 1893.)

PRINCIPAL AND SURETY—WHAT ACTS WILL NOT  
RELEASE SURETY—ESTOPPEL—COUNTERCLAIM.

1. A mere declaration by a creditor that he would not execute his judgment until a certain person should return from Europe is not such a granting of time as would release the debtor's surety. Even had the words used been unequivocal, this, being expressive of mere intent, did not create any obligation, nor estop the creditor. *Civil Code*, arts. 1814, 1815.

2. Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and, becoming subrogated to the creditor's rights, control the claim to his own satisfaction.

3. A surety upon an unconditional obligation to pay has no right, when sued, to attempt in that suit, in which the principal debtor is not a party, to adjust collaterally an unliquidated claim for damages for inexecution of a contract between the latter and the creditor which the principal debtor has not himself claimed or asserted.

(Syllabus by the Court.)

Appeal from district court, parish of East Carroll; Field F. Montgomery, Judge.

Action by V. M. Purdy against Anatole J. Forstall and others for an injunction and other relief. Plaintiff had judgment, and defendants appeal. Reversed.

The other facts fully appear in the following statement by NICHOLLS, C. J.:

The plaintiff alleges that under a writ of *fi. fa.* issued from the district court for East Carroll parish, in suits Nos. 701, 705, 708, 707, 711, and 748, the sheriff of that parish had seized and advertised for sale certain property belonging to him. That he was informed that said writ was issued at the instance, and under the instructions and order, of Anatole J. Forstall, upon a certain pretended 12-months bond for \$2,400, which he claims to own, given for the sale of a lot of mules and other personal property sold under judgments in the above-numbered suits, which said bond was executed on the 5th day of June, 1886, and held by the sheriff, or some other person, until the 12th day of June, 1889, when it was filed in the district court for East Carroll in the clerk's office, indorsed in blank by J. O. Bass, sheriff, and the writ of *fi. fa.* was issued upon it, and his property seized. That said seizure was wrongful, unjust, and unwarranted because it was in violation of an express agreement upon the part of Francis M. Taylor (who acted as the agent of A. J. Forstall) with petitioner, who, petitioner was informed, believed, and alleges, acted in the interest and benefit of said Forstall, and the interest and benefit of Mrs. F. M. Taylor, the defendant in the above-mentioned suits. That when the sale was made of said mules, etc., and it became necessary to give said bond, F. M. Taylor, acting as aforesaid, procured and induced the plaintiff, Purdy, to become surety thereon, with the understanding that he would not be held liable on the same if the proceeds should be held by the court to belong to Forstall and Hernandez. That at that time there was an agreement upon the part of Forstall to sell to Mrs. Taylor and Francis M. Taylor the Live Oak plantation, which Forstall had lately purchased under a foreclosure of mortgage, and to which said mules, farming utensils, etc., were attached and belonged, as claimed by Forstall; and said F. M. Taylor purchased the same with the understanding that they would be covered by the purchase price of the sale of the plantation; and plaintiff signed said bond with said Taylor, as he understood, at the request of Forstall, to protect them from passing out of the hands of said Taylor, and taken from the Live Oak plantation; and when he signed said bond as Taylor's security it was his understanding that Forstall and Hernandez would look only to the property for the purchase of which the bond was given, and not to him. That, after the execution of said bond, Forstall and Hernandez were declared by a judgment of the district court for East Carroll, upon oppositions filed in suits Nos. 701, 705, 707, 708, 711, and 748, to be entitled to the proceeds of the sales made under the *fi. fa.* issued therein, and for which the bond was given, and, in violation of said

<sup>1</sup>Rehearing refused, May 31, 1893.

agreement of his (Forstall's) agent, he was seeking to hold him upon the bond. That said *fi. fa.* was wrongfully issued upon said bond, because it was not, at the time the same was issued, such an instrument as under the law a *fi. fa.* could issue upon. That it was no longer a 12-months bond; its character, force, and effect as such having been changed by taking additional security thereon after it became due, and should have been executed, making it really and in fact an ordinary bond or contract. That, by the acts of Forstall, plaintiff has been released upon said bond, even if he were ever liable upon it as security. That on the 5th day of June, 1887, when said bond was due and exigible, execution should have issued upon it, and the property for which it was given should have been seized and sold; but, instead, additional security was taken thereon, and its collection extended to November following,—about five months,—with the distinct understanding and instruction of plaintiff that its collection should then be enforced, if he was bound upon it, which he avers he was not, if it became the property of Forstall. That at that time Taylor held possession of all the stock and other property for the purchase of which the bond was given, and the amount of the bond could easily have been made by the sale of them under it; but, instead of proceeding to the collection of the bond at that time, Forstall allowed the time of payment by Taylor, the principal thereon, to be extended from month to month, and year to year, without plaintiff's consent, and in fact against his express wish and instruction, until a large portion of said property had been disposed of by Taylor, and he became insolvent; and now Forstall illegally endeavors to hold plaintiff responsible therefor, and require of him to make good the loss, if any, which he had sustained by his own acts, but that he has been informed, and will show, that the debt for which said bond was executed, as claimed by Forstall, has been extinguished, and really and in fact Mrs. Taylor is not indebted to him in any amount,—alleging that the sheriff, unless enjoined, would sell his property under the writ, and that he (the plaintiff) had been damaged by the seizure to the amount of \$5,250. He prayed that the said sale be enjoined, that the sheriff and Forstall be cited, and that he have judgment in his favor decreeing him released from any liability upon said bond; that the injunction be perpetuated, and that he have further judgment for the amount of the damages claimed. The sale was enjoined as prayed for. Forstall answered, first pleading the general issue. He then admitted that he, together with Charles Hernandez, owned the 12-months bond referred to, and averred that the same was a just and binding obligation of plaintiff, and exigible in manner and form attempted by him and Hernandez. He admitted that he, together with Hernandez,

caused the seizure of plaintiff's property under *fi. fa.* issued on said 12-months bond, which the principal and security refused to pay; that he and Hernandez, being joint owners of the bond, had the legal right and a just cause to proceed as they did. Reserving his right to demand damages from plaintiff and his sureties on the injunction bond, he prayed that plaintiff's demand be rejected, and the preliminary injunction dissolved. Charles Hernandez, with leave of court, intervened in the suit, averring that he is equally interested therein with A. J. Forstall, for the reason that they together owned the 12-months bond, execution on which had been enjoined. He adopted Forstall's answer and allegations, and joined also in his prayer. The case went to trial, and judgment was rendered therein perpetuating plaintiff's injunction, and condemning defendants to pay \$250 attorneys' fees. Defendant and intervener have appealed from this judgment.

In order to reach a clear understanding of the position of the parties it will be necessary to make a statement of facts, which are somewhat complicated: On the 25th of January, 1884, Mrs. Lizzie M. Taylor, wife of F. M. Taylor, executed her mortgage note of that date for \$5,000 to her own order, and by her indorsed, payable on the 1st January, 1885, with interest at 8 per cent. per annum from maturity, and secured payment of the same, and 10 per cent. attorneys' fees in case of suit, by a mortgage on her plantation, known as the "Live Oak Plantation," in the parish of East Carroll, with the mules, etc., thereon. On the 21st of February, 1885, she mortgaged the same property to secure two promissory notes of \$4,000 each, to her own order and by her indorsed, payable one year after date, with interest at 8 per cent. after maturity, and 10 per cent. attorneys' fees in case of suit. On December 4, 1885, a number of the creditors of Mrs. Taylor sued her, accompanying their demands for moneyed judgments by applications for writs of attachment against her property, which writs, having been granted and issued, were executed, some upon the Live Oak plantation, and others upon that plantation and a stock of goods belonging to her in her store at Lake Providence. On December 8, 1885, Anatole J. Forstall, as owner of the note first described, of Mrs. Taylor for \$5,000, instituted proceedings via *executiva* thereon, and under the same the Live Oak plantation, and the mules, farming utensils, etc., thereon, were seized. W. G. Vincent and other attaching creditors thereupon intervened by way of third oppositions, which (as similar ones were again filed at a later period) are now simply referred to, and will be more particularly mentioned hereafter. On the 26th April, 1885, Anatole J. Forstall, as holder of one of the two mortgage notes of \$4,000, and Charles Hernandez, as holder of the other note, insti-

tuted proceedings jointly, via executiva, and the Live Oak plantation, with the mules, carts, utensils, thereon, were seized thereunder, and under these writs it was advertised for sale. W. G. Vincent, one of the attaching creditors spoken of, who had already filed one third opposition, now filed another, covering the same grounds as the first. In this petition he averred that, finding that the property originally attached by himself was insufficient to cover his claim, he had applied for and obtained an order for a second attachment, directed to the sheriff of West Carroll parish, with instructions to seize 16 mules belonging to his debtor, which he had been informed were then in that parish; that, before process issued, Mrs. Taylor caused the property to be brought to East Carroll, and placed them on the West Oaks plantation, for the purpose of avoiding a seizure, and with a view of permitting them to be seized under the executory process of Forstall, which had been previously levied on that plantation, the object being to shelter them from his (Vincent's) pursuit by having them embraced under said proceeding, which was a friendly suit conducted for the mutual benefit of the litigants therein; that as soon as said mules were placed on said plantation, he had caused an alias writ of attachment to issue, and they were seized thereon; that, soon after he had caused them to be seized, they were seized under executory proceedings, and were advertised to be sold thereunder; that since his petition of third opposition was filed, on the 5th February, 1886, Forstall and Hernandez, representing themselves as mortgage creditors of Mrs. Taylor, commenced proceedings against her in April, 1886, in which they are again attempting a sale of the mules, notwithstanding said mules had been taken out of the possession of Mrs. Taylor by his attachment, which was prior to the last proceedings; that said plantation without said mules was worth more than sufficient to pay the demands of Forstall and Hernandez, by reason of mortgage or otherwise,—charging fraud and collusion between Forstall and Hernandez and Mrs. Taylor, and that the real object of the executory proceedings was to overreach and destroy his rights, and to make a fraudulent and simulated sale of the Live Oak plantation and the mules for the benefit of Mrs. Taylor; that Forstall or Hernandez, or some interposed party, was to buy in said plantation and mules, ostensibly for cash, but actually to allow Mrs. Taylor, in her own name, her husband's name, or that of some interposed party, to occupy and cultivate said plantation, and out of the crops make annual payments to Forstall and Hernandez of the small balance really due them on said mortgages, and ultimately preserve the property for the benefit of Mrs. Taylor; and, attacking the claim set up by the mortgage creditors, third opponent prayed that, if Forstall and Hernandez per-

sisted in having said sale made, the sheriff be ordered to have the mules separately appraised and separately sold from the other property seized, and ordered to hold the proceeds of their sale in his hands until further orders of court; that, after trial had, the executory proceedings be decreed fraudulent and collusive; that the proceeds of the sale of the mules be ordered to be paid to opponent by the sheriff in satisfaction of the judgment he would obtain in his attachment suit; that his rights as attaching creditor be recognized and maintained, and as being superior in rank to all others as regards said mules and their proceeds. This opposition was quickly followed by others of a similar character on the part of other creditors, and under and by virtue of them the mules were ordered to be withheld from sale under the executory proceedings, and to be appraised and sold separately, which order was subsequently carried into effect. Pending the seizure the sheriff leased the plantation and mules to F. M. Taylor, the husband of the defendant,—the lease of the plantation for the year 1886 at a rental of \$2,000, and the mules for a period and for a rental not shown by the record. In the mean time, and after considerable delay, the plantation was sold on the 17th day of July, 1886, on a 12-months bond, and adjudicated to Forstall, for \$10,000, he paying the sheriff the costs of proceeding, giving his 12-months bond for \$7,000 to cover the possible eventual rights of the various third opponents, and retaining the balance as mortgage creditor. Some of the ordinary attaching creditors having succeeded in obtaining judgment on their claims, writs of *fi. fa.* were issued thereon, and under them the mules were seized, and, together with some movable property, were, under those seizures and those of Forstall and Hernandez, sold on 12 months' credit to F. M. Taylor for the sum of \$2,400, for which he executed his 12-months bond as purchaser, with V. M. Purdy as security. The issuing of the writs of *fi. fa.* brought about the filing of a number of third oppositions in the matter of this last sale, the different parties claiming priority of payment, among them Forstall and Hernandez. We may say here that that litigation terminated adversely to the third opponents, and favorably to Forstall and Hernandez, adjudging to the latter the 12-months bond, the proceeds thereof to be applied to the payment of their mortgage claims. On the 29th November, 1886, after Forstall had become the adjudicatee of the Live Oak plantation, an agreement was entered into between Forstall and Hernandez and Mrs. Taylor as follows: "It is agreed and understood between Mrs. Lizzie M. Taylor, of Lake Providence, Louisiana, and Anatole J. Forstall and Charles Hernandez, of New Orleans, Louisiana, that whereas, the Live Oak plantation in the parish of East Carroll was purchased in July, 1886, by said A. J. For-

stall for ten thousand dollars at a sheriff sale thereof in the suit of Forstall and Hernandez v. said Mrs. Lizzie M. Taylor; and whereas, the parties hereto hereby appraise said property at \$15,000, and verily believe that the same could be sold at that price at some future time: The said Forstall and Hernandez both hereby agree that, at any time within five years that the said Mrs. Taylor shall pay to them the amount due them, they should transfer said property to her, or to any person whom she shall designate. The said Mrs. Taylor obligates herself to pay to the said Forstall and Hernandez the amount she owes them, which amount shall be determined in the suit now pending in East Carroll, entitled 'A. J. Forstall and C. J. Hernandez v. Mrs. Lizzie M. Taylor,' said interest to be paid annually on the 1st day of January of each year. Mrs. Taylor moreover binds herself to pay yearly, as they shall become due, all of the taxes on said Live Oak plantation. Forstall and Hernandez agree that they shall rent the said plantation, and credit Mrs. Taylor with the rent on account of her said indebtedness to them. They further agree that at any time that they shall find a good purchaser for said plantation, to sell it for fifteen thousand dollars, out of which amount they shall deduct the amount due them by said Mrs. Taylor, and turn over the balance to her. In case any part of this agreement is not complied with, the same to be null. Thus done and signed at New Orleans, Louisiana, this 29th November, 1886. [Original signed] F. M. Taylor, Agt. of Mrs. Taylor. A. J. Forstall. Charles Hernandez." About the time the 12-months bond fell due, (5th June, 1887,) the litigation relative to the mules being then pending and undetermined, a question arose as to whether it should be then executed or not, and a conference took place between some of the attorneys representing the third opponents in that proceeding and F. M. Taylor. As a result of that conference, execution of the bond was stayed until the issues raised in the third oppositions should be disposed of, provided J. B. Donnelly should sign the bond as additional security, which was done. Forstall and Hernandez do not seem to have been parties to that agreement. Whether Purdy was present or not at the conference is immaterial, as he concedes in his pleadings that he consented to the extension. No action was taken upon the bond, so far as Purdy was concerned, until it was filed in court, and the *fi. fa.* issued upon it, under which the seizure was made which gave rise to the present controversy. F. M. Taylor, who had purchased the mules, subsequently to that purchase bought one-half of a plantation in East Carroll, mortgaging the property for payment of the price. He disposed of four of these mules, not accounting to Hernandez and Forstall for the proceeds. The balance was placed by him on the property pur-

chased, and, falling under the operation of the mortgage, the proceeds of the sale thereof, when they were afterwards sold in the execution of the bond as against Taylor, were adjudged to his vendor. Referring to Purdy's petition, it will be seen that he claims that the indebtedness of Mrs. Taylor to Forstall and Hernandez (which, so far as the record shows has not up to the present time been fixed by a personal judgment against her) was extinguished. The basis of his claim is the action of Forstall and Hernandez relative to the Live Oak plantation after the agreement between them and Mrs. Taylor. On this subject counsel of plaintiff say in their brief: "Under the terms of that agreement Messrs. Forstall and Hernandez are now indebted to Mrs. Taylor. They agreed in said contract they would pay to Mrs. Taylor all in excess of ten thousand dollars that they gave for her Live Oak plantation, if they could find a purchaser for said named place, provided the sale could be made within five years from the date of the contract. The records show that Forstall sold to Hernandez, both of whom were contracting parties with Mrs. Taylor. The records further show that Hernandez made Joseph E. Ransdell his agent to sell this Live Oak plantation, and that Ransdell, as agent, has sold 919 acres of land out of the 960 tract, and that he sold it at the price of \$28,894, having still left forty-one acres that he had not sold. Even if the sworn statement that Forstall has made is correct, he and Hernandez would owe Mrs. Taylor about \$18,000 after she has paid them every cent that she owes them. The evidence shows she was in possession of Live Oak plantation at the time it was seized and sold. She made and gathered a crop that year. Forstall allowed her to keep the place after he had it sold and he bought it. He furnished her plantation supplies that year, and it was to his interest to assist and aid Mrs. Taylor. There was an express understanding between F. M. Taylor and Forstall that Taylor was to buy the work stock when sold, so that they would be kept upon the plantation in order to cultivate and complete the crop they had planted. Forstall had written a letter to Taylor requesting that he would get some one to go on a bond for him if he purchased the property. The evidence shows that in 1886—the year that she made this contract, and the same year of all these transactions—Mrs. Taylor paid the interest and the taxes on the property. The following year (1887) the plantation was rented to Dunn for the sum of two thousand dollars. This amount was collected by Forstall and Hernandez. This amount collected paid the interest on the plantation for that year, and there were about nine hundred dollars over to go as a credit on the year 1888. Forstall and Hernandez then took the plantation out from the possession of Mrs. Taylor, thereby violating their part of the

contract, placing it beyond the power of Mrs. Taylor. After Live Oak plantation was seized, the sheriff rented the plantation to Taylor for that year (1886) for two thousand dollars. Taylor never paid one cent of this money to the sheriff, but the latter turned the money over to Taylor upon a written order of Forstall. The "records" to which counsel allude are doubtless acts of sale of the Live Oak plantation, and different portions thereof, from Forstall to Hernandez and from Hernandez to different persons, but they are not in the transcript. In a letter written by Forstall to Taylor under date of May 24, 1888, he said: "Mr. Hernandez is absent at present from the city, and of course, under the circumstances, as he is interested with me in this matter of the Live Oak plantation, I can give you no positive answer until his return, which I believe will be in about a month, as he is now in Europe, but expects to return soon."

We now turn to the consideration of plaintiff's contention that under certain circumstances he was not to be held liable on the bond, and that the circumstances have occurred which were to exempt him. F. M. Taylor testified as follows: "I got Mr. Purdy to sign it [the bond] as obliging two parties,—myself and Mr. Forstall. I told Mr. Purdy that he would run no risk, as I was Mr. Forstall's duly-authorized agent, and I showed him the power of attorney offered in evidence, [from Forstall to Taylor.] I accepted the terms and conditions of the power of attorney, and on various occasions acted by its authority. I transacted all of Mr. Forstall's business for him in this parish; collected debts for him; authorized suits to be brought for him. I looked after his business in every particular, the same as if he had been present. I brought suit against V. M. Purdy [another suit] for him, closed out the Larch business for him, and bought the Therrel store for him; bought it in my own name, but it was virtually for him. The check I gave Mr. Therrel for his store and fixtures I sent to Forstall, and had him credit Therrel's account with it. At the time the mules were seized, Forstall had a bill of sale for the mules. There was an agreement between Mr. Forstall and myself to wait until Hernandez should return from Europe. The letter [of May 24, 1888] was in answer to one I had written in regard to Mrs. Taylor's business,—I represented her as well as Mr. Forstall,—with request that Mr. Forstall come up and settle up the business, and show what Mrs. Taylor's indebtedness was to him. There was an agreement between Mrs. Taylor and Forstall and Hernandez. It included the Live Oak plantation. In connection with my evidence I offer document 'D,' [agreement between Mrs. Taylor and Forstall and Hernandez.] The reason for extending the 12-months bond, I suppose, was Forstall and Hernandez were waiting until the Live Oak plantation was sold, so

they could make a settlement with Mrs. Taylor. I don't know this positively. I presume this to be the case. At the time I had an understanding with Forstall about extending the time for collecting the 12-months bond, it was about 23 months after the bond had been given. The reason execution was not issued on the bond when due, I suppose, Forstall was waiting to have a settlement with Mrs. Taylor. The mules were all in my possession, and I bought additional stock and farming utensils. As agent for Mrs. Taylor I have never made a settlement with Forstall and Hernandez. I had nothing but a verbal agreement with Forstall. I represented Forstall and Mrs. Taylor at the same time. The verbal agreement with Forstall and myself was made in New Orleans. Mr. Forstall told Mrs. Taylor and myself that he would not see her suffer, but would provide for her to have \$4,000 or \$5,000 in case of failure in business on her part. I had a written agreement with Forstall (but have lost it) that in any event the mules would belong to Mrs. Taylor. The bill of sale to Forstall of the mules was given as collateral to be placed in bank by Forstall. The mules were bought by Forstall, for which he gave his check on the bank. This check was sent to the bank, and in return got a bank check for it, which I handed Forstall. I did not get any of the proceeds of the check. At the time of the sale [of the mules] I was cultivating the Live Oak plantation for my own account. I had rented the mules from the sheriff, and was in possession of them at the time of the sale, and protested against the sale." On the examination the following question was asked the witness: "Question. When you went to Mr. Purdy, and asked him to give his consent for the extension of payment of the 12-months bond, did you not, as agent of Mr. Forstall, represent to him that, in case the circuit court which was to be held at an early day in this parish should decide that Forstall were entitled to the proceeds of the 12-months bond in preference to the other creditors of Mrs. Taylor, then, in that event, did you not tell him that the 12-months bond was to be canceled? Answer. I certainly intended to convey that impression, as I was acting for Forstall. Previous to the seizure of the Live Oak plantation the place had been in the name of Mrs. Taylor. In 1886 I rented the place from the sheriff. I agreed to pay two thousand dollars' rent for which I gave him my note. The sheriff returned the note to me on an order from Forstall and Hernandez. I never paid the sheriff for the note. When Forstall made the contract with Mrs. Taylor they gave me an order for the return of my note. In compliance with the contract I was to pay the taxes due, which I did. I furnished the supplies to make the crop on the place that year. Forstall and Hernandez have not complied with their contract. If they had complied with their contract, I

think they would be considerably indebted to Mrs. Taylor. She has complied with the contract after the sale of the Live Oak plantation. She considered that she had paid the interest and taxes from the rents collected from Mr. Dunn, who had the place in 1887, and from the rent she considered there was sufficient amount to pay the interest and taxes for 1888 and 1889, from the fact that Forstall never made any demand on me, as her agent, for interest or taxes for 1886. There was no interest or taxes due, as this contract was not made until November, 1886." The plaintiff, Purdy, testified as follows: "The day the mules were sold, Mr. Taylor came to my place of business, and asked me, as a special accommodation to himself and Forstall, to go on the 12-months bond for the mules he had bought that day, showing me his power of attorney from Forstall authorizing him to secure bonds for him. The power of attorney shown me is the same as that offered in evidence. Mr. Taylor told me it was more to Forstall's interest to sign the bond than it was to his. He stated that he had leased the mules and implements for the year, and it would be the means of destroying his prospects if they were taken off the place." Being asked the question whether, at the time of the extension of the bond when it was about to mature, Taylor had not told him, as agent of Forstall, that, in case the court should decide that Forstall and Hernandez were entitled to the proceeds of the 12-months bond in preference to the other creditors, then, in that event, the 12-months bond was to be canceled, he answered: "I certainly so understood it. All of the cases were decided in favor of Forstall." The power of attorney from Forstall to Taylor bears date the 12th of December, 1883. It gave Taylor full power and authority to represent him and to attend to all his business and concerns in the parish of East Carroll and elsewhere, "of every nature and kind whatever; \* \* \* to take in payment, from whom it may concern, any form or kind of movable or immovable property, and dispose of the same to others, by sale or otherwise; to ask, demand, have, and take, and by all lawful ways and means to recover and receive, from whom it may concern, all and every such wares or funds, debts, property, and effects whatsoever, as is now, or may be, in his or her or their custody and possession, due, owing, or belonging to him, this constituent, whether by bond, bill, note book, debt, account, consignment, bequest, or for and by what other reason or means soever, and to that end, to whom it may concern, to adjust and settle all accounts, and, upon recovery and receipt in the premises, to make and give good and sufficient receipts and acquittances; to appear before all courts of law and equity, there to do, prosecute, and defend as occasion shall require, or to compromise, compound, and agree in the premises,

by arbitration or otherwise, as the said attorney in his discretion may think proper; also, to apply for and obtain any attachments or sequestrations, injunctions, appeal, and provisional seizure, give the requisite security, sign the necessary bonds, and make and subscribe therein all the necessary affidavits, and generally to do and perform all and every other matter that shall or may be necessary, and bind the said constituent as firmly as he himself might do if personally present." Under date of July 12, 1886, a few days previous to the sales of the plantation and of the mules, Forstall wrote to Taylor as follows: "Dear Sir: I confirm mine of the 9th instant. Live Oak is to be sold on the 17th, and I will be required to furnish two bondsmen. Can you specify any two parties in your city who will act in that capacity for me? If you find two who are willing to do this, send me their names at once, as the time is very short before the sale. Let me hear from you immediately, and oblige, yours truly, A. J. Forstall. Per Rareshide." The defendant Forstall testified as follows: "V. M. Purdy's allegation in the injunction is not correct. F. M. Taylor did not act as my agent with plaintiff. I do not know anything as to the agreement entered into between Taylor and Purdy, but I authorized Taylor to make no such agreement, and in fact was very sorry when I heard that Taylor had purchased these articles under a twelve-months bond, because I knew we would have trouble to make him pay. From the time I issued executory process in said suit up to the sale I had no conversation or interview with him, and certainly never authorized him to act for me. Taylor was not my agent for any purpose whatever. I had nothing to do with said bond. I did not authorize Taylor to obtain security on said bond. I never induced Taylor to purchase said property. I never held out, directly or indirectly, through Taylor or any one else, inducements to Purdy or Donnelly in order to obtain them as sureties. I am not responsible for what Taylor may have told them, but, if he did speak for me, he was not authorized by me to do so. I never did or said anything to make Purdy understand I would not hold him on said bond."

Omer Villere, for appellants. Robert Whetstone and Cunningham & Lyons, for appellee.

NICHOLLS, C. J., (after stating the facts.) The theory upon which the plaintiff, Purdy, as security upon the 12-months bond furnished by Francis M. Taylor, as adjudicatee of the lot of mules purchased by him in the proceedings of Forstall and others against his wife, has enjoined the seizure of his own property, is that, when Mrs. Taylor was threatened with ruin by the numerous attachments against her, her friend Anatole J. Forstall, holding the vantage ground of



being the mortgagee of her Live Oak plantation, went to her assistance by foreclosure proceedings, under which he was to buy in that property, with the mules, carts, and farming utensils thereon, at a price within his claim, and, by arrangements to be perfected subsequently to his purchase he was to secure his own debt, enabling her to pay out, but at the same time guard her against her other creditors. That this plan was disarranged by the proceedings of the third opponents, who succeeded in obtaining a sale of the mules separately from the plantation. That, this severance placing Forstall in a position of possible danger of personal liability on the 12-months bond which had to be furnished at the sale should he buy himself, inasmuch as the third oppositions might be determined adversely to his mortgage rights on the mules, it was agreed that F. M. Taylor, the husband, should purchase the mules with the understanding that, if the third opponents won their suit, Forstall was to disappear entirely from any connection with that sale, and Taylor was to bear all the consequences of a purchaser, but, should Forstall win the suit, Taylor was to be considered as having purchased for Forstall. The mules were then to be replaced on the plantation, and matters were to be placed on the same footing as if the severance had not taken place, and Forstall had bought both land and mules at once under his mortgage claim. That under such a condition of things Purdy was to be released, or not looked to, as Taylor's surety on the bond. That Forstall having bought the plantation, and having won his suit as to the mules, matters had taken the shape to entitle him (Purdy) to demand that he be not proceeded against. In view of the friendly relations between the Taylors and Forstall, and the actual execution of an agreement between Forstall and them, so nearly identical with that foreshadowed by W. G. Vincent in his third opposition, it cannot be denied that plaintiff has placed his case inferentially very strongly before the court, and we were at one time disposed to take his view of the situation, but on more mature deliberation we do not think the judgment of the lower court sustaining it can be maintained, for several reasons.

In the first place, the mules having been sold under the writs of a number of creditors on terms of 12 months' credit with security, it is clear that when Taylor bid them in he became their actual owner. Their title in the interval between the sale and the termination of the third opposition proceedings could not be swinging in a balance, to rest finally upon Taylor personally should the third opponents have judgment in their favor, and upon Taylor as an agent of or interposed party for Forstall should judgment go against the opponents. Taylor was undoubtedly the absolute owner

of the mules, and Purdy undoubtedly his surety as such for the purchase price. We have very critically examined the pleadings and the evidence, and we think that the plaintiff himself and the Taylors concede this to be the fact. Plaintiff's contention is that, although this was the case, none the less, by a collateral agreement between himself and Taylor, as agent of Forstall, he was not to be proceeded against should Forstall have judgment in his favor in the matter of the third oppositions. If Taylor was the actual owner and actual debtor, and Purdy his actual security, then the claim is that these absolute obligations, evidenced by a contract of so high a nature as to be executory at once on default by *fi. fa.*, should be done away with, so far as Purdy is concerned, by a side agreement. Such a claim as this would necessarily have to be supported by very strong evidence. We do not think it has been furnished. The side contract which plaintiff sets up rests, in the first place, solely on parol evidence, which, although permitted to be received without proper objection to the same, was, as we shall hereafter show, of the weakest character. Taylor had been the agent of Forstall by a notarial power of attorney antedating all these proceedings, but the agency evidently was not intended to cover a case where Taylor himself and Taylor's wife were personally concerned. It obviously had reference to dealings with parties other than Taylor and his wife, but, even were this otherwise, the powers given to Taylor in the act did not extend to making any such contract or such arrangements as plaintiff contends for. Again, Taylor occupied a very peculiar position in relation to all these proceedings, for, even if the parties were all acting in accord, they to a certain extent, in the nature of things, had adverse interests. Taylor claims to have represented both the creditor, Forstall, and the debtor, who was his own wife, and he was at the same time the debtor himself on the 12-months bond, in which both Forstall and his wife had an interest. Arrangements by a person holding such conflicting interests are, to say the least, very questionable. To hold that there was such an arrangement, as Purdy asserts, we have to leave the notarial act of agency, or use it only to an exceedingly limited extent, and rest our conclusions upon the actions and relations of parties, and upon parol evidence to destroy written obligations.

But, leaving all this aside, we do not think the testimony supports Purdy in contending that there was any agreement between Taylor and himself prior to his becoming surety such as he now declares on. What occurred at that time is practically covered by Taylor's testimony to the effect that he got Mr. Purdy to sign it (the bond) as obliging two parties,—himself and Mr. Forstall; that he told Mr. Purdy that he would run no risk,

as he was Mr. Forstall's duly-authorized agent; and that he showed him the power of attorney offered in evidence; and by Purdy's testimony that when he received the power of attorney he exhibited it to his own attorney, and on his advice that he could safely sign he did so. In Purdy's own statement he says: "The day the mules were sold, Mr. Taylor came to my place of business, and asked me, as a special accommodation to himself and Forstall, to go on the 12-months bond for the mules he had bought that day, showing me his power of attorney from Forstall authorizing him to secure bonds for him, [the power of attorney being the same offered in evidence.] Mr. Taylor told me it was more to Forstall's interest to sign the bond than it was to his. He stated that he had leased the mules and implements for the year, and it would be the means of destroying his prospects if they were taken off the place." Being asked the question whether, at the time of the extension of the bond when it was about to mature, Taylor had not told him that, in case the court should decide that Forstall and Hernandez were entitled to the proceeds of the 12-months bond in preference to the other creditors, then, in that event, the 12-months bond was to be canceled, he answered, "I certainly so understood it;" and, this same question having been asked of Taylor, he answered, "I certainly intended to convey that impression, as I was acting for Forstall." We think the evidence does not show that an understanding was made with Purdy, at the time of his signing the bond, that under certain contingencies he was not to be looked to, and does show that Purdy's action rested upon an examination of Taylor's powers under the notarial act, and an erroneous conclusion as to their extent, and not upon anything dehors that act. The first evidence looking to or tending towards such an understanding as plaintiff speaks of refers to a date much later than the date of sale. It refers to a time when the bond was about to mature, at which time Taylor was anxious for an extension, and obtained it, with Purdy's consent, not from Forstall nor from Hernandez, but from the attorneys representing the different plaintiffs in the third opposition proceedings, which proceedings were at that time still pending. It was those parties, and not Forstall or Hernandez, who were pressing for execution, and it was with those parties Taylor was then dealing. It was they who exacted Purdy's consent to the extension, and it was they who insisted upon the additional security being given upon the bond, which was secured by obtaining the signature thereto at that time of Donnelly. Taylor was clearly not acting for Forstall at that time, and Purdy had no reason to suppose that he was. If he thought proper to receive the "impression" that Taylor says he "intended to convey" he did so at his own risk, on the strength of misplaced confidence in Taylor. Even at that date, matters, even be-

tween Taylor and Purdy, do not seem to have reached the point of any contract or agreement on the subject. Purdy's action in insisting upon what he now claims to have been a "condition" of his consent to an extension, that the bond should receive execution immediately upon the termination of the opposition proceedings, shows that he considered himself as Taylor's actual surety at that time, and then bound absolutely upon it; and his contention in this suit that he has been discharged because Forstall and Hernandez did not execute the 12-months bond at that time, as against Taylor, shows the same fact. With the evidence before us we do not feel justified in accepting as established the collateral agreement for discharge which plaintiff relies on; and in making that declaration it may be well to note that, through the whole of the discussion, Hernandez's rights in the premises have been utterly ignored. His rights are separate and distinct from those of Forstall. There is no pretense that he ever entered into any contract for Purdy's discharge, and from all we can see he is, *prima facie* at least, a creditor of Mrs. Taylor for a much larger amount than this bond would cover.

We now consider the claim of plaintiff that time was given to Taylor by Forstall without Purdy's consent. We have already said that to the extension of time granted at the maturity of the bond neither Forstall nor Hernandez were parties. To that extension Purdy agreed. Taylor, in one place in his testimony, says that Forstall agreed verbally in New Orleans to give him time. What he says on the subject is said so loosely that we attach no importance to the statement. We think it quite likely Mr. Forstall may have, without any intention of binding himself, declared his intention to hold matters in abeyance until Mr. Hernandez should return home from Europe. A mere declaration of that character is not the granting of time referred to in article 3063 of the Civil Code, as carrying with it the release of a surety. There is no pretense that there was ever even a "promise" to postpone, but, had there been, it would fall under the terms of article 1815, which declares that a positive promise that, from the manner in which it is made, shows there was no serious intent to contract, creates no obligation. The failure of Forstall and Hernandez to execute the 12-months bond promptly at maturity did not discharge Purdy. A mere forbearance or delay in enforcing their rights did not have that effect. He could have paid the debt, and, becoming subrogated to their rights, he could have managed the claim to his own satisfaction. *Hen. Dig. p. 1541.*

Plaintiff next claims that, subsequently to the purchase of the Live Oak plantation by Forstall, the latter and Hernandez entered into a written agreement by which Mrs. Taylor was to remain on the plantation, exercise certain rights of ownership thereon, (but short

of ownership,) and ultimately become, under certain contingencies, the owner of the property; that Mrs. Taylor had complied with all her obligations under this contract up to a certain period, when suddenly, without right so to do, Forstall sold the property to Hernandez, and Hernandez sold the same to different parties, placing it out of Mrs. Taylor's power to finally comply with the balance of her obligations; that one of the clauses of this contract so broken up was that, in the event Forstall and Hernandez should find a purchaser within a certain time for the plantation, and should sell it for over a certain amount, the surplus over that amount should be paid to Mrs. Taylor; that the price for which the property had been sold not only exceeded the amount fixed, and paid off all the indebtedness of Mrs. Taylor to Forstall and Hernandez, but left a large balance, which she was entitled to receive from them. Up to the present time Mrs. Taylor (who is no party to the present litigation) has asserted no such claim, that we are aware of, against Forstall and Hernandez. We cannot collaterally in this suit settle or liquidate the rights of Mrs. Taylor under that contract. Purdy is not authorized to advance claims for or stand in judgment for her. We cannot undertake to say what the rights of parties would be were she to do so herself at some future time, and the condition of affairs should prove such as plaintiff represents. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, annulled, avoided, and reversed, and that plaintiff's demand be, and the same is hereby, rejected, and the injunction taken out by him be, and the same is hereby, dissolved. Costs in both courts to be paid by appellee.

(31 Fla. 432)

**FLORIDA CENT. & P. R. CO. v. STATE ex rel. MAYOR, ETC., OF TOWN OF TAVARES.**

(Supreme Court of Florida. May 18, 1893.)

**MANDAMUS — PARTIES — ENFORCEMENT OF CONTRACTS — CONTRACTS BINDING RAILROADS TO LOCATE DEPOT AT PARTICULAR POINT VOID — LOCATION OF DEPOT CANNOT BE CONTROLLED — MANDAMUS.**

1. When mandamus is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. In such case the relator is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced.

2. Mandamus never lies to enforce the performance of private contracts.

3. Contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Such companies should be left free to establish and re-establish their depots wherever

the public welfare or wants of the public may require.

4. The courts are not authorized by mandamus to so far control a railroad company's discretion in the matter of the location of its depot buildings as to indicate in any case the exact spot of such location.

5. The mandatory part of an alternative writ of mandamus must conform to the case made by the recitals in such writ, and must not require more to be done than is justified by such recitals.

6. The range of action required of the respondent by an alternative writ of mandamus should be clearly, particularly, and explicitly set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate outside ascertainment dehors the writ.

(Syllabus by the Court.)

Error to circuit court, Lake county; John D. Brome, Judge.

Petition by the mayor, inhabitants, and town of Tavares, in name of the state, for writ of mandate to the Florida Central & Peninsular Railroad Company. Judgment granting the relief. Respondent takes error. Reversed.

Wall & Knight and John A. Henderson, for plaintiff in error. Alex. St. Clair-Abrams, for defendants in error.

TAYLOR, J. On the 11th of March, 1891, an alternative writ of mandamus was granted and issued by the judge of the circuit court in and for Lake county, in the seventh judicial circuit, upon the petition of the state on the relation of the mayor, inhabitants, and town of Tavares, against the corporate plaintiff in error, the Florida Central & Peninsular Railroad Company. Upon the denial of a motion to quash the alternative writ, and the sustaining of a demurrer to the respondent's answer, a peremptory writ was awarded, and from this judgment the respondent takes error.

The alternative writ, which contains all the recitals in the petition making application therefor, is as follows:

"Whereas, the state of Florida, on the relation of the mayor, inhabitants, and town of Tavares, has filed its petition for mandamus, and it appearing from the allegations of the petition that the Florida Central and Peninsular Railway Company, successors to the Florida Railway and Navigation Company, is a corporation duly chartered under the laws of the state of Florida, and doing business in said state, and within the limits of the town of Tavares, and that said town of Tavares has been a regularly established station of and for said railway for more than six years past, and that, when the said railroad was first constructed, Alex. St. Clair-Abrams, in his own person, gave the said railway the right of way in the said town, and also a block of land known as 'Shore Park,' the consideration for which was that said railway company should cause to be constructed on said block of land a passenger depot, and that all passenger

trains of said railway company should stop at such passenger depot; and that the inhabitants and town of Tavares assented to the use and occupancy of the streets and avenues of said town by said railroad upon the understanding and condition that the passenger depot would be constructed on the block known as 'Shore Park,' said block being the best situated and most convenient to the people of Tavares, and that by reason of establishing a station in said town of Tavares, and by reason of its receipt of the land herein described, it became, and was, and still is, the duty of said railway company to construct a passenger depot on said block in said town of Tavares for the proper use and accommodation of the public; that the said Florida Central and Peninsular Railway Company has failed to construct any passenger depot whatever in said town, but stops its trains in the public streets in said town, exposing its passengers and the public to great inconvenience and hardship; that in winter, while the public await the trains of said company, the only accommodation they have are bonfires lit in the public streets, around which the public have to cluster to obtain warmth; that, no provision whatever being made for the public, passengers in said town are compelled to go to the water-closets on the cars while they are standing in said streets, to answer the calls of nature, and human feces and urine are deposited on the public streets or public highway in said town, to the great scandal and injury of said town and the inhabitants thereof; that in rainy weather the public are compelled to remain uncovered in the rain, or to seek shelter in adjacent stores and buildings, because of the failure of the said railway company to perform its duty of constructing suitable railroad accommodations; that the Florida Central and Peninsular Railway Company, the successor of the Florida Railway and Navigation Company in the ownership, control, and operation of said railroad, still permits the scandalous and outrageous condition of affairs to exist in said town; that, although repeatedly requested to construct suitable depot accommodations in said town, it has failed and refused to construct any whatever, and, by reason of its failure so to do, great injury, damage, and inconvenience has resulted, to the injury of the inhabitants of said town, and to the town itself; that the Florida Central and Peninsular Railway Company has taken possession of, and uses, controls, and claims the ownership of, the lands deeded to the Florida Railway and Navigation Company, including the block of land known as 'Shore Park,' deeded for a passenger depot, said block being bounded on the east by St. Clair-Abrams avenue, and on the north by Tavares boulevard, but that the said railroad company utterly refuses to construct any depot on said block, or to construct any depot what-

soever in said town; that heretofore the said railroad company has stopped its passenger trains at the foot of Joanna avenue, in said town, where no depot accommodations whatsoever exist, and that the trains still stop at the foot of said avenue, but that on the 3d of January, 1891, the agents and employes of said railroad company were engaged in measuring the distance from defendant's railroad track near a large marsh to the post office, and that the petitioner is informed and believes that it is the purpose and intention of said railroad company to hereafter stop its trains near the edge of said marsh; that nearly the entire built-up portion of said town is east and north of said marsh; that the purpose of the defendant is to further annoy and injure the inhabitants of the town of Tavares; that, if the passenger trains of defendant are stopped there, it will not only inconvenience, but will inflict great injury upon, said inhabitants and upon said town; that said marsh is unhealthy, and abounding in malaria; that it presents an unsightly appearance, is forbidding in aspect, and is calculated to impress a stranger most unfavorably of said town and said inhabitants; that it will force said inhabitants and the public to additional inconvenience and expense in going to and from the cars of defendant; that the locality is utterly unfitted for a passenger depot, of which fact the defendant is aware; that the block of land known as 'Shore Park' is the best situated and most convenient for a passenger depot in said town, being only about two hundred and fifty feet from the post office, and less than three hundred feet from the principal hotel, and from ten of the fourteen stores in said town, and the most accessible to nearly all of the residences in said town; that it is the duty of the defendant as a public carrier to construct all needed depot accommodations at every one of its stations; that the town of Tavares is an important station on defendant's road; that said town is the county seat of said Lake county; that it is the junction of five railroads; that the defendant has a large business in said town, both of freight and passengers, and that great wrong and injury has been done to the said town and inhabitants thereof by the failure and refusal of the defendant to construct necessary depots; that by reason thereof the inhabitants of said town and the traveling public have been exposed to sickness and to suffering, and the public health has been endangered: It is therefore ordered that the respondents, the Florida Central and Peninsular Railway Company, proceed immediately to construct, or to have constructed, in the town of Tavares, on the block of land therein formerly known as 'Shore Park,' and bounded on the east by St. Clair-Abrams avenue and on the north by Tavares boulevard, a suitable depot for the accommodation of passengers, said

depot to be constructed in conformity with the ordinances of said town, and to be completed by the first Monday in June, 1891, and to stop all their passenger trains at said passenger depot for the reception and delivery of passengers; or to show cause, if any they have, by the said first Monday in June, A. D. 1891, why they have not obeyed this writ. Done at chambers, at De Land, Volusia county, Florida, this 11th day of March, A. D. 1891. John D. Brome, Judge."

The respondent's motion to quash this writ was upon the following grounds:

"(1) There are no sufficient parties to said relation.

"(2) There is a misjoinder of parties to the relation.

"(3) The inhabitants of the town of Tavares have each their individual, full, and complete legal remedy for any and every grievance against the respondents.

"(4) No obligation of contract between Alex. St. Clair-Abrams and the Florida Railway & Navigation Company, as charged, furnished a legal basis for redress for any breach thereof to the relators, or either of them, by mandamus.

"(5) There is no allegation in the relation of the existence of any ordinance of the town of Tavares in reference to the mode and manner of constructing a depot to support the requirement in the alternative writ that said depot be constructed in conformity with the ordinances of the said town.

"(6) There is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating a place at said station where the same should be placed."

The refusal of the court to grant this motion is assigned as error. We shall confine our remarks to the points raised by this motion to quash, as a discussion of them will completely dispose of all questions involved in the case.

In support of the first ground of the motion to quash it is urged for the plaintiff in error that, the proceeding having been instituted for the enforcement of a public right, no citizen or number of citizens, in their individual or collective capacity as such, would be entitled to the writ, but that the application for it should have been made by the attorney general. While there are many cases in several of the states that sustain this contention, yet the decided weight and preponderance of the authorities establish the following to be the correct rule as to who are proper relators in mandamus proceedings: "When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator (in such case) is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people

are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced." 14 Amer. & Eng. Enc. Law, 218, and authorities there cited. The above has been adopted by this court as being the correct rule in *McConihe v. State*, 17 Fla. 238, and in *State v. Crawford*, 28 Fla. 441, 10 South. Rep. 118.

The second ground on the motion to quash is that there is a misjoinder of parties as relators. The writ was issued in the name of the state of Florida *ex relatione* "The Mayor, Inhabitants, and Town of Tavares." The contention of the respondent is that the mayor in his official character and the inhabitants in their individual capacity have no such similitude of duty or interests as makes it proper to have them joined as relators. Under our laws for the incorporation of cities and towns such towns are required, as part of the process of incorporation, to adopt a corporate name, and by such corporate name they can sue and be sued. Sections 4, 8, pp. 246, 247, *McClell. Dig.*; sections 661, 665, *Rev. St.* There was no necessity to have used the words "mayor and inhabitants" in this proceeding. The accurate practice would have been simply to use the corporate name of the town as being the relator, (1 *Dill. Mun. Corp.* [3d Ed.] section 237, note 1,) as it was evidently the intention of the pleader to make the municipal corporation, "Town of Tavares," the relator in the case. But, the object of the proceeding being to enforce the performance of a public duty, under the rule as above announced the state is to be considered here as the real party; and as the town of Tavares by its corporate name is included as a relator, we can see no harm that could result from treating the words "mayor and inhabitants" as immaterial surplusage, particularly as the mayor is not individually named, and no individual inhabitant is named. The suit, according to the rule, could have been instituted on the relation of any citizen of the town of Tavares, or several of its citizens could have united as relators. The town of Tavares, being a corporation of the state, having the general power as such to sue and be sued, could also, in such a case, be the relator in its corporate capacity. The object of the proceeding being to enforce a public duty, so long as it is instituted and conducted in the name of the state, who, in such cases, is the real party, it is not a matter of so much moment as to who is the relator, as that the proceedings will be quashed because of any mere technical misjoinder of parties as relators.

The third ground of the motion to quash contends that there is ample remedy at law for the relief sought here by mandamus. The sixth ground of the motion to quash is that there is no law of the state of Florida

requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating the place at such station where the same shall be located. These two grounds of the motion present the question as to whether the power exists in the courts, in the absence of legislation expressly and specifically prescribing it as a legal duty to be performed by such companies, to compel railroad companies by mandamus to establish stations along their lines, and to erect and maintain thereat depot buildings for freight and passengers. From the specific relief sought by the writ in this case it becomes unnecessary for us to pass upon this question, since to pass upon it with the pleadings herein constructed as they are would be adjudicating an abstract proposition not properly presented. Without, therefore, even intimating any conclusion of our own upon the question, we deem it proper to say that there is weighty and serious conflict in the authorities as to whether the courts can in any case compel a railroad company to establish a station, or to erect and maintain thereat depot buildings, unless there is legislation in express terms making it a legal duty that they must perform, in contradistinction to a discretionary power that they are authorized to carry out or not, as they see fit. Some of the authorities hold that, independently of any legislation, it is a common-law duty that such companies owe to the public, and that it will be enforced by mandamus. *Northern Pac. R. Co. v. Territory*, 3 Wash. T. 303, 13 Pac. Rep. 604; *State v. Republican Val. R. Co.*, 17 Neb. 647, 24 N. W. Rep. 329; *McDonald v. Railroad Co.*, 26 Iowa, 124; *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. Rep. 857. Other authorities, upon the ground that the broad discretion vested in these companies in such matters by their charters is beyond the reach of judicial interference or control, hold that the courts cannot interfere unless the duty is made a clear one by express legislative enactment. *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. Rep. 856; *Northern Pac. R. Co. v. Territory*, 142 U. S. 492, 12 Sup. Ct. Rep. 283, overruling 3 Wash. T. 303, 13 Pac. Rep. 604, *supra*. The case made, however, by the alternative writ before us, does not seek merely to compel the erection of a depot building on the line of the respondent's road at some point at or near the town of Tavares that will be reasonably subservient to the wants and convenience of the inhabitants and business of that community, leaving the exact spot of its location there to the discretion necessarily vested in the company in such matters, but the sole demand of the writ is that the respondent company shall be compelled to erect a depot building on the particular lot in said town known as "Shore Park."

There is no better settled elementary principle in the law of mandamus than that the

writ will never lie to enforce the performance of private contracts. *Merrill, Mand.* § 16, and numerous authorities there cited; *Hlgh, Extr. Rem.* § 25, and authorities cited; *State v. Patterson, N. & N. Y. R. Co.*, 43 N. J. Law, 505; *Parrott v. City of Bridgeport*, 44 Conn. 180. Besides this principle, in so far as the alternative writ would seem to predicate its contention for the location of the depot upon the exact spot known as "Shore Park" upon the private contract between Alex. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, it seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. In *Marsh v. Railway Co.*, 64 Ill. 414, where the effort was made by bill in equity to enforce the specific performance of such a contract, the court says: "The location of railroad depots has much to do with the accommodation of the wants of the public; and, when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantages of such individual. Railroad companies, in order to fulfill one of the ends of their creation,—the promotion of the public welfare,—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy."

In *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. Rep. 857, the court says: "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void." The same doctrine was announced by Chief Justice Shaw in *Fuller v. Dame*, 18 Pick. 472; and also in *Railroad Co. v. Ryan*, 11 Kan. 602; *Railroad Co. v. Seeley*, 45 Mo. 212; *Currie v. Natchez, J. & O. R. Co.*, 61 Miss. 725. In *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. Rep. 643, the court says: "The location of stations for the receipt and discharge of passengers and freight at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, the railway company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed,

on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point, when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself, by contract with individuals, to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require." The same doctrine is held in *Holladay v. Patterson*, 5 Or. 177, in which case the court says: "A railroad company is a quasi public corporation, and the public have an interest in the location of their lines of road and depots. An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them will not be enforced." *Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846.

Counsel for the relator contends, however, in his briefs filed here, that the right to compel the location of the depot on Shore Park is not predicated upon the contract between Mr. St. Clair-Abrams and the town of Tavares on the one hand and the railroad company on the other, but that the allegations as to this contract contained in the writ are merely by way of recital to show that the company owned sufficient and suitable land for depot purposes, donated for such purpose, and that such land is most convenient for public use, and to forestall any claim by the company that they were without land in a convenient part of the town for depot purposes. Conceding, for the purposes of this case, that the alternative writ as framed will permit this contention, still the law will not, in our judgment, authorize the court to dictate the exact spot of the location of the depot building or to confine its location to any particular lot or block of ground. All of the authorities *supra* bearing upon this question agree that a very broad discretion is vested in these companies by their charters in the matter of the location of their roads, stations, depots, etc.

We have been unable, after the most laborious search, to find a single case where any court has ever undertaken to so far encroach upon this discretion as to dictate the exact spot of the location of one of its depot buildings; and, though the power may lie in the courts, upon a proper case made, and without legislation expressly enjoining it as a specific legal duty, to compel railroad companies to erect depot buildings at their stations, so that the convenience of the public there will be reasonably and measurably subserved, still we are perfectly satisfied

from the authorities cited that the courts are not authorized to so far control the company's discretion in the matter as to dictate in any case the exact spot of the location of one of its depot buildings; but such exact location must, of necessity, in every case, be left to the company's discretion to determine, limited only by the condition that it must be so located as to be reasonably subservient to the convenience of the community to be accommodated thereby. In reaching this conclusion we have not failed to consider that the language of our statute empowering railroads to build and maintain depots is permissive only, and not mandatory; but, even if it were mandatory as to the duty to erect depots, our conclusion would remain the same, that the effort of this writ to dictate its exact location could not be sustained.

In the mandatory part of the alternative writ, to which the peremptory writ also conforms, the respondent is required, not only to construct a depot upon the particular lot known as "Shore Park," but to construct it "in conformity with the ordinances of said town." Neither in the relator's petition for the writ nor in the recitals of the alternative writ is there any mention whatever of the existence of any ordinance of said town prescribing any regulations as to buildings of any kind in said town. This defect in the alternative writ constituted the fifth ground of the respondent's motion to quash. It is well settled that great care, particularity, and certainty is required in the preparation of the mandatory part of the alternative writ, and that it must conform to the case made by the recitals in the writ, and must not require more to be done than is justified by the recitals. *Merrill*, Mand. § 260; *Hartshorn v. Assessors*, 60 Me. 276; *King v. Church Trustees of St. Pancras*, 1 Nev. & P. 507; *Fisher v. Mayor*, etc., 17 W. Va. 628; *State v. State Board of Health*, 108 Mo. 22, 15 S. W. Rep. 322; *People v. Brooks*, 57 Ill. 142; *Tapp*, Mand. 371. Another rule applicable to mandamus that seems to be equally well settled is "that the range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look dehors the writ to ascertain his duty." *Merrill*, Mand. § 260; *Cross v. Railway Co.*, 34 W. Va. 742, 12 S. E. Rep. 765; *Hartshorn v. Assessors*, *supra*; *State v. Mobile & M. Ry. Co.*, 59 Ala. 321. The requirement of the respondent to construct its depots in conformity with the ordinances of the town of Tavares not only overstepped the case as made by the recitals in the petition and writ, but left the respondent's duty thereunder in a state of uncertainty, to be ascertained from the town ordinance, if there was any, entirely dehors the writ.

The motion of the respondent to quash the alternative writ should have been granted.

The judgment of the court below is reversed, and the cause remanded for such further proceedings as shall not be inconsistent herewith.

(31 Fla. 525)

**GODWIN v. KING et al.**

(Supreme Court of Florida. May 8, 1893.)

**DOWER—HOMESTEAD EXEMPTION—RIGHTS OF HEIR—SEGREGATION—COURTS OF EQUITY.**

1. The widow is entitled under the statute to dower of one-third part of all the lands, tenements, and hereditaments of which her husband died seised and possessed, or had before conveyed, whereof she had not relinquished her right of dower as provided by law; and article 10 of the constitution of 1885, providing that the exemptions therein contained shall inure to the widow and heirs of the party entitled to such exemption, does not take away her right to dower in that portion of the real estate exempt as a homestead.

2. The constitution of 1885 does not undertake, any more than did the constitution of 1868, to regulate the descent of property, but it simply exempts a certain portion of the estate of the head of a family residing in this state from forced sale under process of any court for the debts of such head of the family, and to continue this exemption, after his death, to his widow and heirs. The respective shares of the widow and heirs are not determined by the homestead article in the constitution, but are ascertained under the law regulating dower and the descent of property in force in this state.

3. The widow's right of dower under the statute is entirely distinct and separate from the estate descending to the heir, and is superior both to the claims of creditors and the inheritance of the heir.

4. In case of an intestate estate, where the decedent leaves more than one child, the widow is entitled under the statute to one-third part in fee of the personal property, and the fact that, under the homestead article in the constitution of 1885, \$1,000 worth of personal property is exempt, together with the homestead real estate, and this exemption also inures to the widow and heirs, does not repeal the statute in reference to, or take away her right to, the one-third part of the personal property in the estate of her deceased husband.

5. Where the head of a family residing in this state, and entitled to the benefit of the homestead exemptions, is residing at the time of his death upon real estate containing more than 160 acres, not in an incorporated city or town, the heirs are interested in any question looking to the segregation or setting apart of the homestead exempt property. The assignment of dower and the setting apart of the widow's part in the personal property under the statute does not, however, involve the segregation or separation of the homestead exempt property.

6. The statutory proceeding is a summary method for the simple admeasurement of dower, and no other relief than that specially authorized by the statute can be granted; and, should the powers of a court of equity be required to completely adjust the rights and interests of parties in such a case, resort must be had to such a court. But the mere fact that a portion of the property in which dower is asked to be assigned to the widow was the homestead of the deceased husband in his lifetime does not of itself necessitate a resort to the court of equity.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county.

Petition by Sarah J. Godwin against Emma King and Henry D. King for as-

signment of dower. Decree, from which petitioner appeals. Reversed.

B. S. Liddon, for appellant. F. B. Carter, for appellees.

**MABRY, J.** Alexander R. Godwin departed this life intestate on the 27th day of January, A. D. 1889, leaving appellant as his widow, and seven living children, and an heir of a deceased child. Decedent dwelt, before his death, in Jackson county, Fla., and letters of administration were granted in said county to his widow. In April, 1889, she filed a petition in the circuit court for Jackson county to have set apart her dower in the estate of her deceased husband, and, in addition to the foregoing facts, alleged in her petition that said decedent at the time of his death owned a large amount of personal property and the following real estate, in which she had not relinquished her right of dower, viz.: N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , N. E.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , of section 16, all in township 5, range 11; the S. E.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of section 25, township 5, range 12; two lots of land in the town of Cottondale, with certain boundaries given; also an undivided three-fourths interest in S. W.  $\frac{1}{4}$  of section 10, S. E.  $\frac{1}{4}$  of section 9, S.  $\frac{1}{2}$  of section 7, and N. W.  $\frac{1}{4}$  of section 8, all in township 5, range 11; and an undivided one-half interest in S. W.  $\frac{1}{4}$  of section 8; N. W.  $\frac{1}{4}$  of section 17, and W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ; N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 17, township 5, range 11. The prayer of the petition is that an order be made that petitioner have set off and allotted to her one-third part of all the said lands, tenements, and hereditaments as her dower, and also that the portion of the personal property of which her husband died possessed be set off to her.

Emma King and her husband, Henry D. King, filed an answer to said petition, and therein alleged that decedent, Alexander R. Godwin, at the time of his death, was the head of a family, residing upon and enjoying as a homestead under the constitution and laws of Florida the following portion of the real estate described in said petition, viz. N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of section 16, township 5, range 11, containing 160 acres, not situated within the corporate limits of any city or town. That, in addition to his said homestead, decedent was entitled to and enjoyed an exemption of \$1,000 worth of personal property under the constitution and laws of this state; and the personal property of said estate was appraised at \$5,470.50. That said administratrix has sold \$1,943.50 of said personal property, and this amount, less some small sums paid to the heirs of decedent, and for costs and expenses of administration, is now in her hands. The appraised value of \$559.50 of the personal es-



tate she has reserved unsold with the intention of having her dower assigned in it, and she has selected \$347.15 worth at its appraised value, to be credited on the shares of the minor children in said personal property. That the family of decedent at the time of his death consisted of his said widow and six minor children by a former marriage, residing in said county; and, in addition to said children, decedent left surviving him as heirs at law respondent Emma King, wife of Henry D. King, and Floie Knapp, minor and only child of Sarah R. Knapp, deceased, who was a child of deceased, A. R. Godwin.

It is then then alleged that the homestead and personal property exemptions of said decedent, Alexander R. Godwin, upon his death inured to said petitioner and said children as heirs, and that petitioner had no right of dower, or a third part, in said exempt property, but the same inured to her and said children in equal portions, under the constitution of this state.

A notice of the intention of petitioner to apply to the circuit judge for an order to have dower in said estate assigned to her, and for her part of the personal property to be allotted, was published for five consecutive weeks in the Times-Courier, a newspaper published in Jackson county, nearest the residence of said widow, Sarah J. Godwin, before the date of application.

Upon a hearing on said petition and answer the court granted the prayer of the petition as to all the property of said estate, real and personal, except the real estate alleged to be the homestead of decedent Godwin and \$1,000 worth of the personal property, and as to this the petition was denied, on the ground that such property was the exemption of said decedent.

That the wife was entitled to dower in the homestead real estate exemption of her deceased husband under the constitution of 1868 has been settled by adjudications in this court. *Wilson v. Fridenberg*, 19 Fla. 461; *Brokaw v. McDougall*, 20 Fla. 212; *Wilson v. Fridenberg*, 21 Fla. 386; *Barco v. Fennell*, 24 Fla. 378, 5 South. Rep. 9; *Miller v. Finegan*, 26 Fla. 29, 7 South. Rep. 140. Her right to dower in the homestead exempt property was not derived from the homestead article in that instrument, nor did the fact that the exemptions therein provided for accrued to the heirs of the party having enjoyed or taken the benefit of such exemptions have the effect to deprive her of her dower right in the homestead. The widow is entitled, under the statute of 1828, in force long prior to the adoption of the constitution of 1868, to dower of one-third part of all the lands, tenements, and hereditaments of which her husband died seised and possessed, or had before conveyed, whereof she had not relinquished her right of dower, as provided by law; and this right is superior to the claims of creditors. Neither was the heir's title to the homestead

exempt property derived from the constitution of 1868, but came to him under the statute of descents, and the effect of the constitutional exemption was to relieve the homestead portion of the estate from the debts of the homesteader during his lifetime, and, after his death, in the hands of his heir. The language used in the first *Wilson-Fridenberg Case*, supra, is that "the exemption here provided for is clearly exemption from sale for the debts of the owner of the property who is the head of a family residing in this state, and it is also as clear as language can make it that this exemption as a homestead from the debts of such owner is all that inures to his heirs upon his death, by virtue of the constitution." This construction of the constitution of 1868 has been reiterated, and ever after, in subsequent decisions of this court, adhered to, as sound and correct. Upon the death of the ancestor his real estate descends to his heir, subject to the dower right of the widow, and, independent of the constitutional exemption, to the claims of creditors. The widow's right of dower, which is entirely distinct and separate from the estate descending to the heir, was superior to the claims of creditors, but the heir's inheritance enjoyed no such immunity independent of the constitutional exemption. The effect of this exemption was to shield the homestead from forced sale for the debts of the homesteader, not only during his life, but also after his death, in the hands of his heir. Whatever misapprehension has existed as to the effect of the decisions of this court in construing the homestead article in the constitution of 1868 seems to have resulted from overlooking the fact that it did not undertake to regulate the descent of property, but simply to exempt a certain portion from sale for the debts of the head of a family residing in this state, and to continue this exemption after his death to his heir. When it is considered that this article was not a statute of descents, but a constitutional exemption, under certain conditions, of a specified portion of a debtor's property from forced sale for his debts, the decisions referred to will appear correct.

But the present case has arisen under the constitution of 1885, and counsel for appellees contends that the framers of this constitution intended to change the law as held by the former decisions of this court, and that the language used by them in this instrument is sufficient to accomplish this purpose. In ascertaining what is the proper construction of this instrument in this respect, it is proper that we refer to the construction placed upon the constitution of 1868, as the former is a revision of the latter. *State v. George*, 23 Fla. 585, 3 South. Rep. 81; *State v. Johnson*, 30 Fla. —, 11 South. Rep. 845. It is provided in section 1, art. 10, of the constitution of 1885, that "a homestead to the extent of one hundred

and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists." The other provisions of this section need not be referred to here, as no question is raised under them. The second section provides that "the exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section." The change in the language between the present and former constitutions, so far as need be noticed now, is in reference to the disposition of the homestead exemption after the death of the homesteader. The constitution of 1868 provided that the exemptions therein mentioned "shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemptions." The language in the instrument of 1885 is that the said exemptions "shall inure to the widow and heirs of the party entitled to such exemptions." The association of the widow with heirs in the provision that the exemptions "shall inure to the widow and heirs of the party entitled to such exemptions," it is claimed, has given her the status of an heir in the exempt property, and her interest in the same is the same as any other heir. The difference in language of the two instruments indicates a design to change the organic law for some purpose, but we are unable to see that the result contended for here has been accomplished. The construction put upon the old constitution was that the exemption provided for was an exemption from sale for the debts of the homesteader, and that this exemption was all that inured to the heir after the death of the ancestor by virtue of the constitution. The provision in this constitution that the exemption should accrue to the heir did not cast upon him an estate in the exempt property, but was a shield for so much of his inheritance against the debts of his ancestor. The homestead article in the constitution of 1885 is no more a regulation of the descent of property than the former one of 1868. The term "inure" is employed instead of "accrue," but this term is not equivalent to the word "descend," or any other word importing the descent of property. The exemption provided for is an exemption from forced sale for the debts of the homesteader who is the head of a family residing in this state, and this exemption is all that inures to the widow and heirs by virtue of the constitution. Upon no reasonable construction of language can the present constitution, any more than the former one, be construed as

granting a title to, or the casting of a descent as to the homestead exemption upon, either the widow or heir. The homestead exemption inures to the widow as widow, and to the heirs as such, and their respective rights in this property must be ascertained from other sources. Under the statute the widow is entitled to dower in all the real estate possessed by her deceased husband,—in the part exempt as a homestead as well as the other portion; and the constitution does not directly or by implication repeal the law giving her such dower. But it may be objected that the widow's dower in the homestead, as well as in any other portion of the real estate of her husband, needed no protection from the debts of her husband, as it was superior to the claims of his creditors, and that there could have been no object in associating her with the heirs for this purpose in the exemption article of the constitution. It is true that her dower right under the statute prior to the adoption of the constitution was superior to the claims of her husband's creditors, but still the constitution has embodied it as organic law that the exemptions therein provided shall inure to the widow as well as to the heirs of the homesteader, and this will undoubtedly have the effect to prohibit the legislature, under that instrument, from ever subordinating the widow's right of dower, or any other interest which she, as widow, may acquire in the homestead exemption, to the creditors of her husband. She had no homestead exemptions under the constitution of 1868, nor any other exemption, except, under the statute, her superior dower right to the claims of her husband's creditors. Under the statute she has the right by election to take a child's part in the estate of her deceased husband in lieu of dower, in which event the part so taken and set apart to her will vest in her in fee as to the real estate, and in absolute right as to the personal property. In case of an election by the widow to take a child's part in the real estate, her status is not that of heir, and without the constitutional immunity from sale of the homestead for the debts of her husband the part allotted to her in the homestead might be subject to such debts.

The present constitution, in providing that the homestead exemption shall inure to the widow and heirs, does not, in our judgment, have the effect to repeal the law giving her dower therein. If a special estate in the exempt property had been carved out by the constitution and cast upon the widow and heirs, upon the death of the homesteader, a different question would be presented, but this is not the construction placed upon the old constitution, nor can the new be so construed. The exemption provided is an exemption from sale for debts of the owner of the property who is the head of a family residing in this state, and this exemption as homestead is all that inures to the widow

and heirs after his death by virtue of the constitution. The constitution also exempts to the head of a family residing in this state \$1,000 worth of personal property, and this exemption also inures to the widow and heirs of the party entitled to such exemption. In case of an intestate estate, where the decedent leaves more than one child, as is the case here, the widow is entitled, under the statute, to one-third part in fee of the personal property, and this claim shall have preference over all others. The petition before us also asks for the widow's part in the personal property to be set apart to her under the statute. The fact that the real estate homestead exemption under the constitution inures to the widow as well as to the heirs, does not, as we have seen, have the effect to repeal the law giving her dower therein; neither can it be held that, because the \$1,000 worth of personal property exemption inures to her and the heirs, her right, under the statute, to one-third part of the personal property of the estate has been taken away. There is no more of a repeal of her statutory right in the one case than in the other. Her right to the one-third part of the personal property is superior to that of creditors, but in case of an indebted estate the heirs are entitled to only \$1,000 worth of the personal property exempt from the debts of their ancestor. It is not necessary for us to consider here how the allotment of the respective shares of the widow and heirs in the personal property should be made in case of an indebted estate, as the record does not present such a case. Whether or not the widow would be entitled, in such a case, to one-third of the personal property, and the heirs to \$1,000 worth in the remainder, will be material where the estate is indebted, and a portion of it is required to satisfy the demands of creditors. We are concerned at present only in ascertaining whether or not the homestead article in making the exemptions therein provided inure to the widow and heirs has taken away her dower in the homestead real estate, and her statutory part in the \$1,000 worth of exempt personal property, and our conclusion is that it has no such effect. The result is that the widow is entitled, under the constitution of 1885, to dower in the homestead real estate of her deceased husband, and to her statutory part in the personal property; and the decision of the court denying this right was to this extent wrong. From the allegations of the answer it is made to appear that the decedent, Godwin, died seised and possessed of much more real and personal estate than he was entitled to exempt from debts under the constitution, and that the 160 acres of land upon which it is alleged he resided, and enjoyed as a homestead, under the constitution and laws of this state, was part of a much larger contiguous body of land. While the answer states that decedent, as the head of a family, resided upon

and enjoyed as a homestead under the constitution the certain described 160 acres, we do not understand this as an averment that said decedent had in his lifetime designated the described parcel of land as his actual homestead, or that the same has been set aside as such since his death by any legal proceedings. We regard it as nothing more than an allegation by appellees that the described portion of the estate was the homestead of decedent, without any showing that he had so designated it in his lifetime, or that the same had been so set apart since his death by legal proceedings. It cannot be questioned that the heirs are interested in the selection of the homestead in an estate under administration. Of course, where the head of a family is residing at the time of his death upon a single tract of land of 160 acres or less, not situated in an incorporated city or town, no question can arise as to the selection of the homestead; but where such head of a family resides upon real estate containing more than 160 acres, and there has been no setting apart of the homestead or a designation of it as distinguished from the other lands the heir is interested in what is set apart as the homestead. While the constitution, in exempting a certain portion of a debtor's property from forced sale for his debts, does not create or carve out a new and separable estate therein, it does have the effect to distinguish or separate the exempt portion of the estate from the remainder in several important particulars. The exempt portion of the estate is not only shielded from the debts of its owner in his lifetime, and after his death in the hands of his heirs, but it is not assets in the hands of the administrator, nor has he any right to its possession or use as against the heirs. *Baker v. State*, 17 Fla. 406; *Barco v. Fennell*, supra. This being the case, it cannot be denied that the heirs are interested at once in any question looking to the setting apart or separation of the real-estate homestead property where it is a part of a larger tract than 160 acres, and also the setting apart of the \$1,000 worth of personal property exempt from debt of an estate under administration.

In the case before us, the widow, who is applying for dower and a part of the personal property, is also administratrix of her deceased husband's estate, and her application is made under the statute. This is a special and summary legal proceeding provided by statute for the simple admeasurement of dower, and no other relief than that specially authorized by the statute can be granted. *Milton v. Milton*, 14 Fla. 369; *Parish v. Ellis*, 16 Pet. 451. Should the powers of a court of equity be required to completely adjust the rights and interests arising in any case of this kind, resort should be had to such court by bill. There is no doubt about the jurisdiction of equity in such matters. *Campbell v. Murphy*, 2 Jones, Eq. 357; *Herbert v. Wren*, 7 Cranch, 370; *Farrow v. Far-*

row, 1 Del. Ch. 457; *Menifee v. Menifee*, 9 Ark. 9; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Swaine v. Perine*, 5 Johns. Ch. 482.

But the answer of appellees presents no difficulty in the way of the assignment of dower and the widow's part in the personal property under the statute. It simply sets up that decedent, Godwin, as head of a family residing in this state, occupied and enjoyed during his lifetime a certain portion of his real estate as a homestead under the constitution of Florida, and that he was also entitled as exempt under the constitution to \$1,000 worth of personal property. As we have already seen, the homestead article of the constitution does not repeal the statute in reference to dower, or the widow's part in the personal estate, which are superior and independent claims to the homestead rights of the heirs. The assignment of dower, and the setting apart of the widow's share in the personal estate, does not involve the segregation or setting apart of the homestead exempt property, and hence the answer shows no reason why there may not be an assignment of dower under the statutory proceeding. The decree of the circuit court was, therefore, erroneous, and must be reversed, and it is so ordered.

(99 Ala. 379)

**BIRMINGHAM TRUST & SAV. CO. et al.  
v. LOUISIANA NAT. BANK.**

(Supreme Court of Alabama. May 2, 1893.)

TRUST COMPANIES—NOTICE TO CASHIER—EFFECT  
—PLEDGE OF STOCK—SUBSEQUENT LOAN TO  
STOCKHOLDER—PRIORITIES.

1. Complainant bank made a loan to a citizen of the same city as defendant trust company on a pledge of stock of the latter. The cashier of defendant attested the transfer of the certificates of stock, and they were forwarded to complainant in an envelope bearing the stamp of the company. At the same time the trust company, through its cashier, drew on the broker, who was in the same city as complainant, for the proceeds of the loan, remitting the draft to complainant for collection, with instructions to collect and deposit to the credit of the trust company in another bank, which was done. The borrower was at the same time credited with the draft, and debited on the books of the trust company with charges on account thereof. The correspondence which complainant had with defendant's cashier was with him in his official capacity and not as an individual. *Held*, that defendant was affected with its cashier's knowledge of the loan made by complainant, so that it could not claim a lien on the pledged stock for advances afterwards made by it to the owner thereof.

2. The fact that the advances by defendant were made after the cashier's death, by officers who had no knowledge of the loan made by complainant, was immaterial.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by the Louisiana National Bank against the Birmingham Trust & Savings Company and W. C. Ward, as administrator of the estate of John Boddie, deceased. The prayer of the bill was that the Birmingham Trust

& Savings Company be compelled to enter on its books a transfer from John Boddie to the complainant of the stock pledged to it by said Boddie; that the lien of the complainant on said stock by reason of said pledge be declared superior to the lien of the defendant company; that it be referred to the register to state an account of the dividends due and received of the Birmingham Trust & Savings Company; and that it be required to pay the same to complainants. From a decree for complainant, defendants appeal. Affirmed.

The facts averred in the bill as going to establish the equity thereof are substantially as follows: The complainant was a resident of New Orleans, La., and the other parties resided in Birmingham. On April 25, 1889, John Boddie borrowed from the complainant \$25,000, and executed his note therefor, payable six months after date; and pledged at the same time as collateral security for the payment of said note 300 shares of the capital stock of the Birmingham Trust & Savings Company. This pledge was made by, and with the active assistance and cooperation of, the cashier and assistant bookkeeper of the trust and savings company. When the note matured it was renewed by said Boddie, Hudson, the cashier of appellant, writing the written part of the renewal note, and indorsed in his own handwriting on the back of the note the pledge of 300 shares of stock as collateral security. On the maturity of this note Boddie informed the complainant that he had sold 50 shares of the pledged stock, made a payment of \$5,000 on said note, and again executed a note for \$20,000, and pledged the remaining 250 shares of the capital stock of the defendant company as collateral security therefor. It was also averred in the bill that Hudson, the cashier of the Birmingham Trust & Savings Company, upon the loan being negotiated, and the check drawn in favor of John Boddie being cashed in New Orleans, as directed by said Hudson, cashier, the amount thereof was placed to the credit of said Boddie with the defendant company. Upon the maturity of this last note, given as stated above, and upon the same not being paid, the Louisiana National Bank demanded of the Birmingham Trust & Savings Company a transfer of the stock pledged to them on the books of said company. This demand was refused, the trust and savings company claiming that Boddie was indebted to it, and that on account of this indebtedness the said company had a lien on the stock so pledged by the complainant. Thereupon the complainant filed its bill for the purposes as above stated. The defendants, in their answer, and in the evidence introduced in support thereof, did not deny the equity of the bill, but set up the defense that under section 1674 of the Code it has a lien on the stock by reason of the indebtedness of Boddie to it, and that it

had no notice of the transfer of the stock to appellee; that, although Hudson, its cashier, may have had notice of the transfer, and the lien as alleged in the bill, it was in his individual capacity, and had never been communicated to the officers of the defendant company at the date of the notes given by Boddie to it evidencing his indebtedness. The evidence for the complainant tended to show that the bank had notice of the transfer through Hudson, its cashier, and Speed, its bookkeeper. Such other facts as are necessary to a full understanding of the decision are sufficiently stated in the opinion.

Gillespey & Smyer and Hewitt, Walker & Porter, for appellants. W. R. Houghton, for appellee.

STONE, C. J. The controlling, if not the sole, inquiry in this case is whether the Birmingham Trust & Savings Company has a lien on the shares of its capital stock, the subject-matter of controversy, to secure the payment of the debts contracted with it by Boddie, the original holder and owner of the stock. The certificates were issued to him, and he remains registered as owner and holder on the books of the company. The question is, will the asserted lien prevail over his prior pledge of the stock to the appellee, to secure the payment of a debt contracted on the faith of the pledge? The common law regards shares of stock in private corporations as personal property, capable of alienation or descent in any of the modes by which that species of property may be transferred. Thus regarding such shares, a lien or equity in favor of the corporation to charge them with a debt due from the shareholder would not be implied. Where the rights of third persons, accruing by purchase, or pledge from the shareholders, accrue, the recognition of such lien or equity would find no sanction in the rules of the common law. It discountenances all secret liens or trusts, as tending to fraud, to the embarrassment of trade, and to insecurity in the safe and speedy transfer of property. 1 Jones, Liens, § 375; Ang. & A. Corp. § 355; Cook, Stocks, & S. § 521. There is, however, much of equity and justice in such a lien, growing out of the relations which exist between the corporation and its shareholders, and it has become a very general legislative policy to confer it either by a general law, applicable to all corporations, or by a provision in the charters of particular corporations. As between the shareholder and the corporation, and all others than bona fide purchasers without notice, a by-law or rule of the corporation may very naturally and reasonably create such lien. This proposition is supported by the weight of judicial authority. Cook, Stocks, & S. § 552; Cunningham v. Insurance & Trust Co., 4 Ala. 652. The statutes declare: "Shares or interests in the stock of private corporations are personal

property, transferable on the books of the corporation in such manner as is required by the by-laws or by the rules and regulations of the corporation." It is made the duty of every private corporation to require transfers of its stock to be made or registered on its books, and all transfers, hypothecations, mortgages, or other liens of and on the stock, if not so made or registered, are invalid as to bona fide creditors, or subsequent purchasers without notice. The stock is the subject of levy and sale under attachment or execution, as is other personal property; and on the stock the corporation has a lien for any debt or liability incurred to it by the shareholder, before notice of a transfer, or of a levy thereon. Code, §§ 1669-1674. So far as the statute declares the shares personal property, it is simply affirmative of the common law. Ang. & A. Corp. § 557. The requirement that a transfer of them must be made or registered on the books of the corporation does not prohibit a transfer in other modes, or render a transfer otherwise made absolutely invalid. It is invalid only as to the particular parties mentioned in the statute. A transfer not made or registered on the books of the corporation may not pass the legal title. But it is not intended to establish a rule applicable only to this particular species of property, prohibiting the creation therein of equities binding the legal title, or requiring that at all times the legal and equitable title must be united in the same person. When such equities are created, the corporation is bound to regard them from the time it receives notice of their existence. Duke v. Navigation Co., 10 Ala. 82; Planters' & M. Mutual Ins. Co. v. Selma Savings Bank, 63 Ala. 585; Campbell v. Iron Co., 83 Ala. 351, 3 South. Rep. 369; Bank v. Hartwell, 84 Ala. 379, 4 South. Rep. 156; Winter v. Gas-Light Co., 89 Ala. 544, 7 South. Rep. 773. It is the protection of bona fide creditors, and of subsequent purchasers, the statute contemplates, and the protection of these only in the event there is want of notice of a prior transfer, hypothecation, mortgage, or lien. The lien which the corporation can assert and enforce against a prior transfer of the stock, though the transfer may create only an equity, binds the legal title of the shareholder, by the very terms of the statute. Like the protection extended to bona fide creditors or subsequent purchasers, it is dependent on a want of notice of the transfer, if the debts or liabilities were incurred by the shareholder. The lien, being created by statute, is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute. If there is a levy on the stock, or a transfer of it, subsequent to the incurring of a debt or liability to the corporation by the shareholder, the levy or transfer is subordinate to the corporation's lien. But if the debt or liability does not precede

the levy or transfer, the lien is subordinate, and must yield, unless the corporation dealt with the shareholder without knowledge or notice. Having knowledge or notice, in fair dealing the corporation could not extend credit to the shareholder, relying upon the lien to displace whatever of right the levy or transfer may have conferred.

The pledge to the appellee preceded in point of time the exclusion of credit to Boddie, and the creation of the debts for the security and payment of which the trust and savings company now attempts to assert a statutory lien on the stock. The material inquiry is, therefore, whether the company at and prior to the creation of the debts is chargeable with notice of the pledge. The fact is undisputed that Hudson, the cashier of the company, at the time of the pledge, had knowledge and notice of it, and was in fact an active participator and agent in the creation of the debt it was intended to secure; and the fact is undisputed that all the correspondence and intercourse the appellees had with him were had in his official capacity and relation as cashier, and were not had with him in his private, individual capacity. Nor can it be disputed that the correspondence, intercourse, and dealing were in accordance with the general usage, practice, and course of business of banking institutions, and within the general apparent line of duty and authority of the cashier of such institution. He is the executive officer, held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions; and his acts and dealings within the scope of such usage, practice, and course of business bind the corporation in favor of those dealing with him, not having other knowledge. Notice received, or knowledge acquired by him, while engaged in the transaction of business according to such usage and practice, is substantially notice to and the knowledge of the corporation. *Everett v. U. S.*, 6 Port. (Ala.) 166; *Bank v. Steele*, 10 Ala. 915; *Merchants' Bank v. State Bank*, 10 Wall. 650; *Case v. Bank*, 100 U. S. 454. The general rule, applicable alike to individuals and to corporations, is that the knowledge acquired, or the notice received by an agent, which will affect and bind the principal, must have been acquired or received by the agent doing some act within the line of his duty and authority. Whether, as between Boddie and the trust company, the transaction in which Hudson was engaged was the negotiation of the loan from the appellee to Boddie, or the collection for Boddie of the proceeds of the loan, is not material. It may or may not be within the usual scope of the business of a banking institution to negotiate loans. The negotiation of loans is, however, a function and power expressly conferred by the charter on the trust and savings company. The power existing, the negotiation becomes business of the company, which may

be transacted as other ordinary business is transacted. It falls within the line of duty and authority intrusted to the cashier as the executive officer to whom the management and transaction of the ordinary business of the company is intrusted. 1 Mor. Priv. Corp. § 359 et seq.; 2 Amer. & Eng. Enc. Law, p. 118. There is no other officer of whom the public at large would so readily expect the exercise of such function and power; no other with whom it would so confidently deal in reference to its exercise. Whether there was a by-law or a resolution of the board of directors expressly imposing the duty or delegating the authority, in the absence of knowledge or notice thereof, is not a matter of importance when the rights and dealings of third persons are involved. Whoever deals with an agent or officer of a corporation within the scope of the apparent powers of such agent or officer, is not affected by the secret instructions of the corporation, or the secret limitations which may have been placed upon his power. 2 Mor. Priv. Corp. § 593 et seq. Nor is it important whether it be true or not true that in no other instance than this did Hudson ever negotiate a loan. If the negotiation of loans was within the scope of his authority and duty as cashier under the usages, practice, and course of business of banking institutions, it was the right of the appellee to rely on this apparent authority in dealing with him in his official capacity. If, in his capacity of cashier, Hudson negotiated or aided in negotiating the loan for Boddie, and in the course of the negotiation acquired knowledge and received notice of the pledge, that knowledge was also acquired, and the notice also received, in the course of the collection for Boddie of the proceeds of the loan, and it cannot be doubted that in making the collection he acted wholly for the company, and within the line of his duty and authority. There are but few functions of a banking institution more frequently exercised than that of making collections, especially at places distant from the locality of the bank. The collection of necessity is made through the medium of correspondence, and the conduct of its correspondence is surely, according to the usages and practice of banking institutions, within the line of the duty and authority of the cashier. The loan having been negotiated, a pledge of 300 shares of the capital stock of the trust and savings company was the required security for its repayment. Hudson attested the transfer of the certificates of stock, and they were forwarded to the appellee in an envelope bearing the stamp of the company. At the same time the trust company, through Hudson, its cashier, drew upon Seixas, the broker in New Orleans, for \$24,162.50, the net proceeds of the loan, remitting the draft to the appellee for collection, with instructions to collect and deposit to the credit of the company in the

Whitney National Bank of New Orleans. The collection and deposit were made, of which the company were promptly informed. On the same day the certificates of stock were forwarded to the appellee, the draft was drawn, and Boddie was credited with the draft and debited on the books of the company with charges on account thereof, \$62.50. Whatever may have been the knowledge acquired or the notice previously received by Hudson in this particular transaction, by the collection from Selxas of the proceeds of the loan he acquired full knowledge, and received full, actual notice of the pledge of the stock to the appellee. That knowledge and notice were the knowledge of and notice to the company. The collection of the money for Boddie was ordinary business of the company, and such business, according to the usage and practice of banking institutions, is transacted by and through the cashier. It is only through its officers and agents that a corporation acquires knowledge or receives notice; and, though knowledge acquired or notice received by an officer or agent, while not engaged in transacting the business of the corporation, may not affect or be imputed to it, yet, if it is acquired or received while engaged in the sphere of his official duty and authority, the knowledge or notice becomes the knowledge of and notice to the corporation; otherwise knowledge and notice could never be traced to the corporation, and the utmost insecurity in dealing with it would follow. As against corporations, there are peculiar and urgent reasons for a stringent enforcement of the general rule that knowledge acquired or notice received by an officer or agent within the scope of the agency is deemed notice to the principal, as "the corporation cannot see or know anything except by the intelligence of its officers." *Bank v. Whitehead*, 36 Amer. Dec. 183, notes.

It is insisted that, although Hudson, in his relation and capacity of cashier, acquired knowledge and received notice of the pledge, the knowledge and notice is not imputable to the company to affect such transactions had with Boddie which were conducted by other officers and agents subsequent to Hudson's death, and who were without such knowledge or notice. This insistence is founded in misapprehension of the principles of law, and of its true theory. The knowledge and notice an agent acquires and receives in the transaction of the business of the principal is not personal, pertaining to the agent only. The legal principle is thus tersely expressed: "Notice to an agent is notice to the principal." *Wade*, Notice, § 672. And the theory of the principle is that, if the principal had in person transacted the business, he would have acquired the knowledge or received the notice the agent acquires and receives, and therefore is chargeable with such knowledge and notice, (*Sooy v. State*, 41 N. J. Law, 400;) and upon general principles

of public policy it is and must be presumed that the agent communicates to the principal the facts of which he acquires knowledge or notice. If the communication is not made, it is the fault or neglect of the agent, which must be visited on the principal, rather than upon strangers dealing with the agent, within the scope of the agency. *Story*, Ag. § 140. The trust and savings company, being chargeable with knowledge and notice of the prior pledge to the appellee, is not entitled to assert a lien on the stock for the security of the debts subsequently contracted by Boddie. We find no error in the record, and the decree of the chancellor is affirmed.

(98 Ala. 343)

## COFER v. SCROGGINS.

(Supreme Court of Alabama. May 2, 1893.)

## HOMESTEAD—RIGHTS OF ADOPTED CHILD—OBJECTIONS.

1. A general objection to the whole question, a part of which is proper, may be overruled.

2. Where the judgment debtor has absconded, and certain land attached to secure the judgment is claimed as exempt by his adopted child, it is proper to ask defendant what were the improvements on the land when the debtor left, and their condition, and whether any improvements had since been made by defendant or for her, since the answers might tend to show the value of the property.

3. An answer, "Right smart improvements have been made in clearing and fencing," though a mere conclusion of facts, is properly allowable, subject to cross-examination by plaintiff.

4. Evidence that the debtor's wife was on good terms with him when he left, and went with him, is irrelevant.

5. Where a declaration of claim of exemption is made, filed, and recorded in the probate court in accordance with the statutes on the subject, a certified copy of such proceedings is admissible in such contest, as are the original minute entries from the record book of the probate, but either are sufficient.

6. Where claimant is an adopted child of the debtor, a certified transcript of the proceedings in the probate court is admissible to show such adoption, as are the original minute entries of such proceeding.

7. In Alabama, an adopted child, as a natural one, is entitled, during minority, to an exemption in the homestead of her adopted parent.

8. Code, § 2537, providing for exemption in favor of children, when the father absconds, or abandons his family, and that such exemptions shall continue only so long as the wife and minor child shall remain bona fide residents of the state, must be construed in connection with Const. art. 10, § 3, providing that the homestead of the family, after the death of the owner, shall be exempt from the payment of debts during the minority of the children, and Code, § 2507, providing that such homestead, not exceeding in value \$2,000, shall be so exempt during such time, and means that the exemption is to be enjoyed by the children during minority only, if they remain bona fide residents for that length of time.

Appeal from circuit court, Cullman county; H. O. Speake, Judge.

Action by W. T. L. Cofer against Robert Jones for debt, aided by attachment, in which

plaintiff had judgment. Mary J. Scroggins, defendant's adopted daughter, filed a declaration of claim of exemption, and in the contest of exemption proceedings had judgment, and plaintiff appeals. Modified.

The evidence on the part of the plaintiff tended to show that on December 3, 1888, the plaintiff, W. T. L. Cofer, sued out an attachment against one Robert Jones on a debt contracted after April, 1873, and the same was levied by the sheriff of Cullman county, Ala., upon the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 14, township 10, range 2 W., in said county and state; and that at the July term, 1891, of the circuit court the plaintiff recovered a judgment against said Jones for the sum of \$103.24; that said Jones was the owner of the said above-described land, and occupied and used the same up to January or February, 1886, when he left the land and state. The defendant, being introduced as a witness in her own behalf, testified that she was the adopted daughter of Robert Jones; that she was 22 years old in February, 1892, was married, and was living with her husband; that said Robert Jones was in possession of the land involved in this suit, exercising acts of ownership over the same, and owned the same up to the time he left Cullman county, in the early part of 1886; that when he left the state he left his wife, who has since died, and the defendant herself is now residing upon the land above described, and has resided upon the same continuously since the said Jones left in 1886. The defendant further testified that she was the Mary Jane Stephenson who was adopted by Robert Jones in 1882; that she afterwards married one Scroggins; that she lived with the said Jones on the land involved in this suit from the time he adopted her up to the time he left in 1886, and that the land was the homestead of Jones, and was occupied by him as such, and was the only land he owned; that her husband has made considerable improvements on the land; that on the day she filed her claim of exemption in the probate court of Cullman county she was a resident of the state of Alabama, and intended to remain a resident of said state; and that the land in contest did not exceed \$2,000 in value at the time said claim of exemption was filed nor at the time of the filing of the contest, nor at the time of the trial. During the examination of this witness she was asked by her counsel the following question: "State whether or not you were a resident of this county and state, and whether you intended to remain so in December, 1888." The plaintiff objected to this question, and duly excepted, and the court overruled his objection. The defendant answered that she was, and intended to remain so. She was then asked by her counsel the following questions, and the plaintiff separately excepted to the asking of each of them, and to the court's allowing the defendant to answer the same: "What were the improvements on the land in 1886, when

Robt. Jones left, and what were their condition?" "State whether or not any other improvements have been made on the land since Jones left, by you or for you?" On cross-examination of this witness the plaintiff asked her the following questions: "Was his [Robert Jones] wife on good terms with him when he left?" and "Did his [Robert Jones] wife go with him?" The court sustained the defendant's objections to each of these questions, and the plaintiff separately excepted. The defendant next introduced in evidence a certified copy of the record of the claim of exemptions. The plaintiff objected to the introduction of the said record, on the ground that the plaintiff's claim to exemption was the best evidence. The court overruled the objection, and the plaintiff excepted. The defendant introduced in evidence a certified transcript of the minute entry of the probate court of Cullman county, in which said Robert Jones adopted her, Mary Stephenson. Plaintiff objected to the introduction of this paper in writing, and duly excepted to the court overruling his objection. Upon the introduction of all the evidence the court made the following remark to the defendant's counsel: "If you ask the general charge in writing, I will give it." The plaintiff duly excepted to this remark, and also excepted to the court's giving the general affirmative charge at the request of the defendant.

W. R. Austin and W. T. L. Cofer, for appellant. Geo. H. Parker, for appellee.

HARALSON, J. 1. The question propounded to the defendant on her examination as a witness, "State whether or not you were a resident of this county and state, and whether you intended to remain so, in December, 1888," contains two inquiries, either of which might have been differently answered. The first—whether she was a resident of this state—is a collective fact, (*Pollock v. Gantt*, 69 Ala. 373; *Hood v. Disston*, 80 Ala. 379, 7 South. Rep. 732,) and was legal and pertinent, as only residents are entitled to exemptions; the second, calling for her intentions, was not, (*Sternau v. Marx*, 58 Ala. 608; *Wilson v. State*, 73 Ala. 527.) But it is a familiar rule that, where there is a general objection to evidence, as in this instance, a part of which is legal and another part illegal, it may be overruled. *Railroad Co. v. Jones*, 92 Ala. 225, 9 South. Rep. 276.

2. The questions allowed to be asked defendant, and excepted to by plaintiff, "What were the improvements on said land in 1886, when Robert Jones left, and what were their condition?" and whether any "improvements have been made on the land since Jones left, by you or for you," were not improper, since answers to them might tend to show the value of the property,—an important inquiry, in one phase of the case. The answer to the last question, "A right smart improvements



have been made in clearing and fencing," was a mere conclusion of facts, an inference necessarily involving facts as to the quantity of land cleared and fenced, which, as a collective fact, was properly allowable, subject to the cross-examination of the plaintiff, if he desired the matter stated more explicitly or in detail. *Railroad Co. v. McLendon*, 63 Ala. 276; *Hood v. Disston*, 90 Ala. 379, 7 South. Rep. 732. Besides, a sufficient answer to all these exceptions is that, if material, they could not have influenced a jury in any way, since the court gave the general charge for the defendant, thereby withdrawing from the jury all consideration of the facts, except as to their belief of them, there being no conflict in the evidence. 1 Greenl. Ev. § 52.

3. There was no error in refusing to allow plaintiff to ask defendant on her cross-examination if Jones' wife was on good terms with him when he left, and if she went with him. An answer to the question was irrelevant to the principal fact or matter in dispute.

4. The declaration of claim of exemption made and filed in the office of the judge of probate of Cullman county, in this state, was made and recorded in accordance with the statutes on the subject, and was relevant, since the statute makes it thereafter prima facie correct, and operative as notice of its contents. Code, §§ 2515-2517, 2507, 2537. The statute makes the certified copy of such proceedings (and these were properly certified) have the same effect as if the originals were produced and proved; but, in addition to the certified transcript, the defendant introduced, proved, and read the original minute entries of this proceeding from the record book of the probate court, to which the plaintiff also objected. But these objections were properly overruled, since either was sufficient. Code, § 2788; *Stevenson v. Moody*, 85 Ala. 35, 4 South. Rep. 595.

5. A transcript of the proceedings in the probate court of Cullman county, duly certified, by which defendant claimed to have been adopted as the child of Robert Jones, was offered and read in evidence, against the objection of the plaintiff. The proceedings were in close and satisfactory compliance with the statutory mode for the adoption of a child. Code, § 2367; *Abney v. De Loach*, 84 Ala. 393, 4 South. Rep. 757. The defendant also proved and read in evidence the original minute entry of said proceeding from the record book from the probate court of said county. The transcript of the entry, or the original entry itself, was admissible. Authorities, *supra*.

6. The act of adoption of a child has been defined to be "one by which a person takes the child of another into his family and treats it as his own." (1 Amer. & Eng. Enc. Law, 204;) "to receive or treat as a son or daughter one who is the child of another," (Worc. Dict.;) "to take into one's family as a son or heir; to take and treat as a child;

giving a title to the privileges and rights of a child;" (Webst. Dict.; *Tilley v. Harrison*, 91 Ala. 295, 8 South. Rep. 802; *Russell v. Russell*, 84 Ala. 48, 3 South. Rep. 900.) Our statute on the subject is: "Any person desirous to adopt a child so as to make it capable of inheriting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing attested by two witnesses, \* \* \* which, being acknowledged by the declarant before the judge of probate of the county of his residence, \* \* \* has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one in the declaration." The primary object of the statute would seem to be to allow any person to adopt the child of another, and make it capable of inheriting his estate if he should die intestate, or to change the name of one previously adopted. But a liberal intendment and operation should be given to the statute. Accordingly we held on this subject, in another connection, that, "though adoption may not, by operation of the statute, originate and establish all the legal consequences and incidents of the natural relation of parent and child, when the adoptive father declares his own name as the name by which he wishes the child to be thereafter known, and takes it into his family to be treated as a child, he assumes the duties of a natural parent, and is entitled to its custody and services or earnings as against all persons, unless it may be the true parents, when they have not consented to the adoption." *Tilley v. Harrison*, 91 Ala. 297, 8 South. Rep. 802. And so our homestead exemption, deemed so important as to be made the subject of constitutional and legislative provision, is one in favor of the family, and is founded in a spirit of humanity and benevolence; and the statutes on the subject, like the one providing for the adoption of a minor, are to be liberally construed. 3 Brick. Dig. p. 490, § 2; *Thomp. Homest. & Ex.* §§ 47, 131. Applying such construction to our homestead and exemption laws, we hold that an adopted child, as a natural one, is entitled, during minority, to this claim of exemption.

7. The judgment in this case is one of exemption to the defendant "so long as said Mary J. Scroggins remains a bona fide resident of the state of Alabama," etc. The statute (Code, § 2507) and the constitution (article 10, § 3)<sup>1</sup> limit the exemption as to children during their minority. The judgment entry no doubt followed section 2537 of the Code, making provision for exemption in favor of children when the father absconds or abandons his family, as was the

<sup>1</sup>Const. art. 10, § 3, provides that the homestead of a family, after the death of the owner, shall be exempt from the payment of debt during the minority of the children. Code, § 2507, provides that such homestead, not exceeding \$2,000 in value, shall be exempt during such time.

case here, which provides that "such exemptions shall continue only so long as the wife and minor child or children, or either, shall remain bona fide residents of this state." But this section must be construed in pari materia with said section 2507 and said article of the constitution, and clearly means that the exemption is to be enjoyed by the children during minority only, if they remain bona fide residents for that length of time. *Miller v. Marx*, 55 Ala. 322; *Hunter v. Law*, 68 Ala. 365; *Barber v. Williams*, 74 Ala. 333. The judgment will be here so corrected, and, as corrected, affirmed.

(99 Ala. 630)

**CORNISH et al. v. SUYDAM.**

(Supreme Court of Alabama. May 2, 1893.)

**MODIFICATION OF BUILDING CONTRACT — EFFECT.**

Where plaintiff contracts to complete a house "ready for occupancy" within 60 days, according to plans which do not require the finishing of the second story and putting on the last coat of paint, the effect of a subsequent contract, made after the 60 days have expired, to do the additional work, for an extra payment, is to waive the original stipulation to complete the work at a certain time, and substitute a stipulation for completion within a reasonable time.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by W. H. Suydam against W. K. Cornish and others to recover on a contract for the erection of a house, and to enforce a mechanic's lien. Defendants pleaded the general issue, and also sought to recoup damages for plaintiff's failure to finish the contract within the time specified therein. From a judgment for plaintiff, defendants appeal. Affirmed.

Wade & Vaughan, for appellants. W. R. Houghton, for appellee.

**MCLELLAN, J.** The contract of September 25, 1890, stipulated for the completion of the house "ready for occupancy" within 60 days from that date,—that is, by the 24th day of November, 1890,—according to the architect's plans and specifications. It seems that these plans and specifications did not provide for, contemplate, or require the finishing of the second story of the building in respect of the plastering, casing, and hanging of the doors and windows, wainscoting, etc., nor that the last coat of paint of lead and oil on the whole exterior of the building should be put on by the contractor, Suydam. On November 25, 1890, the day after the time limited in the first contract for the completion thereunder of the house, the parties entered into another contract, by the terms of which the contractor, for an additional consideration, undertook to do this plastering, casing, and hanging doors and windows, wainscoting, etc., in the second story, and "to paint last coat on house with lead and oil for ten (\$10) dollars extra on contract." The contract here referred

to is manifestly that of September, 1890. Nothing was said at the time of this second contract to the effect that it was a waiver of the time stipulated in the first for the completion of the house; but the trial court properly held that the second contract was itself such waiver, and that, instead of the original stipulation in this regard, the effect of the last contract was to substitute a stipulation for completion within a reasonable time. It is obvious that the contract of September 25th did not provide for or contemplate the full completion of the house at all, but only to the extent covered by the specifications, which made no provision for finishing the second story, or for putting on the final coat of paint over the entire building. The second contract was intended to take the place of the first, in our opinion, with reference to what should be considered the completion of the building in the understanding of the parties; and, being entered into after the lapse of the original 60 days' limitation, and providing for additional work and material thereafter to be done and supplied, thus necessitating further time for completion, the effect of it could only be to waive the original stipulation, and to leave in the place of it an obligation on the contractor to complete the house within the specifications referred to in the first contract, as added to by the second, in a reasonable time after November 25, 1890; and this conclusion is aided by reference to the last clause of the second contract, which provides for an extra payment under the first contract, and whereby, in effect, the defendant, after he knew there would be a forfeiture by the terms of that contract, which, if he insisted upon it, would reduce the original contract price, agreed to pay the price so stipulated and \$10 extra thereon. Of course, the parties had a right to alter and modify the original contract, and to make the second one by mutual consent, and without any new consideration, and by such alteration or new agreement either expressly or impliedly to waive any right either would otherwise have had. *Robinson v. Bullock*, 66 Ala. 548; *Young v. Fuller*, 29 Ala. 464; *Badgers v. Davis*, 88 Ala. 367, 6 South. Rep. 834. We see no reason to disturb the conclusions of the trial judge on the questions of fact which arose on the trial.

The judgment is affirmed.

(99 Ala. 579)

**ZEALY v. BIRMINGHAM RAILWAY & ELECTRIC CO.**

(Supreme Court of Alabama. May 2, 1893.)

**RAILROAD COMPANIES—MERGER BY CONSOLIDATION—PLEADING—EVIDENCE—SUFFICIENCY.**

1. In an action for personal injuries, brought against defendant railroad company on the theory that after the injuries were received, and before suit, the negligent corporation was consolidated with several others, forming de-

defendant, which latter assumed the liabilities of the negligent corporation, pleading the general issue, while admitting the capacity in which defendant is sued, does not admit the merger of the wrongdoing corporation, by consolidation, into defendant.

2. Where the suit is brought August 2, 1890, and plaintiff introduces the deed executed by the negligent corporation to defendant on September 30, 1890, which recites the consolidation and the creation of defendant at some time, not specified, before its date, and also the act of the legislature authorizing such consolidation, while the evidence does not show precisely whether the consolidation took place before or after suit was brought, yet, with the admission in the pleading that defendant was a corporation, it constitutes competent evidence of the alleged consolidation before the suit.

Appeal from circuit court, Jefferson county; S. H. Sprott, Judge.

Action brought by Hattie O. Zealy against the Birmingham Railway & Electric Company to recover damages for personal injuries alleged to have been suffered on account of negligence of the Birmingham Union Street Railway Company, or of its employees. There was judgment for defendant, and plaintiff appeals. Reversed.

Jas. H. Little, for appellant. Hewitt, Walker & Porter, for appellee.

McCLELLAN, J. This action is for personal injuries resulting to the plaintiff, Hattie O. Zealy, from negligence on the part of the Birmingham Union Railway Company or its employees. The suit is against the Birmingham Railway & Electric Company, on the theory that after the injuries were received, and before the institution of the suit, the negligent corporation was, with several other corporations, consolidated, forming the defendant corporation, which latter concern thereby assumed the liability now sought to be enforced, though primarily it rested solely, of course, on the Birmingham Union Railway Company. The complaint is to be taken as averring these facts, though they appear therein more in the way of casual recital than affirmative and direct allegation. It was necessary, obviously, for the complaint to aver them, since, without the fact of consolidation before suit brought, no cause of action existed when the suit was brought, and no recovery could be had. Several pleas were filed by the defendant, each of which presented only the general issue of not guilty, and upon this issue the case was tried. It is insisted that the submission of the cause on this issue alone was an admission on the part of the defendant, both of the capacity in which it was sued, and of its responsibility for the wrongs charged against the Union Railway Company, or, in other words, that neither defendant's corporate character, nor the fact of the merger of the wrongdoing corporation, by consolidation, into the defendant corporation, is within the general issue. As to the first proposition, the contention is sound. The plea of not guilty admits the

capacity in which defendant is sued. But from the fact that defendant is a corporation it does not follow that it came into existence as such as a result of the consolidation of the Birmingham Union Railway Company with other corporations. While the pleas interposed are not to be taken as denying the capacity in which the defendant is sued, they do go in traverse of every fact alleged in the complaint which is essential to the existence and enforcement of the claim advanced, so far as the misconduct charged against the Union Railway Company, and defendant's responsible connection therewith, are concerned. As has been said by this court, "this form of defense goes \* \* \* in traverse of the misconduct resulting in injury, which (or liability for which) the complaint imputes to the defendants,—the facts out of which the liability arises." Railroad Co. v. Trammell, 93 Ala. 350, 9 South. Rep. 870. The complaint shows that the defendant corporation did not commit the wrongs counted on. Had it simply averred these wrongs as being committed by another corporation, the consequent injury, and that defendant was a corporation, it clearly would have presented no cause of action against the party sued. That party's liability for the wrongs of the negligent corporation arose, if at all, from the fact that it succeeded, by process of consolidation, to the assets and liabilities of the wrongdoing company; and the fact of such consolidation was necessary to be alleged, was denied by the plea of the general issue, and, of consequence, was necessary to be proved by the plaintiff.

The trial court held that there was no evidence adduced which tended to prove that the Birmingham Union Railway Company had been merged into the defendant corporation before suit brought, and upon this theory gave the affirmative charge for the defendant. The record leaves no room for doubt that the defendant company became a corporation by the name of the Birmingham Railway & Electric Company at some time prior to the act of February 12, 1891, by and through a consolidation of several then existing corporations, one of which was the Birmingham Union Railway Company, which in April, 1890, inflicted the injuries complained of. This fully appears by an act approved February 12, 1891, entitled "An act to confirm, amend, and enlarge the charter of Birmingham Railway and Electric Company, and to ratify and confirm the consolidation of the Bessemer and Birmingham Railroad Company with other corporations therein named," which, after reciting that under and by virtue of the provisions of section 13 of "An act to confirm, amend, and enlarge the charter of the Bessemer Dummy Line, and to change the name thereof," approved February 19, 1889, the Bessemer & Birmingham Railroad Company has united and consolidated its

railroads and franchises, rights, and privileges with the railroads, franchises, rights, and privileges of the Birmingham Union Railway Company, the Ensley Railway, and of the Birmingham Electric Company, corporations organized under the general laws of the state; that by such consolidation and amalgamation "the said four corporations did form one general corporation, under the name and style of Birmingham Railway and Electric Company;" and further setting forth the terms of said consolidation, and the manner in which it was effected, etc.,—proceeds to ratify and confirm the same in all respects, and to provide "that all the rights, powers, and franchises, at the time of such consolidation, belonging to each and all of said corporations so consolidating, and their rights and interest in and to every species of property, are by virtue of said consolidation declared to be transferred to and vested in the Birmingham Railway and Electric Company, without any other deed or transfer," etc., with a proviso that "all the debts, liabilities, and duties of each and all the said consolidating corporations shall attach to said consolidated company, and be enforced from the same, to the same extent and in the same manner as if such debts, liabilities, and duties had been originally incurred by it." Acts 1890-91, pp. 584-587. This statute was adduced in evidence. So also was a deed executed by the Birmingham Union Railway Company to the Birmingham Railway & Electric Company on September 30, 1890, which recites the consolidation referred to in the act, and the creation thereby of the last-named corporation at some time, not specified, prior to its date, and in terms conveys to the consolidated company all the rights, privileges, franchises, and property of the grantor, and among other property the line of street railway upon which the plaintiff was injured. This, the act of assembly and the deed, was unquestionably evidence that the defendant became a corporation under and by the name of the Birmingham Railway & Electric Company by consolidation between the Birmingham Union Railway Company and the other named corporations prior to September 30, 1890. The fact of incorporation,—in other words, the manner in which it was effected,—the name of the consolidated company, and its responsibility for the wrongs of the consolidating companies, are shown by this evidence. What this evidence does not show is the precise date at which the consolidation took place, not whether it was prior or subsequent to August 2, 1890, when this suit was instituted. But while the plea of the general issue does not admit the responsibility of the defendant for the negligence of the Birmingham Union Railway Company, and does not, of itself, admit that the defendant corporation was the result of a consolidation between that particular com-

pany and others, it does admit that on August 2, 1890, when the suit was brought, the defendant was a corporation by the name and style of the Birmingham Railway & Electric Company. And the confirmatory statute and the deed we have referred to go to show that it became such corporation by the consolidation of the negligent corporation with others; and the admission of the plea, with the facts thus shown, taken together,—the one as showing that the defendant existed as a corporation by this name prior to suit brought; the other, as showing that this corporate existence and name were acquired by this consolidation,—clearly, in our opinion, constituted competent evidence of the alleged consolidation prior to the institution of the suit. The trial court erred, therefore, in giving the general affirmative charge for the defendant on the assumption of the nonexistence of such evidence.

The other questions urged upon our attention need not arise on another trial, and we will not pass upon them.

Reversed and remanded.

(99 Ala. 460)

#### WALLIS TOBACCO CO. v. JACKSON.

(Supreme Court of Alabama. May 2, 1893.)

SALES TO AGENTS—ACTIONS AGAINST PRINCIPAL—BURDEN OF PROOF.

In an action against a principal to recover the value of goods sold to an agent for use in an hotel, the burden is on plaintiff to show that the goods sold are of such character as the nature of the business authorized the agent to purchase.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Assumpsit by the Wallis Tobacco Company against J. F. B. Jackson. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff introduced as a witness in its behalf one J. W. Wallis, who was president of the plaintiff, and who testified that between August 26, 1889, and October 26, 1889, W. E. Yancey purchased from the plaintiff a bill of goods for and to be used in the Magic City Hotel, in the city of Birmingham; that when the goods were sold he, the witness, sold them upon the faith that he was selling to one L. W. McCants, as the agent of the defendant; that said Yancey informed the witness that McCants was running the hotel for and as the agent of the defendant, and that he, McCants, was purchasing the said goods as his agent; and that thereupon the plaintiff sold the goods upon credit of, and the same were charged upon the books of said company to, McCants, as agent for the defendant. Said W. E. Yancey was introduced as a witness, and corroborated the witness Wallis as to the manner in which the goods were ordered from the company. L. W. McCants, who was introduced as a witness for the plaintiff, testified, among other things, that for

the purpose of preventing garnishments being made against his customers, which would necessitate the giving up of his hotel, the defendant agreed with the said McCants that the hotel should be run in the name of L. W. McCants, agent for the defendant; and the agreement further provided as to how the money due McCants from the railroad for boarding certain hands should be deposited with the American National Bank. Said McCants further testified that after said arrangement between himself and the defendant he deposited said money in the bank to the credit of McCants, agent of J. F. B. Jackson, and that he ran the said hotel in the name of L. W. McCants as agent. The defendant, introduced as a witness in his own behalf, testified that he had no interest in said hotel business at the time of the trial, and had never had any, except he held a mortgage against said McCants; that he had not at any time authorized said McCants to run the hotel in his (defendant's) name; that he did not go about the hotel, and did not know that he was being held out to the world or to any one as the manager of said hotel; and that he had no knowledge that the hotel was being run in the name of L. W. McCants as agent. The defendant further testified that the agreement between him and McCants was made simply as a friend, to help McCants out of his trouble, and the fact of the agreement was that he would instruct the railroad to pay the money due McCants every month for the board of its employees, and to pay the same unto "L. W. McCants as his agent."

James H. Little and Lane & White, for appellant. Hewitt, Walker & Porter, for appellee.

**HEAD, J.** The evidence in this case wholly fails to show that the goods for the price of which this suit is brought were reasonably necessary for the uses and purposes of of the hotel which it is claimed McCants was conducting as agent for the defendant, or that they were such goods as were customarily used in the business of an hotel, or, indeed, that they were used at all in the business of the particular hotel. For aught the evidence discloses, they may have consisted of a stock of general merchandise, or agricultural implements, or some other commodities, having no use or place, either by custom or necessity, in the business of an hotel. If McCants was conducting the hotel as agent for the defendant, as contended, and as such was authorized to purchase supplies on credit, his agency extended no further than the right to purchase such supplies as were reasonably adapted to, or customarily used in, a business of that kind; and it is the duty of the party selling, under such circumstances, to know that the goods sold are of such character as the nature of the business authorized the agent to purchase;

and in a suit against the principal for the price the burden is on him (the seller) to prove the fact. See 1 Amer. & Eng. Enc. Law, pp. 363, 364, and notes. This principle is invoked by the defendant's counsel, and, as we read this record, we can see no escape from its proper application to this case. It is unnecessary to consider the other questions.

The judgment of the city court is affirmed.

(99 Ala. 450)

### HOWARD v. TAYLOR.

(Supreme Court of Alabama. April 28, 1893.)

INSTRUCTIONS — SALE — BREACH OF CONTRACT — MEASURE OF DAMAGES — EVIDENCE — BURDEN OF PROOF.

1. A charge which, in effect, asserts no more than that, if plaintiff has established the material averments of the complaint, he is entitled to recover, is not erroneous.

2. In an action to recover for an alleged breach of a contract entered into by defendant on selling his business to plaintiff, under which he agreed not to carry on a similar business in the same town, evidence that plaintiff's business had fallen off greatly after defendant opened up another place, and that defendant's old customers returned to him, does not furnish sufficient data by which damages can be estimated, and on such evidence he would only be entitled to nominal damages.

3. A charge that when plaintiff and defendant each testify in a case, and contradict each other on material points, and neither is corroborated by other circumstances or evidence, and are equally credible and worthy of belief, the verdict should be for defendant, is erroneous.

4. A charge predicated on a fact unsupported by any evidence is erroneous.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by William T. Taylor against Frank A. Howard to recover for an alleged breach of a contract of sale. There was judgment for plaintiff, and defendant appeals. Reversed.

The original complaint was demurred to, and defendant assigns six grounds of demurrer. The court sustained the 1st, 4th, and 5th grounds of demurrer, and overruled the 2d, 3d, and 6th. Thereupon the plaintiff amended his complaint by adding another count. Issue was joined thereto on the plea of the general issue. The plaintiff, being examined as witness in his own behalf, testified that in February, 1887, he purchased from the defendant, who was a retail liquor dealer in the city of Decatur, his bar fixtures and good will in the business, and that in the trade, and as a part thereof, Howard agreed not to engage in the saloon business in the city of Decatur, but promised to remove his stock of wines, whiskies, and liquors to Limestone county, and to cancel and give up his license, and not use them any more in Decatur; that the price paid was \$1,400; that the bar fixtures were worth \$450; and that he had offered \$1,000 for the bar fixtures and stand to the defendant, but he declined to accept it, saying that he had recently purchased

his license for the year, and estimated it at that time to be worth \$350. Plaintiff further testified that finally he told the defendant that he should not lose the license, and agreed to pay him \$1,400 for the bar and fixtures, good will and stand, and the license and some other property. The testimony of the defendant was in conflict with that of the plaintiff, in reference to his agreeing not to engage in the retail liquor business again in Decatur, and as to his selling him the license. It was further shown in evidence, and admitted by the defendant, that he did engage in business in Decatur, and the testimony was to the effect that by so doing the defendant greatly injured him. The defendant introduced two witnesses who testified that a few days after the purchase, and after the defendant had opened up business again, plaintiff stated that, while the defendant had not agreed not to again engage in the liquor business in Decatur, it was understood that he would not. On cross-examination each of these witnesses stated "that it was possible that plaintiff said to them that he had no written contract with the defendant not to open up in Decatur again." The defendant requested the following written charges, each of which was refused by the court: (1) "Nominal damages, in this case, would be six cents, or other inconsiderate sum." (2) "You are bound to weigh the testimony of both Howard and Taylor, and give it such credence as you think it entitled to. You must reconcile it, if you can, and, if you cannot reconcile, then your verdict should be for the defendant." (3) "When plaintiff and defendant each testify in a case, and contradict each other on material points, and neither is corroborated by other circumstances or evidence, and are equally credible and worthy of belief, then your verdict should be for defendant." (4) "If you believe the witnesses are equally credible, and equally worthy of belief, then the plaintiff in this case has not established his case by that measure of proof which the law requires, and your verdict should be for defendant." (5) "If you believe from the evidence that Taylor made a hard bargain, and the defendant a good bargain, then the plaintiff, Taylor, cannot be reimbursed in this action for the amount of difference between a reasonable value of the articles purchased and the contract price." (6) "If you believe from the evidence that there was a sale of the license by Howard to Taylor, this would have been a sale contrary to law, and plaintiff could not recover for it." (7) "The use of the license by Howard entailed no loss upon Taylor, and, for said use, Taylor cannot recover." (8) "I charge you, gentlemen of the jury, that there is no evidence before you of any damages sustained by plaintiff by reason of defendant again engaging in business." (9) "If you believe from the evidence that there is doubt and uncer-

tainty in the question of the sale of the good will by Howard to Taylor, then the fact of the sale of the good will must be found against the plaintiff." (10) "The burden of proving that there was a sale of the good will in this case is upon Taylor, and if you believe that the evidence is equally balanced on this point, and the witnesses are equally credible, your verdict must be for the defendant."

Harris & Eyster, for appellant.

HEAD, J. When the court sustained several of the grounds of demurrer to the original complaint, that complaint, not being amended, necessarily went out of court. The fact that the court overruled the 2d, 3d, and 6th grounds of the demurrer can be regarded as no more than a suggestion to the parties that the objections specifically urged by these assignments were not well taken. The case was therefore tried on the new count, which was filed by way of amendment. The overruling the three grounds of demurrer cannot be assigned as error here.

There was no error in the first charge given by the court at the instance of the plaintiff. The complaint sets forth a good cause of action. This charge, in effect, asserts no more than that if the plaintiff has established, to the satisfaction of the jury, the material averments of the complaint, he is entitled to recover.

The second charge given for plaintiff was erroneous. The theory of the plaintiff's case is that he purchased the bar and fixtures and lease from defendant, together with the good will of the business defendant was then carrying on, and in consideration thereof paid him \$1,400, and defendant agreed not to engage in a similar business in Decatur. In estimating the value of this purchase, and determining the contract price, it was considered that defendant had expended \$350 for a license to engage in the business being disposed of, and allowance was made therefor, by way of addition to the value of the goods; and, according to plaintiff's contention, the license was to be canceled, and not to be used again. The transaction in reference to the license was no more than an element entering into, and considered by the parties in the determination of, the value of the purchase plaintiff was negotiating for, and the price he should agree to pay, and into the agreement defendant made, if he made such, not to again engage in the like business. There was no sale and purchase of the license. There could have been none. This is not an action for breach of a contract of sale of the license. No such action would lie. The case, from plaintiff's standpoint, is simply one of a purchase of the fixtures, etc., at the gross agreed price of \$1,400, defendant agreeing to abstain from engaging in a competitive business. This is demonstrated by the complaint itself. The amount paid therefor can exert no influence upon the question of the extent and

amount of damage plaintiff suffered by the breach of the agreement not to again engage in business. Those damages must be determined by other criteria. The only evidence touching the measure of damage plaintiff sustained by reason of the alleged breaches is contained in his statement, as a witness, that "his business fell off very greatly after Howard opened up, on the corner of Bank and Market streets, and that Howard's old customers followed him to that place, and did not deal with the witness." It is perfectly manifest that this furnishes no data by which the jury could possibly arrive at the amount of plaintiff's damage. The proof must go further than this, in order to recover more than nominal damages. 1 Sedg. Dam. (8th Ed.) §§ 182, 254. The 1st, 5th, and 8th charges requested by defendant should therefore have been given.

The 2d, 3d, and 4th charges incorrectly state the rule as to burden of proof. They are efforts to state the general rule that where all the evidence which favors the plaintiff, and all which favors the defendant, are found, when considered together, to be equally balanced, the jury must find against the party on whom rests the burden of proof; but they fall short of it, for reasons too obvious to require discussion.

Charge 6, requested by defendant, was properly refused. There was no sale of the license.

Charge 7 is tantamount to saying that, if defendant carried on the business which it is alleged he agreed not to carry on, the plaintiff cannot recover. It was properly refused. If the plaintiff proved his case to the satisfaction of the jury, he was entitled to recover nominal damages, there being no evidence of substantial damage.

We have recently decided, in several cases, that charge 9 exacts too high a measure of proof. It was properly refused.

Charge 10 pretermits all right of recovery by plaintiff for the alleged breach not to again engage in the business in Decatur, and was properly refused. For the errors mentioned the judgment is reversed, and the cause remanded.

(36 Ala. 235)

#### COFER v. SCHENING.

(Supreme Court of Alabama. May 2, 1898.)

EJECTMENT—TITLE TO SUSTAIN—NONSUIT—BILL OF EXCEPTIONS—REVIEW—EVIDENCE—CERTIFIED COPIES—SUFFICIENCY OF CERTIFICATE.

1. Code, § 2759, authorizing a plaintiff to suffer a nonsuit, and by bill of exceptions reserve for review adverse rulings of the trial court, does not extend to rulings on demurrers to pleadings.

2. A certificate by the register of the chancery court that "the foregoing pages from one to thirty-seven, inclusive, contain a full, true, and correct transcript of said papers in the cause of [giving the title] in said chancery court, and of the proceedings of said court upon the same," sufficiently shows the transcript to contain all the proceedings had in the case to authorize its admission in evidence thereof.

3. In ejectment, where the evidence shows that at the commencement of the action plaintiff was restrained by an injunction from taking possession of the land, a nonsuit is proper, though he had the legal title, and the injunction was dissolved before trial, as in such action plaintiff can recover only on rights existing at the commencement of suit.

Appeal from circuit court, Cullman county; H. C. Speake, Judge.

Statutory ejectment by Mollie M. Cofer against Christopher Schening. Defendant had judgment, and plaintiff appeals. Affirmed.

This action was commenced October 30, 1888. The defendant pleaded the general issue, and, by special plea, that at the time of the commencement of this suit the plaintiff was restrained from the possession of the premises sued for by writ of injunction issued in a cause then pending in the chancery court of Cullman county, in which the said Christopher Schening was complainant and Mollie M. Cofer, plaintiff here, was defendant; that said injunction was issued and served on January 13, 1888. Upon the trial of the cause, as is shown by the bill of exceptions, the plaintiff introduced in evidence three promissory notes, and a mortgage made to secure the same, which conveyed the land here sued for, which were executed by Christopher Schening and his wife to one Baxter Shemwell. The notes and mortgage were executed on May 12, 1887, and on the same day they were transferred by indorsement on the back of each by Baxter Shemwell to Mrs. Mollie M. Cofer, plaintiff in this suit. The defendant offered in evidence the transcript from the chancery court at Cullman county, Ala., showing that on January 12, 1888, the defendant, Christopher Schening, and others filed a bill in the chancery court against Mary M. Cofer, the plaintiff in this suit, and Baxter Shemwell. The purpose of the bill was to cancel the notes and mortgage above described on the ground of fraud in their procurement, and the plaintiffs prayed for an injunction to enjoin the sale of the property involved in this suit. The certificate of said transcript, which was duly signed by the register, was in the following language: "I, Chas. J. Brown, register in chancery in and for said county and state, hereby certify that the foregoing pages from one (1) to thirty-seven, (37,) inclusive, contain a full, true, and correct transcript of said papers in the cause of Christ. Schening et al. v. Mollie M. Cofer et al. in said chancery court, and of the proceedings of said court upon the same. Witness my hand this 22d day of July, 1891." The plaintiff objected to the introduction of said transcript because the proceedings shown therein were illegal, irrelevant, and immaterial, and because the certificate did not show that it was a full, complete, and correct transcript in said cause. The court overruled this objection, and plaintiff duly excepted. The transcript so introduced in evidence showed that the order of the register of the chancery

court of Cullman county for the issuance of a writ of injunction prayed for in the bill was made by "Samuel E. Green, judge of the criminal court of Jefferson county, Alabama." The plaintiff objected to this order, "because the same was not made by any officer authorized under the laws of Alabama to grant an injunction." The court overruled this objection, and the plaintiff excepted. The testimony for the defendant further tended to show that on January 13, 1888, a writ of injunction was issued by the register in chancery of the county of Cullman, after the execution of a bond, in accordance with the order of Samuel E. Green, judge, as aforesaid, and that the same was served on the date of its issuance. It was further shown that on November 17, 1888, the chancellor granted the motion of the defendant in the above-stated chancery suit, and dissolved the temporary injunction upon the denials of the answer; and that on May 3, 1890, the bill of complaint was dismissed out of the chancery court. The cause was tried, as is shown by the bill of exceptions, at an adjourned term of the circuit court of Cullman county, and was held from July 20 to July 25, 1891. Upon the introduction of all the evidence, the court, upon its own motion, stated to the attorneys of the defendant "that, in order to sustain the action of ejectment, plaintiffs, at the commencement of the suit, must not only have the legal title, but must have the right to the possession; and, it appearing from the evidence that, at the commencement of this suit, plaintiff was enjoined from interfering with the possession, if the defendant would ask the general charge, he would give it." Thereupon the defendant requested the general charge in his behalf. To this action of the court plaintiff duly excepted, and then took a nonsuit, with the privilege of presenting a bill of exceptions. There were many rulings of the court upon the pleadings, but the opinion of this court renders it unnecessary to notice them in detail.

W. T. L. Cofer, for appellant. Geo. H. Parker, for appellee.

STONE, C. J. The statute (Code, § 2759) authorizing a plaintiff to suffer a nonsuit, and by bill of exceptions reserve adverse rulings of the trial court for revision in this court, has been uniformly construed as restricting such power to those rulings and decisions which are the proper matter of a bill of exceptions, and which, without such bill, cannot properly appear of record. It does not extend to rulings and decisions on demurrers to pleadings, which, of necessity, form part of the record. 3 Brick. Dig. 678. The assignments of error which refer to the rulings of the court on demurrers to the pleadings are, of consequence, not now before us for revision.

It may be that the certificate of the regis-

ter authenticating the transcript of the record from the chancery court is not very formal or technical. Fairly and reasonably construed, it affirms that the transcript contains a full, true, and correct copy of all the proceedings had in the court of chancery, and all the orders and decrees rendered in the particular cause. This satisfied all the requirements of the law, and the objection to the introduction in evidence of the transcript was properly overruled. *Cargile v. Ragan*, 65 Ala. 287; *Clements v. Pearce*, 63 Ala. 286.

The act establishing the criminal court of Jefferson county in express words confers on the judge of the court the like power and authority to issue writs of injunction which is conferred upon the judges of the circuit courts. Pamph. Acts 1886-87, p. 836, § 5. Similar statutes conferring such authority and power on inferior courts, limited in general jurisdiction to particular counties, have been construed as conferring the power and authority to issue such writs, or grant orders for the issue thereof, returnable into any court of the state having jurisdiction. *East & W. R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 276. If, in the present case, an inquiry into the power and authority of the judge of the criminal court to grant the order for the issue of the injunction could be pertinent, there can be no doubt of its existence. A plaintiff in ejectment, or in the corresponding statutory real action, cannot recover, unless at the commencement of the action he has a legal title, entitling him to the immediate possession. Title and right of possession subsequently acquired will not authorize a recovery. 3 Brick. Dig. p. 324, § 27. At the commencement of the suit the plaintiff had the legal title, but had not the right of possession. That right had been intercepted by the temporary injunction the defendant had obtained from the court of chancery. While the injunction remained of force, the right of entry and of possession could not be asserted elsewhere than in the court of chancery, without the order or decree of that court. An entry on the premises by the plaintiff, and possession of them, would have been a violation of the injunction, a contempt of the process and jurisdiction of the court, to the commission of which other courts should not aid or contribute. The subsequent dissolution of the injunction and dismissal of the bill was not retroactive. The rule of the common law is inflexible that the plaintiff in ejectment must recover upon the state of facts existing at the commencement of the suit. The subsequent occurrence of necessary facts will not support the suit. If such facts had existed at the commencement of the suit, the defendant might have yielded to them, avoiding litigation. *Goodman v. Winter*, 64 Ala. 410. The circuit court did not err in the charge given, and the judgment must be affirmed.



(97 Ala. 32)

**TALIAFERRO v. LEE.****HILLIARD v. BROWN.**

(Supreme Court of Alabama. Jan. 3, 1893.)

CONTESTED ELECTION—JURY TRIAL—CLASS LEGISLATION—CONSTRUCTION OF STATUTE—APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD—JURISDICTION.

1. Since, at common law, a party to proceedings to try title to a public office had no right to have such issue tried by jury, he is not within the protection of Const. art. 1, § 12, providing that the right to trial by jury shall remain inviolate; and Code, § 428, providing that a contest of an election for the office of judge of probate must be heard and decided by the "judge" of the circuit court of the county where the election is held, is therefore not violative of the constitutional provision.

2. Code, § 423, providing that in all contests of elections for the office of justice of the peace or constable, or for any office which is filled by the vote of a single county, except for members of the general assembly, the person whose election is contested is entitled to trial by jury, is not class legislation, within Const. U. S. art. 14, § 1, providing that no state shall deny to any person within its jurisdiction the equal protection of its laws, and is a valid exercise of legislative power.

3. Code, § 413, provides that a copy of the statement required to be made by the person contesting the election, and presented to the judge of the circuit court, must be served on the contestee, with the day of trial indorsed thereon, at least 10 days before the day of trial. *Held*, that the requirement that the judge shall fix the day of hearing, and indorse the same on the statement when presented to him, is directory, merely, and not essential to the valid institution of the suit.

4. Where no ruling on the relevancy and admissibility of evidence is shown by the record the appellate court will not renew the question.

5. Code, § 396, provides that elections may be contested for malconduct, fraud, or corruption on the part of any inspector, clerk, returning officer, or board of supervisors. Section 397 provides that the contestant must make a written statement setting forth the particular ground of such contest. Section 428 provides that the grounds must be presented to the circuit judge of the county in which the election took place, such judge to decide the contest. *Held*, that a statement of a contestant, charging no more than simple negligence, and failure to exercise that degree of care to the end that the votes should be duly counted and returned, and the true result declared, was insufficient to give the circuit judge jurisdiction.

Appeal from circuit court, Pike county, and appeal from circuit court, Conecuh county; John P. Hubbard, Judge.

Two petitions,—one by Charles T. Taliaferro, by writ of certiorari, to review proceedings between Taliaferro and Robert A. Lee, had in the circuit court of Conecuh county, to try title to the office of probate judge, to which Taliaferro was declared elected; the other, by W. J. Hilliard, to review proceedings had in another contested election, in Pike county, in which T. H. Brown contested his right to the office in litigation. Petition and writ dismissed in the case of Taliaferro against Lee. Proceedings quashed in the case of Hilliard against Brown.

M. N. Carlisle, Parks & Gamble, and R. L. Harmon, for appellant Hilliard. Gardner & Wiley, for appellee Brown. Farnham & Crum, Stallworth & Burnett, Bowles & Rabb, H. M. King, and E. W. Godbey, for appellant Taliaferro. A. A. Wiley, for appellee Lee.

HEAD, J. These cases present, in some respects, similar questions, and we will consider them in one opinion. In the first case, Charles T. Taliaferro and Robert A. Lee were opposing candidates for the office of judge of probate in Conecuh county at the August election, 1892; and, in the other, W. J. Hilliard and T. H. Brown were opposing candidates for the same office in Pike county. Taliaferro and Hilliard were, respectively, declared elected by the boards of supervisors of their respective counties, and certificates of election were issued to them. Lee and Brown each instituted in his county, before the judge of the circuit, a proceeding under the statute (Code 1886, art. 4, § 428) to contest the election of his adversary. Trials were had before the circuit judge, the Honorable John P. Hubbard, whereon it was determined that the contestants, Lee and Brown, had been, respectively, elected, and were entitled to be inducted into their respective offices, and it was so adjudged. By the writ of certiorari, each of the contestees brings his case before this court for review of the proceedings before the circuit judge.

Independently of the remedy for the trial of the right to a public office by information in the nature of a writ of quo warranto, and to the exclusion of that remedy in cases falling within the purview of the statute, chapter 4, title 6, pt. 1, of the Code of 1886, provides for contests of the election of persons declared elected to any office, whether state, county, representatives in congress, or to any office which may be filled by a vote of the people, before special tribunals therein created for the purpose, and upon the grounds, and according to methods of procedure, therein prescribed. The special causes or grounds for or upon which this special jurisdiction may be invoked by any person desiring to contest the declared election of another to such an office are defined by this statute to be (1) malconduct, fraud, or corruption on the part of any inspector, clerk, returning officer, or board of supervisors; (2) when the person whose election to such office is contested was not eligible thereto at the time of such election; (3) on account of illegal votes; (4) offers to bribe, or bribery, or any other misconduct calculated to prevent a fair, free, and full exercise of the elective franchise. But no person shall contest the election of any person on account of race, color, or previous condition of servitude. Code, § 396. The procedure prescribed provides that the contestant must make a statement in writing setting forth specifically (1) the name of

the party contesting, and that he was a qualified voter when the election was held; (2) the office which such election was held to fill, and the time of holding the same; and (3) the particular ground or grounds of such contest,—which statement must be verified by the oath of the contesting party, or some one for such party, to the effect that he believes the same to be true. Code, § 397. Other and ample provisions are made in respect to the tribunals for trying the contests, notice, the production of evidence, and the trial, etc. Jury trials are secured to the contestees in certain cases. Section 428 reads as follows: "To contest any election for the office of judge of probate, the party contesting must file his grounds of contest in the office of clerk of the circuit court, and give security for the costs, to be approved by the clerk of the circuit court of the county in which the election was held. The contestant must make the statement of the grounds of such contest, and give notice to the person whose election is contested, in the mode prescribed in sections 397 (303) and 409 (316.) Such contest must be heard and decided by the judge of the circuit court of the county where the election was held, and the rules of procedure prescribed by the preceding article, so far as applicable, shall govern in such contests." The preceding article, referred to, prescribes the procedure for contesting elections, before judges of probate, to offices filled by the vote of a single county, except members of the general assembly, and judges of probate, and justices and constables. These are, in general, the main features of the statute under which these proceedings were had. This statute is assailed by the contestees as violative of that provision of the constitution of Alabama which guaranties the right of trial by jury, and of section 1, art. 14, of the constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The proposition is that the statute is unconstitutional, in the respects stated, because the contestant is not, by the statute, secured the right to demand a trial by jury, and because the right is secured to the contestee in all cases where the election is, by the vote of a single county, except members of the general assembly; thereby, as contended, unlawfully discriminating against contestants in all cases, and against contestees who are elected by the vote of districts, or other larger area than a single county.

By the principles of the common law, no person has such private, inherent right in or to a public office to which he has or claims to have been elected as entitles him, in a contest with an adversary claimant, to a trial of such right by jury. Indeed, in the early history of the common law, even after the invention of the original writ of quo warranto, no remedy, of any character, existed for the trial of the right to, or re-

covery of, an office, by an individual. A public office was not deemed by the common law to be such private property of the person appointed to exercise its functions as that the courts organized for the enforcement of private rights were open to him to recover it from the usurpation of another. The writ of quo warranto was the remedy of the sovereign, against one who usurped or claimed any office or franchise, to inquire by what authority he supported his claim. The judgment was of ouster and forfeiture of the office or franchise to the sovereign, if the respondent failed to show lawful right to exercise or enjoy the same. No individual could obtain the writ, and the right of no person other than the incumbent proceeded against to exercise the office could be inquired into or adjudicated. Later, by legislation in England, the writ partook of a criminal nature, and was used to fine and punish the usurper, as well as oust him; and it thereby became known and designated as an "information in the nature of the writ of quo warranto." The province of this remedy by information in the nature of the writ of quo warranto was enlarged by the statute of 9 Anne, c. 20, (1711,) which gave to private individuals the power of proceeding thereunder against any one who had unlawfully usurped or intruded into any office or franchise, and under that statute it grew in practice to be regarded as a civil remedy for the trial of the private right of individuals to offices and franchises. But at no period in the history of the information in England, so far as we are aware, was the relator or respondent ever regarded as entitled to trial by jury until that right was expressly conferred by act of parliament. 3 Geo. cc. 2-25. As was said by the supreme court of Arkansas in *State v. Johnson*, 28 Ark., at page 292, that "statute was passed for the special purpose and to the end that his majesty's courts at Westminster might be provided with juries to try questions of fact. If this right existed before this time it was certainly a work of supererogation on the part of parliament to enact the law, and the inference to be drawn from this fact is that prior to the date of the statute the issues of fact were tried by the court, even in cases of informations in the nature of quo warranto, which at best is but little more than a summary proceeding to ascertain the right to an office." The remedy, as it existed under the statutes of England at the settlement of this country, came to us, and became a part of our common law, and, indeed, as a civil remedy, under the operation of the statute of Anne, it was recognized and enforced in this state prior to adoption by our own legislature. In the constitution of Alabama of 1819, the supreme court was given power to issue the writ, and that power was preserved in each of the subsequent constitutions, and is now embraced in section 2, art.

6, of the constitution of 1875. Since the adoption of the Code of 1852, to the present time, the supreme court has also, by statute, been invested with original jurisdiction in the issue and determination of writs of quo warranto (or, what is meant, the information in the nature of the writ of quo warranto) in relation to matters in which no other court has jurisdiction. Code 1852, § 568, subd. 2; Rev. Code, § 660, subd. 2; Code 1876, § 571, subd. 2; and Code 1886, § 675, subd. 2. In all these provisions, both of the several constitutions and statutes, this writ has been classed with the extraordinary remedies of mandamus, injunction, habeas corpus, and certiorari, which have always been determinable by the court, both upon issues of law and fact, without the intervention of a jury. To hold that a trial by jury is the constitutional right of the relator and respondent in quo warranto would be to nullify the provision of the constitution conferring original jurisdiction in certain cases upon the supreme court to issue and try the writ, since that court is without power or authority to impanel a jury for the trial of any cause before it. This fact was known to the makers of the constitution, and is conclusive to show that they considered the trial of title to an office by quo warranto as in the nature of an extraordinary remedy, triable by the court as other extraordinary remedies, and in respect to which the right to a jury trial was not supposed or intended to be secured by the constitution. Early in the legislation of this state the essential features of this information, as it existed and was enforced under the statute of Anne, and as we had theretofore administered it as a part of our common law, was incorporated into our statute law, and is now embodied in chapter 14, tit. 2, pt. 3, of the Code of 1886. The statute is substantially the same as that which first appeared, in codified form, in the Code of 1852, and was subsequently introduced in the Codes of 1867 and 1876. This statute plainly recognizes the proceeding as one triable by the court; and though isolated cases may have arisen, on which judges in this state have called juries to try disputed questions of fact in proceedings under this statute, as in *Echols v. State*, 56 Ala. 131, we are persuaded it has been the common understanding of the bench and bar, and their common practice, to treat the remedy as an extraordinary proceeding, triable by the court without a jury. We hold, therefore, that in proceedings to try the right to a public office there was no common-law right of the suitor to a trial by jury, and hence such suitor is not within the protection guarantied by that clause of the bill of rights which provides that the right of trial by jury shall remain inviolate. We are so well satisfied of the correctness of this view that we are unwilling to be led to a contrary conclusion by the dictum found in

*State v. Burnett*, 2 Ala. 140. Hence it is that in the enactment of statutes providing new and additional remedies for suitors of this class, like the laws for the contests of elections before special tribunals, now under our consideration, the conferring of jury trials is purely of legislative grace, and may be conferred according to legislative discretion, if the enactment does not assume the character of what is denominated "class legislation." There is no element of class legislation in the present statute. The provision is: "In all contests of elections for the office of justice of the peace or constable, or for any office which is filled by the vote of a single county, except for members of the general assembly, the person whose election is contested is entitled to a trial by jury." The provision comprehends, without discrimination, all persons falling within the class designated. It acts equally and uniformly upon all persons whose election to office, filled in the designated way, except members of the general assembly, (which exception comprehends a class upon which it operates uniformly,) is contested. As we have indicated, it was competent for the legislature to withhold the right entirely, or extend it to one class of officials to the exclusion of other classes, or to one class of parties to the exclusion of another class. So long as there is no unjust discrimination against a person or persons, in favor of another or other persons of the same class or general designation, there is no class legislation. There are equality and uniformity. The equal protection of the laws is secured. *Youngblood v. Savings Co.*, (Ala.) 12 South. Rep. 579. The statute in question is a valid exercise of legislative power, inoffensive alike to the constitution of this state and the United States.

The statute, as applicable to the present cases, provides that the statement required to be made by the party contesting must be presented to the judge of the circuit court within 15 days after the person whose election is contested is declared duly elected, and such judge must appoint a day, not less than 15 nor more than 20 days from the time of such presentation, for the trial thereof, and indorse the same on such statement. Code, § 416. A copy of such statement, with the day of trial indorsed thereon, must be served on the person whose election is contested, or left at his usual place of residence, at least 10 days before the day appointed for trial. *Id.* § 418. In the case of *Taliaferro against Lee*, it appears the judge omitted to make the prescribed indorsement when the statement was presented to him, but on the 7th day of September, 1892, made upon a paper attached to the statement an order setting down the cause for trial on the 26th day of September, 1892, at the courthouse of Conecuh county. The sheriff's return shows that a copy of the statement was served on the

contestee on the 8th day of September, 1892. It appears from the final judgment entry that the cause was regularly continued until the 14th day of October, 1892, on which day the trial occurred. The judgment entry contains this recital: "And now, on this, the 14th day of October, 1892, the day to which this cause was regularly continued, come the parties, in person and by their attorneys, and this cause is submitted for decision. The contestee, O. T. Taliaferro, moves to dismiss, and to quash the petition. It is considered, ordered, and adjudged that the motions be overruled and denied." We find in the record a motion filed on the day of trial, October 14th, by the contestee, to dismiss and quash the petition or statement on the ground that the day of hearing of the same had not been fixed within 20 days after the presentation and filing thereof, according to the statute, nor the indorsement of the day of trial made thereon as by law required; also, another motion, filed the same day, to dismiss the cause because the contestant did not give the contestee notice of the proceeding, by having served on him, or left at his usual place of residence, a copy of the grounds of contestation, and affidavit, required by section 397, Code. It is not controverted that the statement or petition was presented to the circuit judge by the contestant within 15 days after the declaration of contestee's election, as required by the statute. It is manifest that the requirement of the statute that the judge shall fix the day of hearing, and indorse the same on the statement, when presented to him, is directory, merely, and not essential to the valid institution of the suit, as a pending proceeding in court, conferring upon the court jurisdiction of the subject-matter sufficiently pleaded in the statement. The presentation of the statement to the judge is the commencement of the suit. When that is done the case is properly in court. The requirements of the statute, the omission of which is complained of, are but proceedings to bring the other party into court, and secure the due and orderly trial of the issues to be formed. If the notice given the opposite party is insufficient, in law, to bring him into court, either by reason of its failure to state the time of trial, or other lawful reason, he may refrain from appearance altogether, and in such case any action taken against him in the cause would be void for want of jurisdiction of the person. But he may waive these defects by voluntary appearance on the day irregularly fixed for trial, and entering into the trial of the merits of the cause. That was done in the present case. If contestee desired to appear specially to raise the question of the sufficiency of the notice, he should have done so by a motion to vacate the service, stating his special appearance for that purpose. It matters not how insufficient the

service, or how flagrantly the officers failed to perform the ministerial duties directed by the statute, designed to bring the party proceeded against into court, and provide for the trial of the cause. They furnish no ground for dismissing the cause out of court, at least so long as the derelictions of duty are not attributable to the fault of the party who institutes the proceeding. It would be intolerable that a party should do all that the law enjoins to place his case properly in court, and then be dismissed therefrom because the officers failed to perform the ministerial duties they are directed by law to perform. It would require the plain mandate of the statute to work such a result. The motions to dismiss were properly overruled.

It is insisted that the proceedings in Taliaferro against Lee should be quashed for the want of proof that Lee was a resident citizen and qualified voter of Conecuh county. That does not appear to have been made a real issue on the trial. It is true the answer of Taliaferro to the statement begins with a general denial of all the allegations of the statement, but it proceeds thereafter to answer specially the charges upon which the proposed contest is based; and we find no special denial of the residence and qualification of contestant as a voter, as alleged in the statement. No question of the kind was raised on the trial. There is the testimony of at least two witnesses tending to show Lee's presence in the county, and his participation in public meetings therein, prior to the election; and it appears that he was voted for for the office of probate judge by not far from one-half, or more than one-half, the voters of the county voting at the election. These are circumstances tending in some degree to prove the allegation in question. Their sufficiency was for the trial judge.

There is no other question presented by the record for review, in the case of Taliaferro against Lee. There appears a large volume of testimony adduced on the trial, and we are asked by counsel to pass upon the relevancy and admissibility of much of it, but upon examination we find that no ruling of the trial judge upon any question of evidence is shown by the record. We find in the transcript a motion to exclude certain testimony therein designated; but if any ruling upon the motion was invoked, or had, the record does not disclose it. Our revisory power on certiorari extends only to questions of jurisdiction, and the regularity of the proceedings. *McAlllley v. Horton*, 75 Ala. 491. If there was any evidence, however slight, tending to support the finding of the trial court on the facts, we have no authority to revise such finding. There was such evidence, and there being no ruling of the court, raised by the record, touching the relevancy and admissibility of the evidence, we cannot disturb the judgment. It is not

denied, in this case, that the statement filed by Lee substantially conformed to the statute; that it set forth jurisdictional facts calling into lawful exercise the power of the circuit judge to hear and determine the cause; and, there being shown no error or available irregularity in the subsequent proceedings, it results that in the case of Taliaferro against Lee the petition and writ of certiorari must be dismissed.

In the case of Hillard against Brown a more serious question confronts us. Was the petition or statement filed by Brown sufficient, in its averments, to confer jurisdiction of the subject-matter upon the circuit judge? We have stated the essential provisions of the statute. It cannot, we think, be doubted that the grounds of contest which section 428, above copied, requires the contestant to set forth in the statement he is required to make, are those grounds or causes, or one or more of them, specified in section 396. That section, as we have seen, expressly prescribed the four causes there set down as the grounds of contest in all cases of contest of election of persons declared elected to any office, whether state, county, representatives in congress, or any office which may be filled by a vote of the people. The several provisions of the chapter, comprising articles 1 to 6, inclusive, are in *pari materia*, constituting one general system or body of laws for contestation of elections to public offices, and must be construed together, and effect given to each and every provision. Placing sections 396, 397, and 428 together, and construing them, as we must, each with reference to, and as a part of, the others, the legislative intent that the statement required to be made by section 428 must set forth one or more of the causes prescribed by section 396 could not be made more plainly to appear. We have, then, the mandate of the statute that the four mentioned causes shall, one or more of them, be the grounds upon which a person desiring to contest the declared election of another may invoke the remedy prescribed; that a written statement of the contestant's complaint must be made to the tribunal created to hear and determine it; and that that statement must set forth the particular ground or grounds relied on. It is a principle of law, too long and well settled to be now the subject of contention, that the record or quasi record of a court or tribunal of special, limited jurisdiction, created by statute, whose proceedings are required to be written, must affirmatively disclose every fact upon which, by the statute, the jurisdiction of the court or tribunal is made to depend, in order to sustain the jurisdiction, and uphold the validity of the judgment rendered. It would be a useless consumption of our time to collate the authorities in support of this proposition. They are numbered by scores in our own adjudications, and the principle, it is believed, is recognized everywhere.

The present proceeding was before the circuit judge, created by statute into a new and special tribunal, with the limited power conferred upon it to enforce a new right conferred by the same statute. The grounds upon which this tribunal may exercise the power and jurisdiction for which it was created are expressly prescribed, and expressly required—one or more of them—to be set forth in writing, in the statement required to be filed as the institution of the suit or proceeding. They are therefore jurisdictional. Without them the tribunal does not legally exist. They must affirmatively appear by the record, or else the proceeding is *coram non jure* and void. Does the statement of contestant Brown contain an averment of either of these necessary jurisdictional facts? A mere inspection of the paper would constrain us to hold it does not. It is conceded by counsel that the second, third, and fourth grounds prescribed by section 396 are not set forth, or relied on. The first ground, as we have seen, is thus stated in the statute: "Malconduct, fraud, or corruption on the part of any inspector, clerk, returning officer, or board of supervisors." It would seem unnecessary to discuss the meaning of the words "malconduct, fraud, or corruption," as they are here used. They are of such obvious signification as to preclude discussion. "Corruption," the strongest term used, carries its own force and meaning. "Fraud," a term less strong, means, in the connection in which it is used, actual fraud, evil motive, wickedness. "Malconduct," a term still less strong, means essentially the same thing. Webster defines the prefix "mal" as ill or evil, derived from the Latin "malus," meaning bad, ill, from which, also, we derive "malice," "malicious." It is manifest, therefore, that the conduct of the inspector, clerk, returning officer, or board of supervisors made by the statute a ground of contesting an election must have proceeded from evil motive, wickedness of purpose, on the part of the designated officers of election, and not from mere omissions of official duty—mere negligence—on their part. The statement in the present case, given the most latitudinous construction, does not approximate a charge of malconduct, fraud, or corruption on the part of either of the officers mentioned in the statute. We will not repeat the averments here. It is enough to say that none of them charges more than simple negligence,—mere failure to exercise that efficiency, care, and caution which should have been exercised to the end that the votes, as cast at the election, be duly counted, certified, and returned, and the true result declared. The conduct complained of, though negligent, is entirely consistent with perfect honesty and good faith. The statute, as we have shown, does not authorize a contest in such case, and the proceedings before the circuit judge were void for the want of ju-

isdiction, and the same must be quashed. An order will be here entered accordingly.

A majority of the court are of opinion that section 432 of the Code confers a right of appeal in cases like the present, and that certiorari is not the proper remedy. The question, however, was not raised in these cases. Returns were made to the writs of certiorari, and the parties went to trial upon their merits without objection to the method by which the cases were brought before us. We therefore considered them on their merits.

(101 Ala. 34)

**LOUISVILLE & N. R. CO. v. HURT.**

(Supreme Court of Alabama. May 2, 1893.)

**RAILROAD COMPANIES—INJURY TO EMPLOYE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF—EVIDENCE—INSTRUCTIONS.**

1. In an action by a railroad employee against the company for personal injuries it appeared that plaintiff was an engineer on a switch engine; that he was clearing the main track under the orders of the assistant yard master; that by reason of a switch left open by the fireman of a freight train plaintiff's engine left the main track. Plaintiff testified that before he reached the switch he saw the safety signal; that he was running between five and six miles an hour; that when he saw the collision was inevitable he reversed his engine, sanded the track, and did all he could to stop the engine. The fireman, who left the switch open, testified on behalf of defendant that when he first saw the engine after placing the switch it was only a car's length therefrom; that he at once signaled the plaintiff and started to throw the switch, but did not have time to do so; that the engine was running between 16 and 17 miles an hour. *Held*, that a charge that if plaintiff kept the best lookout he could, consistent with his other duties,—to watch for signals and manage the engine,—if such other duties were of equal importance, this would not be negligence, though incomplete, when taken with the evidence, was not misleading.

2. It was proper to charge that negligence on the part of plaintiff, which did not contribute to his injury, would not prevent a recovery.

3. If the fireman knew of plaintiff's peril in time to have prevented the injury, but negligently failed to do so, and plaintiff was injured in consequence thereof, he could recover, though he was guilty of contributory negligence, provided plaintiff did all he could to prevent the accident and save himself from harm, after he discovered his danger.

4. Where the court errs in giving certain instructions in favor of defendant and at its request, the defendant cannot take advantage of such error to the prejudice of plaintiff.

5. Where some parts of an oral charge are without error, an exception to the entire charge is not well taken.

6. Under a count in the complaint charging simple negligence it was proper to admit evidence of willful or wanton negligence.

7. Where a count in the complaint charged wanton or willful negligence, it was necessary to prove the negligence as averred.

8. A plea to such a count, which alleged that plaintiff was guilty of contributory negligence, was insufficient, since plaintiff might recover, notwithstanding such negligence.

9. Where issue is joined on an insufficient plea, it becomes an issue to be tried by the jury, and evidence in support thereof must be received if offered, and, if sustained, the same must be found for defendant.

10. A charge which singles out any particular part of the evidence, and bases a conclusion of law thereon, is improper, as calculated to mislead the jury.

11. Where there was evidence that defendant did not make a proper effort to prevent plaintiff's injury after his peril was discovered, a charge ignoring such evidence was properly refused.

12. It is not error to refuse an instruction covered by those already given.

13. A charge that, unless the jury believed that the fireman was so negligent that his conduct was "the legal and moral equivalent of willful or intentional wrong, they must find for defendant," if they believed plaintiff guilty of contributory negligence, was erroneous, as leaving the jury to determine what was the "legal" equivalent of willful or intentional wrong.

14. Where a witness testified in contradiction of statements made on a former trial, but explained such contradiction, a charge that such contradiction constituted an impeachment of the witness, ignoring the explanatory statements, was properly refused.

15. Where some parts of statements made by counsel in his closing argument are authorized by the evidence, an exception to the entire argument is not well taken.

16. It was not error to permit plaintiff to ask his witness if he had not testified differently on a former trial, where the same is done to refresh the memory of the witness, and not to impeach him.

17. The American Tables of Mortality were properly admitted to show plaintiff's expectancy of life.

**Appeal from city court of Birmingham; H. A. Sharpe, Judge.**

Action by William Hurt against the Louisville & Nashville Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. *Affirmed*.

The complaint originally contained but one count, but two others were added by way of amendment. The second count was afterwards withdrawn. The negligence charged in each of the remaining counts was that of a person in charge of a switch in opening the same and failing to close it, so that the engine upon which the plaintiff was the engineer ran through the switch, and collided with a train standing on another track. The last count, which is numbered 3, also avers that the employee of the defendant who was in charge of said switch, after knowledge of the plaintiff's danger, failed to exercise proper diligence to avert it. The defendant filed four pleas, pleading the general issue and contributory negligence, and the plaintiff took issue on each of the four pleas. The facts upon which the case was tried, and as gleaned from the bill of exceptions, are as follows: On July 23, 1890, the plaintiff was in the employ of the defendant as an engineer on a switch engine, and was in the yard of the defendant at Birmingham, Ala., his duty being making up trains and distributing cars. The freight train numbered 110 had come in ahead of freight train No. 74, and was standing on the main line of the defendant, the engine having gone to the roundhouse. It was the plaintiff's duty to clear the main line of train 110 before freight train 74 came

in, so that No. 74 could occupy the main line. No. 74, however, came in before 110 was switched off the main line. The assistant yard master of the defendant, who was the plaintiff's superior, gave the signal to plaintiff to signal the incoming train to stop at the switch at Valley Creek crossing, which was done, and train No. 74 stopped there. The plaintiff then went on the main line with the switch engine, and coupled onto the cars which comprised train 110 for the purpose of taking them off the main line; and he then backed down the main line. As the plaintiff was backing his train, and when he had reached a point on the main line between the Alabama Great Southern crossing and the Valley Creek switch, he was signaled by the assistant yard master to go on down the main line instead of going on the side track, as had been his custom. One Hickerson, who was a brakeman on train 74, and whose duty it was to throw the switch, as soon as his train had stopped, ran to the switch, and threw it so as to connect with the north main line instead of the south. This was done but a few minutes before the plaintiff passed with his train intending to go down the south main line, as directed by the assistant yard master; but, on account of the switch being thrown by the switchman Hickerson, instead of going down the main line as he was directed and intended, his train was diverted to the side track on which freight train 74 was standing, and the two trains collided. Just before the collision, and when the plaintiff saw that it was inevitable, he reversed his engine, sanded the track, and did all that he could do to stop his train, and then leaped from the engine. He fell, his back striking against the switch stand, and he received the injuries for which he now brings this action.

The plaintiff testified that when he got to the Alabama Great Southern crossing he looked at the Valley Creek switch, and it showed "white," which was an indication that he could proceed with safety along the main line past that switch. The plaintiff admitted that on the former trial he had testified that he did not look at the Valley Creek switch after leaving Fourteenth street, and accounted for the conflict of the two statements by stating that "he was weak and nervous on the former trial." He also stated that before reaching the Alabama Great Southern crossing he told his fireman to look back, and his fireman told him, "All right;" to back up; and that it was after this that the assistant yard master gave the signal to go on down the south main line, so as to clear the switch at Valley Creek. At the time the train went through Valley Creek switch, which resulted in the injury complained of, the plaintiff testified that it was running between 5 and 6 miles an hour, while the witness Hickerson testified that it was running between 16 and 17 miles an hour. The switchman, Hickerson, who was a witness

introduced by the defendant, testified that after he had thrown the switch for the north-bound main line he first discovered the engine on which the plaintiff was running when it was only about a car length from the switch, and that this was the first knowledge he had of the switch engine coming up from Fourteenth street; that as soon as he saw it he signaled to the switch engineer, and started to the switch at the same time, to throw it the other way, but that he did not have time to do it. He testified that the last time he noticed the switch engine, just before he saw it the car's length from the switch, it was standing at Fourteenth street, and that after he threw the switch he stood with his back to the north, the direction from which the engine was coming, waiting for the train to come on towards the switch, but he did not hear the engine as it approached because of the noise of the furnaces and mills around where he was standing.

The first assignment of error was based on the court's overruling the defendant's objection to the following question, propounded to the witness Will Hill, who had testified that he was a fireman on the engine with the plaintiff at the time of the accident: "Didn't you testify on your former examination that: 'I looked back as we were coming to the crossing. I told him to look back. There was a train coming. Then I looked back and told him it was all right, and I went down and commenced throwing coal. The switches were all set for the south-bound track. I saw they were set for the south-bound track when we crossed the A. G. S. crossing, and I could not say that any of those switches were changed after we crossed the Alabama Great Southern crossing.'" The defendant objected to this evidence, because it was hearsay, and because the plaintiff could not impeach his own witness. The court overruled the objection, and stated that it would permit the question to be asked and answered for the purpose of refreshing the memory of the witness. To this ruling of the court the defendant duly excepted. The second, third, and fourth assignments of error present the same questions as the above. The sixth assignment of error was the admission, against the appellant's objection and exception, of the tables of mortality in evidence to show the plaintiff's expectancy of life. All the other assignments of error are directed to the court's giving and refusing to give several charges asked, and the court's overruling the defendant's motion for a new trial.

The court, in its oral charge, instructed the jury as follows: "So you will say whether Hurt was guilty of negligence. Taking into consideration the rules of the company, such as were brought to his knowledge, and also the circumstances generally surrounding him, to see whether he ought to have run the train of which he was engineer at a slower rate of speed, or to have stopped it,



or to have kept a better lookout; and if you should find that he was negligent in any of these matters, and that his own negligence brought about his own injury, or helped to do it proximately, then he must not recover, even though the switchman was negligent, unless you believe the act of the switchman was willful, wanton, or reckless; not merely negligent,—something worse." "You will consider whether you find that the plaintiff was negligent in failing to keep a lookout, and running his trains too fast across that switch under the circumstances; and you will also consider whether Hickerson was conscious of the danger which threatened the plaintiff by reason of the switch being thrown wrong, and whether, being so conscious of it, he could have turned the switch, so as to save the plaintiff and the plaintiff's train, and prevent the collision, and whether he had time to do it, or whether he willfully and with reckless disregard to the consequences allowed the switch to remain open, and let the plaintiff's train run into the other train; and in such case, if you find that the plaintiff did what he could to prevent the injury to himself after he saw his danger, he may recover." The defendant excepted to each of these portions of the court's general charge, and also separately excepted to the court's refusal to give each of the following written charges requested by it, among many others: (5) "Unless the jury believe that the witness Hickerson was so negligent that his conduct was the legal and moral equivalent of willful or intentional wrong, they must find for the defendant, if they believe the plaintiff was guilty of negligence which proximately contributed to his injury." (17) "If the jury believe that the plaintiff has contradicted his testimony given on the former trial of this cause in any material particular, they are authorized to consider this as an impeachment of the plaintiff's testimony." (21) "If the jury believe that the plaintiff testified on the former trial of this cause that he didn't see how the switch was after he left Fourteenth street, and that he testified on this trial that he saw that it was right for the south main line at or about the Alabama Great Southern crossing, they may consider these contradictory statements as an impeachment of the plaintiff." (22) "If the jury believe that the plaintiff testified on the former trial of this cause that he didn't notice this switch after he left Fourteenth street, and on this trial that he noticed the condition of the switch at the Alabama Great Southern crossing, the jury are authorized to disregard his testimony entirely, if they believe that he knowingly did so." It is not deemed necessary to set out in detail the other charges.

Hewitt, Walker & Porter, for appellant.  
Smith & Lowe, for appellee.

COLEMAN, J. The action is on the case brought by Hurt to recover damages for

personal injuries, alleged to have been sustained by the negligence of the defendant while he was in its employment as an engineer. The court permitted the plaintiff to ask his own witness, Will Hill, against the objection of the defendant, if he had not testified on a former trial, as follows: (The statement is then set out.) The court permitted the question to be asked for the purpose, as stated by the court at the time, to refresh the memory of the witness, and not for the purpose of impeachment. It is a matter largely within the discretion of the court to permit a party to refresh the memory of a witness. The witness answered that he "did not remember." The general rule is, a party cannot impeach his own witness by showing that he is unworthy of belief, or by proving that he has made contradictory statements, but he may refresh his memory in a proper way. This is frequently done by showing the witness a memorandum, and it is permissible to do so by calling the attention of the witness directly to some particular circumstance or statement. It does not appear that it was used for any other purpose, and in this case the question elicited no response unfavorable to the defendant. A party is not held bound by any statement of fact made by his own witness, if he can by other evidence show that in truth the statement was incorrect. The deportment of a witness on the stand, his manner of testifying, may be considered by a jury in weighing his evidence, and is a legitimate subject for argument by either side. A witness may discredit his own testimony by his manner when testifying. There was no error in the ruling of the court, in the several assignments of error involving this question. The court did not err in admitting the American Tables of Mortality. *Railway Co. v. Chambliss*, (Ala.) 11 South. Rep. 897; *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. Rep. 120.

A great many assignments of error are based upon the charges given and the refusal to charge as requested by defendant. The three charges given for the plaintiff are free from error. The first asserts the proposition that, if "the plaintiff kept the best lookout for switches and obstructions on the track he could, consistent with his other duties, to watch for signals and manage the engine, if such other duties were of equal importance, this would not be negligence." The charge is not complete, but, considered in connection with the evidence, it is easily understood, was not calculated to mislead, and was not abstractly erroneous. The second charge given for plaintiff asserted that negligence on the part of the plaintiff, which did not contribute to his injury, would not prevent a recovery; and the third asserted the proposition, thoroughly established in this court, that if defendant knew of plaintiff's peril in time to have prevented the injury, and could have prevented it by the use of



means then under its control, and negligently failed to apply the means to prevent the injury, and plaintiff was injured in consequence of such negligence, he would be entitled to recover, notwithstanding plaintiff may have been guilty of negligence, provided that plaintiff did all he could to prevent the accident and save himself from harm after he became aware of his peril. Authorities collected in *Railroad Co. v. Webb*, (Ala.) 12 South. Rep. 375. The portions of the oral charge excepted to involve very much the same principles of law as those involved in the charges given for the plaintiff, and which have been declared to be free from error. The argument against the oral charge of the court is not insisted upon so much because of any unsoundness in the proposition of law asserted as for its qualifying effect upon another charge of the court, given at the request of the defendant, after the oral charge was concluded. It is insisted that the ruling of the court is inconsistent, in this: that in the oral charge the court left it with the jury to say whether there were facts in evidence which showed that plaintiff was guilty of proximate contributory negligence, and in an affirmative charge the court instructed the jury, at the request of the defendant, as a matter of law, "that if the jury believed the evidence the plaintiff was guilty of negligence which proximately contributed to his injury." We have held that there was no error in the portions of the oral charge excepted to, and, if we are correct, and if there is repugnancy in the oral charge and the affirmative charge given at the request of the defendant, it must be that the error lies in the charge given at the request of the defendant. If there was error committed by the court in favor of the defendant, and at his request, the defendant cannot take advantage of it to the prejudice of the plaintiff. The statute (section 2754, Code) prohibits the court from charging upon the effect of evidence, unless required to do so by one of the parties; and if, upon the evidence in this case, the court had charged the jury, *ex mero motu*, that plaintiff was guilty of proximate contributory negligence, and the verdict had been for the defendant, we are not prepared to say it would not have been reversible error. Code, § 2754, and authorities cited in Code. Employees cannot be held responsible for the failure to perform one duty when such failure resulted from the necessary observance of another of equal importance, and equally binding upon them. Some portions of the oral charge excepted to—that which declared plaintiff's right to recover, although he may have been guilty of contributory negligence—were undoubtedly free from error, and the exception going to the whole, for this additional reason, was not well taken.

Under the written instruction of the court given at the request of defendant, the jury were required to find that plaintiff was guilty

of proximate contributory negligence. The only issue of fact left open to be ascertained by the jury under this charge of the court was whether defendant was guilty of such wanton or willful negligence, or its equivalent, as to authorize a verdict for the plaintiff, although he may have been guilty of proximate contributory negligence. In the case of *Railroad Co. v. Webb*, (Ala.) 12 South. Rep. 375, it is said: "We have often held that, if plaintiff's peril was discovered in time to avoid the injury by the exercise of due care on the part of the defendant, and the injury was the result of the failure to perform its duty in this respect, plaintiff would be entitled to recover, although he may have been guilty of culpable negligence in the first instance." We further held that "the practice which prevails in this state authorizes the introduction in evidence of reckless, wanton, or willful negligence under a complaint which avers only simple negligence, and a recovery may be had upon such proof, although the evidence may sustain a plea of simple contributory negligence." The authorities are collected in the *Webb Case*, *supra*.

The first count of the complaint charged simple negligence, as distinguished from wanton or willful negligence, or its equivalent, and under the foregoing authorities it was proper to admit evidence to show that defendant negligently failed to use preventive effort after discovering plaintiff's peril, and that such negligence caused the injury. Whether the evidence was sufficient to authorize the plaintiff to recover under the first count, notwithstanding plaintiff may have been guilty of contributory negligence was properly left to the jury. The gravamen of the third count of the complaint is that defendant knew of plaintiff's danger, "and could, by the exercise of proper diligence, have prevented his injuries as aforesaid, which it negligently failed to do." The negligence here averred is the equivalent of wanton or willful misconduct. To authorize a recovery under this count, it was necessary to prove the negligence averred. Proof of simple negligence—that is, the failure to exercise ordinary care—would not sustain this count of the complaint. A plea to such a count, which avers as a defense that plaintiff was guilty of negligence which proximately contributed to his injury, does not present a complete answer, for plaintiff may recover, notwithstanding his contributory negligence, upon proof that defendant was guilty of wanton or willful injury or such negligence as to be the equivalent of willful or wanton wrong. The plea does not answer the whole complaint. *Railroad Co. v. Frazier*, 93 Ala. 45, 9 South. Rep. 303; *Railway Co. v. Stewart*, 91 Ala. 421, 8 South. Rep. 708; *Railroad Co. v. Watson*, 90 Ala. 68, 8 South. Rep. 249. Instead of objecting to the plea because of its insufficiency, the plaintiff joined issue upon it. The rule is that, where

issue is joined upon an insufficient plea, it becomes an issue to be tried by the jury, and, although it may be immaterial, or show no bar to a recovery, the court has no discretion, but must receive evidence, if offered, in support of the plea, and, if sustained by the proof, the defendant is entitled to have the issue found in his favor. *Farrow v. Andrews*, 69 Ala. 96; *Agnew v. Walden*, 84 Ala. 503, 4 South. Rep. 672; *Railroad Co. v. Graham*, (Ala.) 10 South. Rep. 283. The court, as we have stated, charged the jury at the request of the defendant, as a matter of law, that plaintiff was guilty of negligence which proximately contributed to his injury. It thus determined that the plea of the defendant to the third count of the complaint was sustained by the proof. Although insufficient as a plea, issue having been joined upon it, and the defendant, as judicially determined by the court, having sustained the plea by uncontroverted evidence, to be consistent it would appear that the court was bound to charge the jury, at the request of the defendant, that the plaintiff could not recover under the third count of the complaint.

We are of opinion the court charged the jury too favorably for the defendant when it declared as a matter of law that plaintiff was guilty of contributory negligence. We think, under one phase of the evidence, the jury might have found that plaintiff was not guilty of contributory negligence. If, after crossing the Alabama Great Southern Railroad track, plaintiff looked, and saw that the switch was properly set, and he received orders from the yard master to move down the track, and if it was equally incumbent on him to attend to his engine, and watch for signals, and he "kept the best lookout he could for the switches, consistent with his other duties of equal importance," and was also informed by his fireman that the switch was all right,—questions of fact to be determined by the jury,—a failure on his part to discover and know exactly when the switch was turned, would not, as a matter of law, necessarily amount to contributory negligence. Under the evidence, it was a question for the jury. If, therefore, the court erred in favor of the defendant in giving the affirmative charge, at its request, that plaintiff was guilty of contributory negligence, the error cannot be visited upon the plaintiff if in fact, under the evidence, the court ought not to have thus charged the jury. The principle of law decided in the case of *Railroad Co. v. Sanders*, 13 South. Rep. 57, (present term,) is directly in point.

Admissions which are relevant and material to the issue made by a party to a suit, whether made as a witness on the stand or elsewhere, are always admissible against him. He is not concluded by them unless they induce action, so as to estop him afterwards, but he may explain or show that in making the statement he was mistaken. Where a

party testifies on a subsequent trial different from that given on a former trial, it is competent for the adverse party to give in evidence his statement on the first trial, and it is the duty of the jury to consider both statements, in connection with the explanation, if any is made, in the light of all the evidence, and determine which is true. A charge which singles out any particular part of the evidence, and bases a conclusion of law upon it, gives the fact thus emphasized undue prominence, and is calculated to mislead the jury. Such charges generally are argumentative, and should be refused. The charges asked by defendant in regard to the former admissions of the plaintiff are faulty in this respect, and the court did not err in refusing them.

Many of the refused charges ignore that phase of the evidence (and there was such evidence by the plaintiff) which tended to show that defendant failed to exercise proper preventive effort after plaintiff's peril was discovered. For this reason they were properly refused. We need not specify them. Section 2756 of the Code, which provides that "charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written," was not intended to license either party to move for charges ad infinitum. A court will not be in error for refusing charges which are mere repetitions of charges which have been given, and a mere variation in the use of words, which "hideth counsel," and which in no way change the meaning or assert different principles from those given, will not affect the rule. Some of the charges asked are subject to this criticism. Charge No. 5, refused by the court, is of that character. The defendant had received the benefit of the principle of law asserted in this charge in four separate charges, given by the court at the instance of the defendant, and in the oral instructions given by the court. The charge (No. 5) may be subject to the further criticism that it refers to the jury to determine what is the "legal" equivalent of willful or intentional wrong, but, aside from this, it is a mere repetition of instructions which were given to the jury. No possible injury can result to defendant by the rule of construction we place upon the statute, for it is now provided that charges "given" are to be taken out by the jury, while those refused are to be retained by the clerk. Acts 1888-89, p. 90, amending section 2756 of the Code. It is manifest, then, that the defendant received the benefit of charge No. 5 in the charges given at its request, and was not injured by the refusal of the court to give charge No. 5.

Charges 17 and 21 are misleading, and also state the proposition in language too strong. When it is shown that statements made by a witness on his examination are different from those made on a previous examination, this is evidence tending to impeachment,

(Harris v. State, [Ala.] 11 South. Rep. 255;) but when the witness makes an explanation of the different statements the jury would not be authorized capriciously to reject the explanation. The charge should not have ignored the explanatory evidence. Contradictory statements tend to impeachment, but do not, as matter of law, amount to an impeachment. If a statement is intentionally made, the witness knowing at the time it is untrue, a jury would be authorized to reject the testimony of the witness entirely. We are of opinion that charge 22 is involved, and is subject to the same criticism. Leaving off the last phrase of the charge, "if they believe he knowingly did so," there is but little difference, if any, in the principle asserted in this charge and in 17 and 21, supra. If the jury believed that on either examination the witness stated as true that which he knew to be untrue in regard to a material matter, the jury would be authorized to discredit the witness altogether, and it would not be an invasion of their province to so instruct them; but that is not the proposition asserted by the charge. The witness in the case at bar knew at the time of his last examination he had made a different statement on his first examination, and he undertook to account for the difference, and to explain why he made a mistake on his first examination. If the jury were satisfied with the explanation, although they may have believed that the witness knowingly and intentionally testified as he did on his first examination, yet, if they believed he made an honest mistake, which he satisfactorily explained, the mere difference of the two statements would not in law justify the court to instruct the jury as requested. The charge as framed ignores the explanatory evidence, and at least was calculated to mislead the jury, and possibly invaded their province. There was no error in refusing it. "Charges should be clear, and of easy interpretation." Hughes v. Anderson, 68 Ala. 280; Harmon v. McRae, 91 Ala. 401, 8 South. Rep. 548.

Some part of the statements of counsel to the jury in his closing argument, to which exception was taken, was authorized by the evidence, and, the exception going to the entire part, that which was authorized as well as that not justified by the evidence, the court was not bound to separate the legal from the illegal, but was justified in refusing the motion as made. A fair and satisfactory discussion of the question as to how far counsel can go in the argument of evidence before a jury without transgressing legitimate limits may be found in the cases of Mitchum v. State, 11 Ga. 615; Tucker v. Henniker, 41 N. H. 817. The doctrine is thoroughly established in this state, and its limitations have been judicially fixed. See the following authorities: Nelson v. Manufacturing Co., (Ala.) 11 South. Rep. 696; Lunsford v. Dietrich, 93 Ala. 565, 9 South. Rep.

308; Billingsley v. State, (Ala.) 11 South. Rep. 409; Cross v. State, 68 Ala. 476; Jackson v. Robinson, 93 Ala. 157, 9 South. Rep. 391; Railroad Co. v. Orr, 91 Ala. 548, 8 South. Rep. 360. There is no error in the record, and the case must be affirmed.

(98 Ala. 285)

# ALABAMA CONNELLSVILLE COAL & IRON CO. v. PITTS.

(Supreme Court of Alabama. May 2, 1893.)

EXPERT EVIDENCE—MASTER AND SERVANT—DEATH OF INFANT—DAMAGES.

1. One who is well acquainted with the use of a mechanical appliance, and has had a large experience in using it, though not familiar with its construction, is competent to testify as to whether such appliance "was reasonably adapted for the purpose for which it was used," and also as to its condition at the time of the accident.

2. A servant who is injured in an employment which is in its nature dangerous, and who has not been warned of the danger by the master, but has received warning from a fellow servant, cannot recover damages on account of the master's negligence in failing to warn him.

3. In an action by the personal representatives of a minor for damages for his death, where such minor was at the time of his death a member of his father's household, paying his wages to his father, and being supported by him, the jury, in estimating damages, must exclude from their calculation the earnings of such minor prior to attaining his majority.

Appeal from city court of Birmingham, Jefferson county; William W. Wilkerson, Judge.

Action by Batiste Pitts, as administrator, against the Alabama Conneltsville Coal & Iron Company, to recover damages for death of Peter Pitts. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

All the facts pertaining to the pleadings and as disclosed in the bill of exceptions are sufficiently stated in the opinion. After the introduction of all the evidence, and after the court had charged the jury on the law applicable to the case, the plaintiff moved for leave to strike count No. 3 from the complaint, and amend count No. 2. The defendant objected to the granting of this motion. The court overruled his objection and granted the motion, and defendant excepted.

The court, at the request of the plaintiff, gave the following charge to the jury: "The master is bound not to expose the servant to dangers of which he knows, or has reason to know, the servant is not aware. He is bound to fully apprise the servant of dangers incident to the business, which he (the employer) ought to know." The defendant excepted to the giving of this charge, and also separately excepted to the refusal of the court to give each of the following charges, as requested by it: (1) "If you believe the evidence, your verdict must be for the defendant under the first count of the complaint." (2) "If you believe the evi-

dence, your verdict must be for the defendant under the second count of the complaint." (3) "If you believe the evidence, your verdict must be for the defendant under the fourth count of the complaint." (4) "If you believe the evidence, your verdict must be for the defendant under the fifth count of the complaint." (5) "If you find from the evidence that the tramway and tipple were adapted to the work expected to be done with them, and were reasonably safe for the ordinary and usual work done on them, then there was no negligence in ordering Peter Pitts to go up on the trestle and help push the cars." (6) "The burden of proof is on the plaintiff to establish by proper evidence that there was a defect in defendant's works, and that Peter Pitts' injuries were directly caused by the defect; and if, after considering all the evidence, you are not reasonably satisfied that there was a defect, and, in addition thereto, that this defect was the direct cause of the injury, your verdict must be for the defendant." (7) "If you find from the evidence that Peter Pitts was directed to help push the car on the tramway, and that he was injured while stooping over the end of the pole, and not in a position required to be assumed by him in pushing or holding back the car, you will find a verdict for the defendant." (8) "If you find from the evidence that the tipple pole flew up and struck Peter Pitts because the two men who were charged with the duty of managing the tram car had negligently failed to put the ring over the end of the pole so as to hold it down, you will find a verdict for the defendant." (9) "If the jury find that the accident was due solely to an unusually heavy load on the car to be handled on the tipple, and the nature of that load, then your verdict must be for the defendant." (10) "The burden of proof is on plaintiff to establish by proper evidence that defendant's servant ordered Peter Pitts to go up on the tramway and help do the very work which he was doing when injured; and if you are left in doubt, and not reasonably satisfied from the evidence, that defendant's said servant knew that this tipple pole was likely to fly up prematurely when a properly loaded car was placed on the tipple in the usual way, and that under his orders Peter Pitts would reasonably be expected to come in contact with the pole while carrying out his orders, and that said pole did fly up prematurely and injure Pitts while he was in a position required of him in the performance of the duty said servant had directed him to perform, then your verdict must be for the defendant." (11) "Should you get so far as to estimating the amount of damages under the law as I have charged you, in making this estimate as to compensatory damages you will exclude from such calculation, in this case, the earnings and savings of deceased up to the age of 21 years, and in

this case only calculate on what is earned and saved after that age."

Chisholm & Whaley, for appellant. Smith & Lowe, for appellee.

STONE, C. J. This action is brought under the employer's act, (section 2590, Code 1886.) It counts on the negligent and unlawful killing of Peter Pitts, an employe of the appellant corporation. The complaint was amended by striking out the third count, and the trial was had on the remaining four counts. A demurrer was interposed to each of the counts of the complaint, which the city court overruled; but that ruling is not assigned as error. The appellant corporation was operating a coal pit. It had an elevated tramway, erected and operated for the purpose of removing the refuse which was mined with the coal. At the end of the tramway was machinery called a "tipple," used in emptying the refuse from the cars. The cars on this tramway were moved by hand power, and plaintiff's intestate was employed in this service at the time he suffered the injury which caused his death. The machinery which operated the tipple is described in the first count of the complaint as follows: "Plaintiff alleges that said tipple was connected with said track by means of a pole about nine feet in length, one end of which pole was fastened to the tipple, and the other end projected over and along the track, and was held in place by means of an iron ring, or belt, or groove fastened to the track, and placed over the end of the pole, and was so constructed that when the said hand car had reached the tipple, and said ring or belt or groove was removed from the end of the pole, the said end would go up in the air as the tipple went down." The negligence of defendant charged in this, the first, count, is that plaintiff's intestate, in what he did, was conforming to orders he was bound to obey, and, while so obeying and conforming to orders, "the end of said pole which extended over the track flew up with great violence, and struck plaintiff's intestate, and injured him so that he died. And plaintiff alleges that said pole was likely to fly up prematurely, and had often done so before, and the work that plaintiff's intestate was directed to do \* \* \* was thereby rendered hazardous and dangerous; and said person in the employment of defendant, to whose orders he was bound to conform and \* \* \* did conform, knew that said pole was liable and likely to fly up prematurely, and had often done so before. \* \* \* That the injury and death \* \* \* were caused by reason of the negligence of the said person, to whose orders plaintiff's intestate was bound to conform and did conform." The gravamen of the second count is "that said tramway or trestle became and was in a defective condition in this:

that that part of the tramway or trestle approaching and next to the tippie had become and was much lower than the portion nearer the mouth of the mine; \* \* \* and by reason of the defect in the condition of the tramway and trestle as aforesaid the said car went with great force and speed upon said tippie, and caused the same to tip suddenly and violently, and thereby caused a pole which was attached to said tippie \* \* \* to fly up and strike plaintiff's intestate," etc. The fourth count is substantially like the first, with this addition: "Plaintiff alleges that said injury was caused by reason of a defect in the ways, works, or machinery of defendant, in this: that no sufficient provision was made to secure the end of said pole, which extended over and along said track. \* \* \* And plaintiff alleges that said defect had not been remedied, owing to the negligence of the person in the employ of the defendant, and intrusted by the defendant with the duty of seeing that the ways, works, and machinery were in proper condition." The fifth count avers that "the defendant negligently ordered him [plaintiff's intestate] to push and assist in pushing a loaded tram car over a tramway, along and upon a trestle, \* \* \* and to place and assist in placing said tram car upon said tippie." This count then alleges how said injury was inflicted, and adds: "And plaintiff alleges that the work which plaintiff was ordered by the defendant to perform was dangerous and hazardous by reason of the fact that said pole was liable to fly up as aforesaid, and defendant knew that the same was dangerous and hazardous by reason of the fact that said pole was liable to fly up as aforesaid; and the defendant negligently failed to notify the deceased of the danger." The case was tried on two pleas,—not guilty, and contributory negligence on the part of plaintiff.

The witness Lewis testified that he was well and long acquainted with the use, if not with the construction, of the machinery he was called to testify about. He stated he had had much experience in its use. We think he should have been permitted to testify that the pattern of the tippie employed on the occasion of the injury "was reasonably adapted for the purpose for which it was used;" and, if he knew the condition it was in when the disaster occurred, whether in good repair, or the contrary, he could state that. *Young v. O'Neal*, 57 Ala. 586; *Railway Co. v. Propst*, 83 Ala. 518, 3 South. Rep. 764; *Blackman v. Collier*, 65 Ala. 311; *Railway Co. v. Blakely*, 59 Ala. 471; *Hames v. Brownlee*, 63 Ala. 277. The city court erred in excluding this testimony. *Railroad Co. v. George*, 94 Ala. 199, 10 South. Rep. 145. The drift of the testimony which went before the jury in this case tends to show that plaintiff's intestate was a youth about 19 years

old, that he was in the employ of the defendant corporation, and that he was usually employed in work other than that in which he lost his life. There was an elevated tramway, along which hand cars were employed in removing the refuse from the mine, which extended some 140 feet from a point above the mouth of the pit. At the end of this tramway, and on a line with it, was what is known as a "tippie," which moved on an axle. A pole connected with the tippie extended some feet along the tramway, and was fastened to it by a movable ring. This pole, so fastened, kept the tippie in place until the hand car was placed upon it, when, by removing the ring, the pole would fly up, and, by releasing the tippie, cause it to do its work. The first 70 feet of this tramway was nearly horizontal, but from that point to the tippie it was down grade. The testimony as to the degree of this inclination is not entirely in harmony, some of the witnesses giving it a steeper descent than others do. All the testimony agrees that in descending this down grade to the tippie the hand car moved of its own momentum, and rapidly, and that on this occasion the fastening which held the pole in place became detached, and the pole flew up prematurely; thus striking intestate on his head, and causing his death. There was testimony that on a former occasion a similar premature flying up of the pole had occurred, but the superintendent or mine boss denied all knowledge or information of such occurrence. A witness for plaintiff had testified that he himself had notified the manager of it. It was proved, and was not denied, that the superintendent or boss directed deceased to assist the hands regularly detailed for the service in placing the car from the platform on the tramway, and it was not claimed, or attempted to be proved, that he warned him of any danger in this service. There was testimony that before starting on the tramway with the hand car the regular hands in the service cautioned plaintiff's intestate against the pole connected with the tippie; and when on the down grade, within 15 or 20 feet of the end of the tramway, each of them told him to "let loose," accompanied with a backward motion of the hand. He did not obey this instruction, but held on to the car, following it up. There was some variation in this part of the testimony, all of which was given by plaintiff's witnesses. One witness testified that he heard the command given to "hold it." This witness was not on the tramway. Another of plaintiff's witnesses testified that this command was given by him, not to intestate, who was at the rear end of the car, but to his regular coworker who was at one side of it, while he, witness, was at the other, each endeavoring to check the car's motion. There was no proof tending to show any defect or want of repair of the tippie, the connecting

pole, or of the ring which held them in place. The only defect of the ways, works, or machinery charged in the complaint, of which any proof was made, was and is that the down grade of the tramway was so steep that a heavily loaded car could not be kept under control while descending it. According to some of the testimony, this defect, and the consequent rapid, uncontrollable movement of a descending, heavily laden car, caused the pole or lever to break loose from its fastening, and fly up prematurely. This was the only defect "in the ways, works, machinery, or plant" which there was any testimony tending to prove. This alleged defect is the gravamen of the second count. The wrong complained of in the fourth count is "that no sufficient provision was made to secure the end of said pole." This refers to the lever which held the tippie in place. No proof was made that this appliance was defective in itself. The fifth count alleges that the work which plaintiff's intestate was commanded to do was "dangerous and hazardous," and "the defendant negligently failed to notify the deceased of the danger." We think the work which plaintiff's intestate was instructed to do was, in its nature, hazardous, and that in assigning an inexperienced youth to such perilous service the boss or person in control should have warned or cautioned him of the danger. If, however, he was sufficiently notified and cautioned by a co-laborer, and heedlessly disregarded such warning, this would leave him without excuse.

We have said that the ruling on demurrer has not been assigned as error. If it were, we would hold the first count does not set forth a good cause of action. We make this statement as a guide for another trial, and to prevent the question from coming again upon us.

Allowing amendment of pleadings, while the trial was in progress, in the manner here complained of, was free from error. 3 Brick. Ala. Dig. p. 23, §§ 5, 7; Code 1886, § 2833.

There was no testimony before the jury tending to support the fourth count of the complaint, and charge 3 asked by defendant ought to have been given.

Defendant's series of charges requested: Charge No. 6 is subject to criticism in two respects: it employs the words, "direct" and "directly," instead of the appropriate words, "proximate" and "proximately." This was calculated to mislead the average juror. But there is a graver fault. The conclusion is too broad. Its hypothesis, if found to be true, would certainly acquit the defendant of fault in the matter of defects in the ways, works, and machinery, but it would extend no further. It would not necessarily exonerate defendant of the charge made in the fifth count, if the jury should find that plaintiff's intestate was assigned to a perilous

work, without receiving instructions from some quarter that would be calculated to put him on the lookout. This would present a question for the jury, on proper instructions. But we must not be misunderstood. If intestate received from other employes the notice and warning he should have had from the superintendent or boss, and disregarded it, this left him without excuse. Charge 8 had no testimony to support its hypothesis, and it was rightly refused for that reason, if for no other. Charge 9 hypothesizes the overload of the tram car as the sole cause of the injury suffered. There is no count in the complaint based on this alleged fault of defendant, and hence no notice was given by the pleadings that a recovery would be sought on this account. It was not within the issue formed. This charge ought to have been given. The legal principles necessary to be consulted in the trial of this case have been many times declared by this court. Railroad Co. v. Allen, 78 Ala. 494; Railway Co. v. Propst, 83 Ala. 518, 3 South. Rep. 764; Railway Co. v. Davis, 92 Ala. 300, 9 South. Rep. 252; Railroad Co. v. George, 94 Ala. 199, 10 South. Rep. 145. See, also, Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. Rep. 1044. Charge 11, asked by the defendant, should have been given. The testimony was without conflict that Peter Pitts was a minor, a member of his father's household, and that the latter supported him, and received the wages he earned. Williams v. Railroad Co., 91 Ala. 685, 9 South. Rep. 77.

Reversed and remanded.

(101 Ala. 232)

#### BATES v. MORRIS.

(Supreme Court of Alabama. May 2, 1893.)

OBJECTIONS TO EVIDENCE—FAILURE TO CALL WITNESS.

1. A general and indefinite objection to a question asked a witness should be overruled unless the question is plainly irrelevant.

2. Where a person whose evidence would be competent for either party to an action was in court during the trial, and equally accessible to both parties, it is error to charge that the jury could draw an unfavorable inference against one of the parties for failing to call such person as a witness.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

In an action by Mary Morris against W. E. Bates judgment was rendered for plaintiff, and garnishment was issued and served upon supposed creditors of defendant. Cora Bates instituted a claim to the money held under the garnishment. Judgment was rendered in favor of the judgment creditor, and claimant appeals. Reversed.

On February 18, 1887, W. E. Bates became indebted to the plaintiff, and, on failure to pay said indebtedness, Mary Morris, the plaintiff, brought suit against him, and obtained judgment thereon in the sum of \$100 on April 26, 1890. Execution being returned

"No property found" on July 21, 1891, garnishment was issued on the judgment, and served on St. Pierre Bros., and in their answer the garnishees acknowledged indebtedness to W. E. Bates, and suggested that the money in his hands was claimed to be the property of Cora W. Bates. After having been duly served with notice, Cora W. Bates instituted a claim to the money in the hands of the garnishees. The claimant claimed the money in the hands of the garnishees, and based her claim upon the following facts, which her testimony tended to show: Prior to 1887 the claimant earned certain money by her own labor, and with her husband's consent was allowed to have and enjoy the proceeds thereof. This money, together with other money, loaned her by her brother, amounting to \$3,500, she loaned to her husband, W. E. Bates, defendant in the original suit. On February 25, 1889, her husband, W. E. Bates, being unable to pay her the money borrowed, and being, as she testified, an intemperate and improvident man, he conveyed to her in satisfaction of said indebtedness his undivided one-half interest in the leasehold interest and rights to the premises which had been rented to St. Pierre Bros. There was some testimony for the claimant that the debt was the full value of W. E. Bates' interest in the leasehold estate. There was other testimony going to show that the property interest conveyed exceeded in value the amount of the indebtedness. The claimant was in possession of her half interest of the leasehold estate from said 25th day of February, 1889, down to the time of this litigation, and it was shown that the lease had yet to run a little less than six years from the date of the trial. There was evidence introduced for the plaintiff in the original suit tending to show that at the time of making the deed to his wife of the leasehold interest W. E. Bates was insolvent, but this fact was not known to his wife. The plaintiff in the original suit introduced one Miles, who, after having testified that he was acquainted with the market value of real estate in Birmingham when the conveyance was made to claimant by W. E. Bates, was asked this question: "What, on February 28, 1889, was the market value of the leasehold interest in the premises, made and referred to by the witnesses as belonging to the claimant, running nine years, and bringing in a rental of \$1,424 net, for half interest, with buildings belonging to lessee at termination of lease?" The claimant objected to the introduction of this question, and duly excepted to the court's overruling her objection. Upon the witness answering, "\$12,000," the claimant objected to the answer, and duly excepted to the court's overruling her objection. W. E. Bates, the husband of the claimant, and the defendant in the original suit, was present during the trial of the present cause, but was not called to testify by either party, and he did not testify. Upon the introduction of all

the evidence the claimant requested the court to give, among others, the following charges: "(5) The court charges the jury that the mere fact that claimant failed to introduce her husband as a witness in this case is not to be considered by the jury as a circumstance against her, but it is a circumstance that can be considered by the jury for or against her, as they may see fit under all the evidence in the case." "(7) Even if the jury believe from the evidence that in making a conveyance to his wife, which was introduced and read to the jury, W. E. Bates intended to defraud his creditors, this would not affect the claimant to the property so conveyed unless she participated in the fraud." The court refused to give each of these charges, and the claimant duly excepted. The court, at the request of the plaintiff, gave the following written charges to the jury, and the claimant separately excepted to each of them as given: (1) "The jury are charged that before the plaintiff can be defeated in this action the claimant must show that the transaction between the claimant and her husband, namely, the conveyance made by him to her of the property in controversy, was for a fair and valuable consideration, and that in determining whether such transaction was fair and just they can look to the fact that W. E. Bates was not examined as a witness in this trial." (2) "I charge you, gentlemen of the jury, that if you believe from the evidence that the transfer of the property in controversy made by W. E. Bates to his wife (the claimant) was made for the purpose of hindering, delaying, or defrauding the creditors of W. E. Bates, you must find for the plaintiff."

Lane & White, for appellant. Guegg & Thornton, for appellee.

STONE, C. J. The issue formed between the parties questioned the bona fides as to the creditors of the husband of the appellant of the transfer he had made to her of his right and interest in the lease executed to him and Beasley by James Wilson and Minnie Constantine. The transfer purports to have been made in consideration and for the payment of an antecedent indebtedness of the husband. If the debt was real, the pivotal inquiry was whether there was such disparity between its amount and the value of the leasehold interest as to be indicative of fraud; whether the appellant had bargained for and received overpayment, or payment in excess of her just demand. *Bank v. Smith*, 93 Ala. 97, 9 South. Rep. 548; *Pollock v. Meyer*, (Ala.) 11 South. Rep. 385. To this inquiry the evidence of the witness Miles was directed, and we do not perceive that it is subject to any just objection. If the question eliciting the evidence was in form objectionable, or if its hypothesis was, as is here insisted, broader than the evidence to which it refers, this was matter of special objection, which, if it had been made, would

have been removed. The objection to the question and to the evidence was general and indefinite. Such objections are not favored, and, if the evidence is not plainly illegal or irrelevant, the trial court commits no error in overruling them. *Wallis v. Rhea*, 10 Ala. 453; *Sanders v. Knox*, 57 Ala. 81; Rule of Practice, 90 Ala. 1x, 9 South. Rep. iv.

The first instruction given to the jury at the request of the appellee is not very clearly expressed. As we construe it, as matter of law it asserts that the failure to examine the husband as a witness should be regarded as a fact or circumstance tending to the proof or disproof of the matter in dispute. It may be that it was intended to assert no more than that the failure to examine the husband was matter of inference or presumption unfavorable to the appellant in weighing the other evidence. In either point of view we deem the instruction erroneous. The husband was in court, accessible to either party, and a competent witness to the same extent for the one party as for the other; and it is difficult to assign any just reason for imputing the failure to examine him as a witness as matter of evidential inference or as ground of unfavorable presumption for or against the one party which would not apply to the other. To neither can be imputed the withholding or suppression of evidence, and all that can be properly said is that neither deemed it necessary to add the evidence of the husband touching the matter in dispute. The question was considered in *Scovel v. Baldwin*, 27 Conn. 316, and it was said by the court: "The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness would aid either party, such party would probably produce him. As he is not produced, the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in the evidence, and upon them alone, without attempting to guess at what might be shown if particular persons were produced by the parties." Cases arise in which material facts lie exclusively within the knowledge of a particular person. If such person is accessible, and is not produced and examined, the party claiming benefit from the facts must generally fall from a want of evidence; and cases may present themselves in which a person having peculiar knowledge of facts from which a party claiming to derive benefit is accessible to such party, and not to his adversary. If such person is not produced and examined, a presumption may arise that the facts do not exist. *Lawson, Presump. Ev.* 120 et seq. Such presumption is, however, indulged with great caution, and

only when it is manifest the evidence is within the power of the one party, and is not accessible to his adversary. The husband was a party to the transaction impeached, and, it may be, the principal actor in it, of necessity having full knowledge of all the facts attending it. The appellant was the other party, having equal knowledge, and was examined. There is no room for any inference that she had omitted the statement of any material fact to which the husband would have testified, or that his evidence would not have been merely cumulative, corroboratory of the evidence she had given. If it was supposed there was any fact within his knowledge of which there was not evidence, or that, so far from corroborating, he would in any respect have contradicted the evidence of the appellant in support of the transaction, the appellee ought to have examined him. Not having examined him, there is no room for any conjecture or speculation as to the character of the evidence he might have given, nor any just reason for unfavorable inference against the appellant. If she had called the husband, and he had corroborated the evidence in support of the transaction, his credibility would have been assailed because of his relation to the appellant and to the transaction. This being true, the appellant ought not to suffer by reason of the failure to examine the husband. Similar instructions have been considered and repudiated by this court. *Patton v. Rambo*, 20 Ala. 485; *Jackson v. State*, 77 Ala. 18; *Carter v. Chambers*, 79 Ala. 223; *Pollak v. Harmon*, 94 Ala. 420, 10 South. Rep. 156. The last case cited is not in any respect distinguishable from the present one, and the instruction requested and refused differs from the instruction we are considering only in being more clearly expressed. It was said by Clopton, J., citing the case of *Scovel v. Baldwin*, supra: "Both the grantors in the bill of sale were in court, and equally in the control of both parties. In such case, the jury, being in duty bound to determine the case on the facts shown and the evidence actually introduced, have no right to presume what would have been shown had the grantors in the bill of sale been examined as witnesses."

It is not necessary to notice separately and particularly the instructions given or refused, the subject of the remaining assignments of error. The controversy between the parties involved only plain, well-settled principles of law. Prior to 28th February, 1887, the earnings of the wife were not her separate property. The common law prevailed, and her earnings belonged to the husband. By contract with her, or by gift, or by renunciation of all right to them, suffering her to retain them, the husband could invest the wife with a separate estate in such earnings, which a court of equity would protect; but such gift,



or such voluntary renunciation, the equivalent of a gift, was not valid as against the existing creditors of the husband, for the same reason that any voluntary conveyance would be void as to the existing creditors of the donor. As to subsequent creditors, such gift or renunciation was valid, unless it was successfully assailed for intentional fraud. *Pinkston v. McLemore*, 31 Ala. 308; *Wing v. Roswald*, 74 Ala. 346. The evidence of such gift or renunciation must have been clear, and it must have been apparent that the husband intended to divest himself of the right to her earnings, and to set them apart to the separate use of the wife. *Carleton v. Rivers*, 54 Ala. 467. If it be shown that the husband gave or renounced to the appellant her personal earnings, and that by her thrift and industry she acquired moneys which were loaned to or used by the husband, by the loan or use he became indebted to the appellant, and the debt would form a valuable consideration for the sale or conveyance of property to her. If at the time of such gift or renunciation the debt of the husband to the appellee had not been created, as to her the gift or renunciation is valid, unless it is shown to have been infected with actual fraud. *Huggins v. Perrine*, 30 Ala. 396. But although it may appear that the appellee was a subsequent creditor of the husband, if her claim existed at the time of the transfer of the leasehold interest to the appellant the transfer cannot be supported, if it be shown that the value of the interest transferred was so materially in excess of the amount of the indebtedness of the husband that the legitimate boundary of securing payment of the debt was passed, and there was intentional bargaining for and receiving overpayment. *Pollock v. Meyer*, (Ala.) 11 South. Rep. 385, and authorities cited. An observance of these well-settled principles will lead to a proper determination of the controversy and of the right of the parties. Reversed and remanded.

(38 Ala. 124)

**MAYOR, ETC., OF CITY OF BIRMINGHAM v. ALABAMA G. S. R. CO.**

(Supreme Court of Alabama. May 2, 1893.)

**MUNICIPAL CORPORATION—ORDINANCES—VALIDITY  
—OBSTRUCTION OF STREET BY RAILROAD CARS.**

1. A city ordinance which makes it unlawful for a railroad company "to make up any train across [a certain street] by switching or otherwise, at any time," construed to mean that the company shall not stop the cars on or across the street in the operation of making up a train, is valid as a reasonable exercise of municipal authority.

2. An ordinance which prohibits a railroad company, between the hours of 6 A. M. and 11 P. M., from moving its cars across a street for the purpose of being distributed in the yards, without regard to whether they are stopped on the street or not, is void, because unreasonable.

3. The provision of an ordinance that a railroad company shall not obstruct a street by

allowing cars to remain on or across the same for a longer period than three minutes is a valid regulation.

4. Where the provisions of an ordinance are severable and capable of distinct enforcement, the fact that some are void because unauthorized does not affect the validity of those otherwise valid.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Bill for an injunction by the Alabama Great Southern Railroad Company against the mayor and aldermen of city of Birmingham. Plaintiff had decree, and defendants appeal. Modified and affirmed.

Gregg & Thornton, City Attys., for appellants. A. G. Smith, for appellee.

HEAD, J. The bill is filed by the Alabama Great Southern Railroad Company to enjoin the enforcement of the following ordinance adopted by the mayor and aldermen of Birmingham, a municipal corporation: "It shall be unlawful to make up any train across Twentieth street, by switching or otherwise, at any time, or to switch back and forth across said street for the purpose of distributing cars, between the hours of 6 in the morning and 11 at night, but it shall not be unlawful to use the tracks on said street for placing cars on bulk tracks in the yards. No obstruction shall remain on or be across said Twentieth street for a longer time than three minutes. Any person violating this section shall be fined on conviction not less than \$1.00 nor more than \$100.00." The bill avers that complainant is a railroad corporation, duly chartered under the laws of Alabama, owning and operating a railroad from Chattanooga, Tenn., to Meridian, Miss., passing through the states of Tennessee, Georgia, Alabama, and Mississippi, and connecting at its termini with other railroads, by association or otherwise, in the interchange of freight and passenger business, thus reaching and extending the commercial relations of the states wherein its road is located into many of the states of the Union, and affording transportation facilities to many of the states into the four states wherein the road is located; also affording transit across said four states to the freight and passenger traffic from many other states. The complainant's road was constructed under and by virtue of the powers contained in the charters of certain other railroad companies in the bill mentioned, and complainant now owns the road, with all the rights, franchises, privileges, and immunities of said other corporations. The complainant's predecessor, who constructed the road, was authorized to put down and use along the main line single, double, or treble tracks, and, whenever necessary to intersect or cross any road or highway, to construct across or upon the same, provided the company should restore the road or highway to its former state, or in a sufficient manner not to impair its usefulness. The company was also author-

ized to lay out the road so as not to exceed 150 feet wide. The road was completed in the year 1871, and has since been in operation to the present time. Prior to construction, a right of way 100 feet wide was obtained through section 36, township 17, range 3 west, which was a part of a field used for agricultural purposes, with no houses or habitations upon it. When the South & North Alabama Railroad Company determined to build its line of road so as to cross complainant's line about Elyton, the Elyton Land Company was formed for the purpose of building a city upon what is the present site of the city of Birmingham, and to that end acquired the title to the said land in section 36, township and range aforesaid, which now forms in part the site of said city, and entered into a contract with the said South & North Alabama Railroad Company by which that road crossed complainant's line of road at the present crossing, which is within the city of Birmingham; and complainant allowed that company to use and occupy a part of its right of way, and complainant acquired the right of way over the strip of land 35 feet wide immediately west of and adjoining its former right of way, and went into the use and occupation of the same. The Elyton Land Company then caused the city of Birmingham to be surveyed, and a map thereof made, which survey and map were made with the center line of complainant's road as the base line and foundation thereof, and now so remain; and said company designated on its map Twentieth street, as now located, so as to cross complainant's line of road and its said rights of way, as acquired by it, in said section, township, and range; and also designated on said map the lands extending from First avenue north to First avenue south as railroad reservations, the same being 1,000 feet wide, including the rights of way already mentioned, and extending through the proposed city. Thereafter the city of Birmingham was built up, as then surveyed and located, on both sides of the roads and rights of way of complainant and said South & North Alabama Railroad Company, and gradually grew from a few houses, from year to year, into its present proportions. The bill also avers that complainant has remained in possession of the said rights of way for many years, and during the year 1886 it caused to be made a plan for the improvement of its yards and property within the city, adjoining said Twentieth street, and in the year 1887 completed said improvements and built its yard at a cost of not less than \$15,000; that the same was built with the full knowledge and assent of the authorities of the city, who in no manner objected thereto; and in the year 1889, the city, with the co-operation of complainant and the South & North Alabama Railroad Company, laid down granite block pavement over said street crossing, at great expense to complainant, as it became necessary

for it to take up and relay its tracks in the most permanent and durable manner possible. The bill further avers that complainant is using four tracks across Twentieth street on its own rights of way; that its yards north and south of the street are immediately contiguous to it, and, in order to use its yards, it is necessary and absolutely essential that it be able to cross the street, and that a denial of such right, in the manner proposed by said ordinance, would so cramp its operations that it could not use its said road to any advantage, and would utterly cripple any attempt to switch, or to use its property for distributing cars, for it is averred the use of its property in its yards involves, and is forced to involve, switching at all hours of the day, whenever the same is required for the business of its patrons; that, if the said ordinance is enforced, it will have the effect to compel the complainant to remove its said yards from the corporate limits of the city, where they would fall, within other suburban towns now building up and adjoining Birmingham, along the line of complainant's road. It is also averred that complainant's trains arrive from time to time in the city, having many cars for different roads and states, and are stopped in said yard north of Twentieth street, which has been built for this purpose, and so used without objection; and that it is absolutely necessary for its cars to be switched, in order that each may be sent to its destination, and absolutely necessary to switch across Twentieth street within the usual working hours of the day for such purpose. The bill further avers that there is no necessity for the ordinance complained of, inasmuch as, since the street has been paved with Belgian block, the safety to travel across the street has been greatly promoted, and there exists across the tracks at Twenty-Second street in the city a bridge which is used by pedestrians, vehicles, and the Highland Avenue & Belt Railroad Company, and there is now building across the tracks upon Twenty-First street a bridge which will be used for pedestrians and vehicles, and will enable all parties who do not desire to cross at Twentieth street to safely cross from the north to the south side and back, and that there are other streets opened across the railroads which can be used; that the city has already provided by ordinance all necessary and reasonable regulations of the use of said street by trains and cars of railroads, by providing that the companies must keep lights and flagmen, and shall have a watchman to precede every train that crosses the street, which regulations have been and are being observed by complainant. The bill prays that the ordinance be declared unreasonable and void, and that its enforcement be perpetually enjoined. The defendant demurred, and also moved to dissolve the temporary injunction for want of equity in the bill, and on the denials of the answer. The defendant appeals from a decree of the

court overruling the demurrers and refusing to dissolve the injunction.

It would seem unnecessary to discuss at length, or cite authorities to support, the proposition that, upon the facts averred in the bill, which, upon demurrer, must be taken to be true, the complainant is invested with the ownership and right to the reasonable use and enjoyment of its rights of way and tracks which cross Twentieth street, and its yards on each side of the street, and, in the exercise thereof, the right to cross the street with its engines and cars in a reasonable and proper manner; and that these rights the city of Birmingham has no power to take away or destroy by virtue of any power inherent in the municipality, or expressly conferred upon it by legislative grant. We do not inquire how far the sovereign power of the state might be exercised to prevent the use of the complainant's yards within the city, for the purposes for which they were acquired and built and are now being used, or how far that power might be delegated by the state to the municipal corporation itself. It is enough, in the present case, that no such power or authority has been conferred upon the city, and that the extent of its authority in the premises is only that conferred by its charter, viz.: "To regulate and control the running of cars or locomotives upon or across the streets, avenues, or alleys of said city, and to regulate and control the speed of such cars, engines, or trains within the corporate limits of said city;" and, as provided by section 1519 of the Code, "to regulate the running of railroad trains or engines within the corporate boundaries, limiting the moving or running thereof to a speed of not more than four miles per hour; and to prohibit the standing thereof on or across the streets or highways within the corporate boundaries." It is not claimed by the city that it can do more than these statutory provisions authorize; nor is it denied by the complainant that the city may exercise the power conferred by these provisions. The question, then, is whether the adoption of the ordinance assailed is a valid exercise of the power to "regulate and control the running of cars or locomotives upon or across the streets, avenues, or alleys of said city." The ordinance is divided into three distinct provisions, which may be stated as follows: (1) It shall be unlawful to make up any train across Twentieth street, by switching or otherwise, at any time; (2) it shall be unlawful to switch back and forth across said street, for the purpose of distributing cars, between the hours of 6 in the morning and 11 at night, but it shall not be unlawful to use the tracks on said street for placing cars on the bulk tracks in the yards; (3) no obstruction shall remain on or be across said Twentieth street for a longer time than three minutes. We lay down as a general proposition that, so far as the city of Birmingham,

invested with the power to regulate and control the running of cars, etc., has the right to interfere, the complainant, by virtue of its franchises and ownership and enjoyment of its rights of way, tracks, and yards, acquired at the time and in the manner stated in the bill, has the right to move its engines, cars, and trains across Twentieth street to the extent reasonably necessary to the operation of its road and the use of its yards in the transaction of its business ordinarily arising and reasonably necessary to be transacted therein; and that any ordinance of the city denying that right would be unauthorized, and of no effect. The power to regulate the moving of cars across the street implies the right in the railroad company to move them, and confers the authority only to prescribe the manner in which they may be moved.

We find considerable difficulty, from the generality and meagerness of its terms, unaided by any averment explaining them, in determining just what the first provision of the ordinance means to prohibit. If it means that a railroad company shall not carry a car or cars from one side of the street to the other, across the street, for the purpose of being made a part of a train being made up at some place in the yards outside the limits of the street, we have no hesitation in pronouncing it unauthorized, as being a denial of the right of the company to cross the street in the legitimate exercise of the demands of its lawful business; but if it means, on the contrary, that the company shall not stop its engines, cars, or trains on or across the street in the operation of making up a train, we think the regulation a just and reasonable exercise of municipal control. Construing it to mean that which the city authorities were lawfully authorized to ordain, we place upon the provision the last interpretation, and, so interpreting it, hold it to be a valid exercise of municipal power. We know from common observation and experience that persons engaged in making up trains on railroads sometimes stop the cars and construct the trains in or across public thoroughfares; and sometimes, in making up trains, move the engine and cars partially across a street, in order to recover a car or cars located near by, and, when recovered, stop the train on or across the street, reverse the movement, and proceed the other way; and these operations are repeated in rapid succession, virtually obstructing the street against the public until the train is made up and moved away. It is the purpose of the first provision of the ordinance in question to prevent abuses like these, and, so far as it tends to that end, should be enforced.

The second provision of the ordinance is also not free from difficulty in determining its meaning. The prohibition is against switching back and forth across the street, for the purpose of distributing cars, between

designated hours, comprising practically all the hours of the day, except that the tracks may be used for placing cars on bulk tracks in the yard. We understand a switch, in railroad parlance, to mean the appliance used to connect two tracks of railway, or by which one track is made to join another, so as that cars may be transferred from one track to the other; and it would seem that switching, literally interpreted, means the act of transferring engines and cars over the switches from one track to the other. We know, however, that switches or switch stands are not usually located in the streets of cities, and cannot suppose that the ordinance in question means other than that it shall be unlawful for an engine or cars to be run or moved back and forth across the street for the purpose of distributing cars. In other words, the effect of the provision is, as we read it, that cars shall not be moved from one side of the street to the other, across the street, for the purpose of being distributed in the yards; and this without regard to whether they are stopped upon the street or not in the operation. Thus construed, our opinion is that it absolutely prohibits crossing the street for the purpose specified, and does not merely regulate it. Incident to its ownership and the legitimate use and enjoyment of its property, complainant has the right, whenever reasonably demanded by the needs and exigencies of its business, to distribute its cars throughout its yards; and, whenever necessary for that purpose, it has the right to cross Twentieth street, subject to reasonable municipal regulation and control as to the manner of crossing. To prohibit entirely is not regulation. Such is the effect of the second clause of the ordinance, as it is presented to us, without any averment of facts showing that a different meaning attaches to the expression "switch back and forth" across the street. When the cause is tried upon issues formed upon the bill and answer, the question may be differently presented.

It is not insisted that the third clause of the ordinance is not within the power of the city to ordain and enforce. A provision that no obstruction shall remain on or across the street for a longer time than three minutes is a valid regulation. *Horr & B. Mun. Ord. § 239; Railroad Co. v. Jersey City*, 47 N. J. Law, 286.

The facts averred in the bill showing the necessity for injunctive relief against the enforcement of the ordinance bring the case within the influence of *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 South. Rep. 106.

As we have seen, the ordinance is divided into several distinct provisions. These provisions are not made to depend on each other, but are as severable and capable of distinct enforcement as if they had been ordained by several ordinances. In such case, that which is valid may be enforced, while

the rest may be rejected as unauthorized and invalid. We have seen the ordinance in question is valid, except as to its second provision, which is void. The special prayer of the bill is that the entire ordinance be held invalid, and its enforcement enjoined; but to this is added the prayer for general relief, under which relief may be obtained against so much of the ordinance as is invalid. The demurrers were therefore properly overruled. The final decree, on the merits, can be so molded as to preserve the integrity of the ordinance in so far as it is a lawful and valid exercise of municipal regulation and control. An order will be here entered modifying the injunction so as that the enforcement of only so much of the ordinance as we have declared void may be restrained. With this modification, the decree of the city court is affirmed.

#### BAYZER et al. v. McMILLAN MILL CO.

(Supreme Court of Alabama. May 17, 1893.)

DISMISSING APPEAL—TIME OF FILING TRANSCRIPT.

Sup. Ct. Rule June 28, 1890, (8 South. Rep. v.) provides that in all appeals during the term, unless the transcript is filed with the clerk by 12 o'clock of the first day of the first week during which such case is subject to call, the appeal may be dismissed on motion of the appellee. *Held* that, where an appeal was taken on March 26th, and the first call of the court thereafter was May 16th, but the transcript was not filed until December following, the appeal will be dismissed.

Appeal from circuit court, Conecuh county; John P. Hubbard, Judge.

Action by Bayzer & Shepherd against the McMillan Mill Company. Defendant had judgment, and plaintiffs appealed. Defendant now moves to dismiss the appeal. Motion granted.

Gamble & Powell and Farnham & Crum, for appellants. Stallworth & Burnett and James M. Davison, for appellee.

HEAD, J. This cause was tried, and verdict and judgment rendered, at the October term, 1891, of the court below. On the 26th day of March, 1892, the plaintiffs sued out an appeal from the judgment to this court by the filing and approval of security for costs. The transcript was filed in this court, and the cause docketed for the first time, on the 13th day of December, 1892, and on the same day the defendant moved to dismiss the appeal by reason of the facts above stated. The appeal was taken during the session of this court beginning the first Tuesday in November, 1891, and ending the last day of June, 1892. Acts Ala. 1890-91, p. 871. Section 3620 of the Code provides that, if the appeal is taken during the term, it must be made returnable to the first Monday of the term next after the expiration of 20 days from the date of the appeal. Rule of practice adopted June 28, 1890,<sup>1</sup> (see 89 Ala. xl.)

<sup>1</sup> 8 South. Rep. v.

requires the transcript to be filed in this court by 12 o'clock noon of the first day of the first week during which such case is subject to call in this court; and, if not so filed, the appellant may be taxed with the costs, and such appeal may, in the discretion of the court, be dismissed, on motion of appellee, if made not later than the next Thursday. The court may, however, consider any affidavit or affidavits offered in excuse of noncompliance with this rule, and may, in its discretion, decline to impose all or any part of the foregoing penalties. The first call of the third division after the appeal in this case was on Monday, May 16, 1892. So, under the above rule, the transcript should have been filed not later than that day; but it was not filed until that entire term had elapsed and the next succeeding term begun. The case, therefore, is identical in principle with *Sears v. Kirksey*, 81 Ala. 98, 2 South. Rep. 90, and *Winthrow v. Iron Co.*, 81 Ala. 100, 2 South. Rep. 92. It is impossible to distinguish them. On the authority of those cases, we are compelled to sustain the motion to dismiss the appeal.

(101 Ala. 261)

**RUSSELL v. JONES.**

(Supreme Court of Alabama. May 2, 1893.)

**ACTION ON NOTES—DEFENSES.**

Where defendant gave his notes to the agent of a foreign insurance company, individually, for the renewal of premium notes previously given, and the agent advanced his own money to the company for defendant, it is no defense, in an action on the notes, that the company had not complied with the provisions of law, so as to entitle it to do business in the state.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action on two promissory notes by T. R. Jones against James M. Russell. Plaintiff had judgment, and defendant appeals. Affirmed.

McGuire & Collier, for appellant. Dickin-son & Kerr, for appellee.

**HARALSON, J.** Errors are assigned for the alleged reason that the court sustained demurrers to special pleas 7-10; but the tenth is the only one appearing to have been demurred to, and the court seems to have made no ruling on that one. Errors are also assigned for the sustaining of demurrers to other pleas, but we decline to pass on these rulings for the reason that there is uncertainty in the record as to what was done; and, besides, it can be of no injury to the defendant, since the case was tried on the general issue, and on the issue intended to be presented by his special pleas. It would seem that issue was taken on pleas from 7 to 10, inclusive, which presented the same defense more fully than the other special pleas did, and, whatever may have been the rulings of the court on

these others, the defendant has no ground of complaint. *Insurance Co. v. Smith*, 92 Ala. 428, 9 South. Rep. 327.

The notes sued on were given by the defendant below, Russell, to the plaintiff, Jones, and grew out of a transaction from the insurance of the life of defendant by the Mutual Life Insurance Company of Kentucky, a foreign corporation, of which the plaintiff was at the time an agent. The defense relied on was that said insurance company, before beginning business in this state, and previous to the execution of the notes sued on, had failed to comply with the requirements of section 1209 of the Code, prescribing conditions on which foreign corporations may transact business in this state. The proof shows that the company was a Kentucky corporation; that defendant took out a policy of insurance on his life in the company, paid part of the premium in cash, and gave his notes for the balance. If this were all, and the contract were executory, and if it were shown the company had failed to comply with the requirements of the section of the Code above referred to, there could be no question but that, under our adjudications, there could be no recovery on the notes. The plaintiff, however, testified to a state of facts which, if true, takes these notes out from the influence of those decisions, and places them under the influence of others, which hold that, where the contract has been executed, there can be no relief granted because the transaction originated with a foreign company, which had not complied with our laws. *Long v. Railway Co.*, 91 Ala. 519, 8 South. Rep. 706; *Craddock v. Mortgage Co.*, 88 Ala. 282, 7 South. Rep. 196. The defendant testified that these notes were given in extension of his notes previously given for premiums due by him to said company, and that he did not know he was dealing with the plaintiff, except as agent of the company. The plaintiff testified, in substance, that he had no interest whatever in the life insurance policy referred to, or in any premiums thereon; that the company had sent out the renewal receipts to be delivered to the defendant on payment by him of his premium notes; that defendant stated he was pressed for money, and could not pay the amount due on his insurance policy; that plaintiff proffered to advance the money for defendant to enable him to pay his premiums and take his notes, if he was sure he could pay when the notes fell due, which defendant said he could do; that plaintiff made inquiry, and was satisfied with defendant's financial standing, and accordingly he advanced the money to the company for defendant, and took his notes, surrendered to him his renewal receipts, and forwarded to the company the amount due from defendant; that the notes taken were not for the benefit of the company, and it had no knowledge of or interest in them,

but that the transaction was entirely and exclusively a personal one between the plaintiff and the defendant; that plaintiff discounted said notes at bank, and, when they matured, defendant claimed to be unable to pay them, and asked an extension of time, whereupon plaintiff, as indorser, paid the bank, the notes were retransferred to him, and further indulgence was allowed to defendant; that the sole consideration of the notes was the money so advanced by plaintiff, individually, to defendant, and he had no control over, or interest in, defendant's policy of insurance. The defendant denied that this conversation occurred, as to plaintiff's advancing the money for him, but he admitted that, in the conversation about which plaintiff had testified, he agreed to extend the time on the premium, and the notes were accordingly extended. The notes show on their face that they were payable to the plaintiff, individually, and not to the insurance company. The defendant introduced evidence tending to show that the insurance company had not complied with the requirements of the statute. The trial was had by and before the presiding judge, —a jury having been waived, as provided by statute in such cases,—and a judgment rendered in favor of the plaintiff against the defendant. We fail to see that the trial court committed any error in the judgment it rendered, and it is accordingly affirmed.

(96 Ala. 35)

#### HENDERSON v. STATE.

(Supreme Court of Alabama. May 2, 1893.)

CRIMINAL LAW — SERVICE OF INDICTMENT AND JURY LIST—HOMICIDE—ACCIDENTAL SHOOTING—PUNISHMENT FOR MANSLAUGHTER.

1. Though an order of court requires a copy of the indictment and a list of jurors to be served on defendant, service on his counsel is sufficient, since Code, § 4449, expressly permits service on defendant, "or on his counsel appearing for him."

2. A mistake as to defendant's Christian name in the caption of the jury list served on his counsel is immaterial, where such counsel was informed by the sheriff, at the time of service, that the list composed the special venire drawn and summoned to try defendant's case; and it is entirely competent to strike out the caption or amend it at any time.

3. The fact that one of the jurors on the jury list served on defendant's counsel was excused for over age at the trial, and that the list was exhausted before a jury was obtained, cannot serve as the basis of an objection that defendant was not served with competent jurors, since the statute requires the sheriff to serve a list of the jurors actually drawn.

4. On a trial for murder, where defendant himself testifies that he and deceased were "skylarking" in front of a barber shop; that deceased went in to get a pistol, and defendant got a gun, "and held it pointed towards" deceased as he went in to get the pistol,—a charge to acquit if the shooting was accidental is properly refused, since the statute makes it a misdemeanor to point a gun at another, and one who causes the death of another under such circumstances is not wholly free from guilt.

5. Code, § 3733, which authorizes the jury

to fix the punishment for manslaughter in the first degree by imprisonment in the penitentiary, is inconsistent with and controlled by section 4492, of a later date, which permits the judge to sentence an offender on conviction of felony; and a sentence of one convicted of manslaughter in the first degree to hard labor for the county for two years, as authorized by said section 4492, is valid. *Zaner v. State*, 8 South. Rep. 698, 90 Ala. 651, followed.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Wilson Henderson was indicted and tried for murder, and convicted of manslaughter in the first degree, and sentenced to hard labor for the county for two years. He appeals. Affirmed.

The evidence tended to show that the accused and the deceased were two colored boys, between whom no hostility existed; that the shooting was in a barber shop, in which the deceased was employed, and where the prisoner was in the habit of going; that no one else was in the shop at the time of the shooting but the deceased and the accused; that the shooting was done with an old double-barreled gun, which was not the property of the accused, but was kept in the barber shop in which the deceased was employed. One Lewis Avendorf, a witness for the state, and who was the first person accused was shown to have spoken to after the shooting, testified that when he (Avendorf) came to where the defendant was, immediately after the shooting, he asked him about the shooting, and defendant answered: "I took up the gun, and it went off. My God, I would not have done it for anything on earth." The defendant testified in his own behalf that "he and deceased were 'skylarking' in front of the barber shop, and deceased went in to get a pistol, and he went in and got the gun; that he held it pointed towards deceased as he went to get the pistol." The evidence further tended to show that the deceased went to the washstand to get a pistol, and that as he turned around the gun accidentally went off and killed the deceased. The charge asked by the defendant, to the refusal to give which he duly excepted, is copied in the opinion.

John R. & Chas. W. Tompkins, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was indicted and tried for murder, and convicted of manslaughter in the first degree, and sentenced to hard labor for the county for a period of two years. The order of the court was that "a copy of the indictment and a list of the jurors be served upon the defendant one entire day before the trial." The bill of exceptions shows that defendant was on bail. It was entirely competent for the sheriff to serve a copy on the defendant's counsel, notwithstanding the order directed that it should be served on the defendant. Service on either was a sufficient compliance

with the statute. Code, § 4449.<sup>1</sup> When the case was called for trial the defendant moved to quash the venire upon the grounds that the caption to the list of jurors was, "Special Jury in Case of Milton Henderson," when in fact the defendant was named Wilson Henderson. On this motion it was shown that the list of jurors served on the counsel for defendant contained the names of the persons drawn and summoned under the order of the court to try the case against the defendant. It was not necessary that the list should have any caption. It was sufficient if the list was correct, and the defendant or his counsel were served with a copy, and informed by the sheriff that the list composed the special venire drawn and summoned in his case. It was entirely competent to strike out the caption, or to amend it at any time. *Kenan v. State*, 73 Ala. 15. It was further shown that neither the defendant nor his counsel made any objection at the time of the service, or at any time demanded a copy of the venire. We cannot see how the defendant was misled or injured or deprived of any legal right. We hold there was no error in overruling the motion to quash the venire.

When the name of the juror Roddy was drawn, the sheriff announced "over age," and proceeded to draw another name, etc. The venire was exhausted before a jury was obtained. Defendant's counsel then objected to the action of the sheriff in regard to the juror Roddy. The court proposed to have the juror called again, but defendant's counsel stated that the ground of his objection was "that he was entitled to be served with competent jurors." The sheriff has no discretion in the matter. The statute provides how the names of the jurors are to be drawn, and it is the duty of the sheriff to serve a list of those only who are drawn as prescribed by the statute. A juror over age may be challenged for cause. Code, § 4331. If the fact of his being over age is contested, the statute provides that the court shall direct how his age may be proven. Code, § 4332. There is no merit in this objection.

The defendant asked the court to charge the jury as follows: "If the jury entertain a reasonable doubt, growing out of the evidence, whether or not the shooting was accidental, they must acquit." This charge was refused. The charge was misleading, and, under the evidence in the case, ought not to have been given. Leaving out of view other evidence in the case, the testimony of the defendant himself is that "he held it [the gun] pointed at the deceased as he went

to get the pistol." Now, if the defendant pointed the gun at the deceased, and it was accidentally discharged, or if defendant believed it was not loaded, it was an unlawful act,—a misdemeanor,—made so by statute. A person who causes the death of another under such circumstances is not wholly free from guilt, and a charge which instructs a jury to acquit under such circumstances is erroneous. *Johnson v. State*, 94 Ala. 35, 10 South. Rep. 667.

It is next contended that there was no authority for sentencing the defendant to hard labor for the county; that under section 3733 of the Code the defendant could be sentenced to the penitentiary only. Section 3733 of the Code, and section 4492,<sup>2</sup> have been judicially construed by this court. The two sections are not consistent, and it was held, for reasons stated which need not be repeated, that the latter section controls. The very question has been adjudicated more than once, and is finally settled. *Zaner v. State*, 90 Ala. 651, 8 South. Rep. 698; *Gunter v. State*, 83 Ala. 96, 3 South. Rep. 600. There is no error in the record. Affirmed.

(101 Ala. 183)

## MITCHELL v. MITCHELL.

(Supreme Court of Alabama. May 16, 1893.)  
HUSBAND AND WIFE — PARTITION OF HOMESTEAD OWNED JOINTLY.

The husband cannot compel the sale, for partition and distribution, of the homestead owned jointly by himself and wife, though under the laws of the state, in relation to her rights of property, the wife is emancipated from the disabilities of coverture.

Appeal from probate court, Conecuh county; P. C. Walker, Judge.

Petition by Charles J. Mitchell against C.

<sup>1</sup>These sections are as follows: "Sec. 3733. Any person who is convicted of manslaughter in the first degree must, at the discretion of the jury, be imprisoned in the penitentiary for not less than one nor more than ten years; and any person who is convicted of manslaughter in the second degree must, at the discretion of the jury, be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may also be fined not more than five hundred dollars." "Sec. 4492. The only legal punishments besides removal from office and disqualification to hold office are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death by hanging; and in all cases in which the period of imprisonment in the penitentiary or hard labor for the county is more than two years, the judge must sentence the party to imprisonment in the penitentiary; and in all cases of conviction for felonies, in which such imprisonment or hard labor is for more than twelve months, and not more than two years, the judge may sentence the party to imprisonment in the penitentiary or confinement in the county jail, or to hard labor for the county, at his discretion, any other section of this Code to the contrary notwithstanding; and in all cases in which the imprisonment or sentence to hard labor is twelve months or less, the party must be sentenced to imprisonment in the county jail, or to hard labor for the county."

<sup>2</sup>This section reads as follows: "If the defendant is indicted for a capital offense, a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury summoned for the week in which his case is set for trial, must be served on him, or on counsel appearing for him, at least one entire day before the day set for his trial."

H. Mitchell, his wife, for the sale of land in partition. Plaintiff had decree, and defendant appeals. Reversed.

Stallworth & Burnett, for appellant. Farnham & Crum, for appellee.

COLEMAN, J. Charles J. Mitchell instituted this proceeding in the probate court to obtain a decree for the sale of lands for partition. The petition and proof show the lot of land which is sought to be sold for distribution is the property of himself and wife, C. H. Mitchell, conveyed to them jointly, by deed, during the year 1890, and constitutes their homestead. The sale is resisted by the wife. At common law, lands thus held were not the subject of partition. *Walthall v. Goree*, 36 Ala. 736. By statutes of this state, in so far as to vest the wife with the right to acquire and hold property in her own right and name, the husband and wife are two distinct persons. By the act of February 23, 1887, carried into the Code of 1886-87, pt. 2, tit. 5, c. 1, art. 3, with but few limitations, the wife is emancipated from the disabilities of coverture. She can now hold the legal, as well as equitable, title to her property, and can sue alone upon all contracts made by or with her, or for the recovery of her separate property, or for injuries to her property or person or reputation. She can maintain an action against her husband. To contract, she must have the assent or concurrence of the husband expressed in writing. This is about the only limitation upon her power to act as a feme sole. By section 787 of the Code, subd. 10, jurisdiction is conferred upon the probate court to "partition lands within their counties." Section 3237 provides: "Any property, real, personal, or mixed, held by joint owners or tenants in common, may be divided among them on the written application of one or more of the owners to the probate court of the county in which the property is situated," etc.; and by section 3253 of the Code such property may be sold for distribution when the same can not be equitably and fairly partitioned. We have no doubt that, under our statute, property held jointly, or as tenants in common, by the husband and wife, ordinarily is governed by the same rules and principles of law, in the matter of partition, or sale for distribution, as apply to property held and owned by persons occupying a different relation to each other than that of husband and wife. *Freem. Coten*. § 458. But do these rules and principles apply to a sale for distribution of the homestead, owned jointly or as tenants in common, by the husband and wife, the wife objecting to the sale? The constitution of the state expressly prohibits the "alienation of the homestead by the owner thereof, if a married man, without the voluntary signature and assent of the wife to the same," and the only manner in which her voluntary

signature and assent may be effectuated to such alienation is regulated by statute. It is true that a sale of the homestead for distribution under the decree of the court would not be, strictly speaking, an alienation by the husband; but a decree to that effect, upon his application, enables him to defeat the constitutional provision made for the protection of the wife, and indirectly accomplish an unlawful end. If there were other joint owners or tenants in common with the husband, or with the husband and wife, the same legal objection would not lie to the right of such person to sever and separate his interest from the other tenants in common. The spirit of our constitution, and the statute in regard to the homestead, enacted for the benefit of the wife, positively prohibits its alienation by the husband, except in the manner prescribed, and he can no more do this by resorting to the courts than by direct deed. There is evidence tending to show that, although living in the same town, they are living separate and apart. This can make no difference, so long as the relation of husband and wife exists. So long as the relation exists, the home of the husband, in law, is deemed the home of the wife. The plea of the defendant, setting up the fact that the parties were husband and wife, and the parcel of land sought to be sold for distribution constituted the homestead, presented a complete defense, and the demurrer to the plea was improperly sustained. Independent of the plea, we think the court erred in its conclusion from the evidence. The burden rested upon the petitioner to show that the lot or parcel of land could not be fairly and equitably divided without a sale. Looking at all the evidence in the case, the burden resting upon the petitioner—to prove that the lot could not be fairly partitioned—was not satisfactorily met. The law will not permit the sale of one person's property, even for distribution, merely to gratify the desire of another. It is allowed, when resisted, only upon satisfactory proof that it cannot be partitioned without a sale. The court erred, both in its ruling as to the law of the case, and in its conclusion from the evidence. The decree of the lower court is reversed, and the cause remanded, that judgment may be rendered in accordance with the principles of law herein declared.

(38 Ala. 50)

#### MOSBY v. STATE.

(Supreme Court of Alabama. May 2, 1893.)

##### LICENSE—PUBLIC EXHIBITION—INDICTMENT.

1. An indictment charging that defendant "engaged in the business of a flying jennie without license" is insufficient without alleging that charges are made for admission, or for the use of any instrument or device, as provided by Code 1886, § 629, subd. 17, making it a misdemeanor to give public exhibitions without a license, since the court cannot judicially know that such charges are made.



2. An indictment under this section should allege that the entertainment was not given for charitable purposes, or in a theater whose owner or manager had taken out a license, since these are excepted from the license by such section.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Cash Mosby was tried and convicted under the following indictment: "The grand jury of said county charge that before the finding of this indictment Cash Mosby engaged in or carried on the business of a flying jennie without a license, and contrary to law," etc. The defendant demurred to the indictment on the grounds that it did not charge any offense known to the laws of Alabama, and that the indictment does not allege that the charge therein was committed after the 15th of January of any year. This demurrer was overruled, and upon the hearing of all the evidence the defendant was found guilty. Reversed.

D. D. Shelby and S. S. Pleasants, for appellant. Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. The indictment charges that defendant "engaged in or carried on the business of a flying jennie without a license, and contrary to law, against the peace and dignity of the state of Alabama." We have now copied the entire charge, as shown in the indictment. There was a demurrer to the indictment, assigning its insufficiency, which the circuit court overruled. We have no statute which expressly mentions a flying jennie, or expressly requires a license for the exhibition or entertainment it is supposed to make or furnish. Nor can we, as matter of law, know or affirm that it is an instrument or device, the public exhibition of which or participation therein presupposes or requires the payment of a charge or admission fee. Code 1886, § 629, subd. 17. An indictment under this subdivision, to be sufficient, must charge that it is an instrument or device for public exhibition or entertainment, where charges are made for admission, or, as the case may be, for the use of the instrument or device, or for participation in the exercise or entertainment; and it must negative the exceptional provisions found in that subdivision.

"This section reads as follows: 'Licenses are required of all persons engaging in or carrying on any business, or doing any act in this section specified, for which shall be paid, for the use of the state, the following taxes, to wit: \* \* \* Subd. 17. For each concert, musical entertainment, public lecture, or other public exhibition or entertainment, where charges are made for admission, or for the use of any instrument or device, or the participation in any exercise or entertainment not given for charitable, school, or religious purposes, and not otherwise provided for, five dollars; but the provisions of this subdivision shall not apply to exhibitions or entertainments given in theaters, where the owner or manager thereof has taken out license as owner or manager.'"

Mays v. State, 89 Ala. 37, 8 South. Rep. 28; Carson v. State, 69 Ala. 235; Clark v. State, 19 Ala. 552; 3 Brick. Dig. p. 279, § 443. The demurrer to the indictment should have been sustained. Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

(99 Ala. 506)

# TERRY v. BIRMINGHAM NAT. BANK.

(Supreme Court of Alabama. May 2, 1893.)  
Set-Off — CONSTRUCTION OF PLEA — AGENT FOR BUYER AND SELLER.

1. In an action on a note defendant pleaded as a set-off that plaintiff had sold corporate stock belonging to defendant "for the use of defendant, and converted to its own use." Held, that by this plea defendant ratified the sale, and claimed as a set-off the purchase price of the stock, and that he was not entitled to recover its actual value.

2. A pledgee of stock, empowered to sell it on the stock exchange, employed a member of the exchange to effect the sale. Held, that the fact that the purchaser of the stock had employed the same member to purchase on the exchange, at a limited price, stock of the character offered by the pledgee, would not invalidate the sale, where such member, according to the rules of the exchange, procured a fellow member to make the bid, and where neither the pledgee nor the purchaser had any knowledge of each other's intentions, or of their instructions to such member.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Assumpsit by the Birmingham National Bank against R. J. Terry to recover the amount of a promissory note. There was judgment for the plaintiff, and defendant appeals. Affirmed.

For prior report, see 9 South. Rep. 299.

Lane & White, for appellant. Cabaniss & Weakley and Mountjoy & Tomlinson, for appellee.

COLEMAN, J. The Birmingham National Bank sued appellant, Terry, upon his promissory note. The record shows that "the defendant withdraws all pleas except the plea of set-off, and the case is tried on issue joined on the plea of set-off." It would require a palpable disregard of this plain record entry were we to consider questions which might have legally arisen under other pleas, and which were not before the court. There was only one plea, and that was the plea of set-off, upon which issue was joined. Plea No. 2 reads as follows: "The defendant, as a defense to the action of the plaintiff, saith that at the time said action was commenced the plaintiff was indebted to him in the sum of five thousand dollars, for the value of fifty shares of the capital stock of the Edison Electric Illuminating Company, the property of the defendant, which was sold by the plaintiff for the use of the defendant on or about the 8th day of December, 1888, and converted to its use, which he hereby offers to set off against the demand of the plaintiff, and he claims judgment for

the excess." This plea distinctly states the shares were "sold by the plaintiff for the use of the defendant," and, although these words in the latter part of the plea are followed by the averment, "and converted to its use," the latter phrase, in the connection used, must be held to mean a conversion of the proceeds of the sale, rather than such wrongful conversion of the stock itself as to authorize proof of damages resulting to the defendant by the sale. As framed, the defendant, by his plea, ratified the sale, and claimed as a set-off the purchase price of the stock. The evidence is uncontradicted that the plaintiff credited the note with the purchase money received for the stock, and in his suit on defendant's note only claimed the balance unpaid.

Were we to consider the case as tried on plea No. 4, and regard that plea in the nature of a claim for damages under the facts, the measure of recovery would be the difference between the price for which the stock sold and its actual value when sold; and we have been unable to find any evidence which would authorize a conclusion that the stock did not bring its fair value on the day of sale. There is no evidence to show that there was any collusion or fraud or agreement between R. D. Johnston, representing the bank, and the purchaser of the stock, in regard to its sale or purchase. In fact, the contrary is abundantly proven. Terry, who was a member of the stock exchange, by his power of attorney, directed that this stock be sold upon the exchange. He was notified that it was going to be sold, was present when it was offered for sale, and knocked down to the purchaser. He knew the rules of the stock exchange, knew that the seller would be required to conform to its rules, and that a sale made in accordance with them would be a valid sale. There was no objection by him at the time that he had not had sufficient notice, nor did he object on account of the price bid. The subsequent advance in the market value of stock sold on exchange doubtless is a fruitful source of regret to sellers who deal in stocks on exchange, but, in the absence of fraud, the advance in price can give no cause of action to the loser. The principle of law that the same person cannot be both buyer and seller has no application to the facts of the case. R. D. Johnston employed Lightfoot, a member of the stock exchange, to sell this stock. One E. W. Rucker, the purchaser, employed Lightfoot to purchase on the exchange, at a limited price, stock of the character offered by Johnston. Johnston knew nothing of Rucker's engagement or intentions. In accordance with the rules of the exchange, Lightfoot secured the services of Bradfield, another member of the exchange, to bid the price fixed by Rucker. Lightfoot knew the instructions of both Johnston and Rucker, but neither Johnston nor Rucker had any knowledge of each other's intentions, or their

instructions to Lightfoot. And, as we have stated, there is no evidence to show that the rules of the stock exchange, which were known to Terry, were not observed, or that the stock did not bring its fair market value, which was credited upon the note of the defendant. Under any view we take of the case, the plaintiff was entitled to the general charge, upon all the evidence, and it is unnecessary to consider special exceptions to the rulings of the court. Affirmed.

(45 La. Ann. 353)

FLOWER et al. v. PEARCE et al., (CANNON, Intervener. No. 11,235.)<sup>1</sup>  
(Supreme Court of Louisiana. May 15, 1893.)

UNRECORDED LEASE—CREDITORS.

The possessor of real estate under an unrecorded lease is thereunder invested with no right whatsoever as against a seizing attachment creditor.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; Adolph V. Coco, Judge.

Action by Flower & King against S. S. Pearce & Son, Clifton Cannon, Intervener. Judgment for intervener. Plaintiffs appeal. Reversed.

T. H. Thorpe and Wm. H. Peterman, for appellants. Joffrion & Joffrion, J. C. Cappel, and John C. & Charles A. Wickliffe, for intervener and appellees.

WATKINS, J. Originally plaintiffs instituted an ordinary action against the defendants upon an ordinary commercial account, but subsequently supplemented it with an attachment, under which two plantations, properties of one of the defendants, situated in the parish of Rapides, with the growing crops of sugar cane, were seized, and also some other effects thereon, such as mules, etc. There were three interventions filed by persons claiming the ownership of portions of the properties seized, but the only one with which we are at present concerned is that of Clifton Cannon, who claims to be the owner of the crops as lessee of the plantations at date of seizure. The claim of Cannon was sustained in the lower court, and the plaintiffs have appealed. Their defense to the intervention of Cannon is that he has no valid lease, and, if valid, it was not, at date of seizure under their writ of attachment, effective as to them, because of the lease contract not having been recorded, as the law requires, so as to give notice to third persons. We take it to be a well-settled principle of our jurisprudence that an unrecorded lease of real estate has no effect as to third persons and seizing creditors. This question was examined and decided by our immediate predecessors in *Summers v. Clark*, 30 La. Ann. 436, the court employing this language, viz.: "As the lease was not

<sup>1</sup>Rehearing refused May 29, 1893.

recorded in the conveyance office, the question is not affected by the registry laws; \* \* \* but, as we have stated, the tenant, Boyd, holds under an unrecorded lease, and any payments of rent which he may have made by anticipation to Clark are without effect as against creditors or subsequent purchasers of Clark. Nor are these principles more inequitable when applied to a lessee than when applied to a purchaser of immovables without registry, or movables without delivery. If a vendee in such a case can, by seizure, be deprived of possession and enjoyment under his purchase, why not a lessee? If, in such case, it is no defense that the vendee has paid the price, why is it that the lessee has paid the rent?" In *Anderson v. Comeau*, 33 La. Ann. 1119, this court reannounced that doctrine in even more emphatic language, thus: "Articles 2264 and 2266 of the Revised Civil Code, providing substantially that all sales, contracts, judgments, and acts affecting or concerning immovable property, not recorded according to law, shall be utterly null and void, except between the parties, and without any effect as to third persons, apply to leases of real estate as well as to other contracts. \* \* \* The possession of immovables under such an unrecorded lease \* \* \* is vested thereunder with no rights whatever as against a seizing creditor." In applying these principles to the facts of that case the court said: "It is sufficient to say that at the time of seizure, the property was unaffected by any recorded lease, and quoad the seizing creditors stood, therefore, precisely as if it had not been leased at all." (Our italics.) These principles were again announced and affirmed in *Cochrane v. Gilbert*, 41 La. Ann. 735, 6 South. Rep. 731, the court again employing similar language, to wit: "While it is true that the plaintiff did not hold possession \* \* \* under a lease from her husband, the judgment debtor of Gilbert, but from Boyer, as his vendee, yet the effect of the nonregistry of her lease from Boyer is of like character. We hold that such a contract, unrecorded, did not serve to put the creditors of Seles upon notice of Boyer's possession and control of the property to which he had a conveyance. Such a contract could not have the effect of forcing defendant to a direct action of nullity." On the faith of those three deliberate opinions, we can with confidence declare that an unrecorded lease of real estate cannot defeat the right of an attaching creditor, though his claim is unsecured by either privilege or mortgage; and, consequently, the intervening lessee of the attached debtor cannot successfully interpose his claims as against the seizure.

Intervener's counsel, with exceptional ingenuity and assiduity, have collated quite a number of cases, on the authority of which they insist that our decision ought to be in his favor. We have examined them all, and find the following to be a correct analysis of them: *Sandel v. Douglass*, 27 La. Ann.

628, involved the ownership of cotton that had been grown on the premises, and afterwards removed from the soil, and packed in bales. The facts of that case were that, after the seizure of the property under the mortgage, the sheriff did not divest or disturb the plaintiff's possession as lessee, and the creditor acquiesced in her rightful possession. A like state of facts is presented in *Richardson v. Dinkgrave*, 26 La. Ann. 632. In neither case was there any question of registry of a lease involved. *Penn v. Bank*, 32 La. Ann. 196, involved no question of lease, the plaintiff claiming damages of the bank in reimbursement of loss sustained in a copartnership adventure with the mortgagee, which had been occasioned by a premature seizure. *Lewis v. Klotz*, 39 La. Ann. 259, 1 South. Rep. 539, is a case of injunction to prevent a purchaser of an interest at sheriff's sale under a mortgage from taking possession of an entire plantation, the plaintiff's claim being that he was lessee, and entitled to possession of two-thirds interest. Of this contention the court said: "He had no more right to enter on the portion or two-thirds interest of the plantation under his purchase of the one-third than a stranger would have had; and to this extent, and as relates to such portion,—unaffected by his seizure and judicial sale, as stated,—his attitude and conduct cannot be viewed otherwise than that of a trespasser." There was no question of the registry of a lease in that case. In the case of *Porche v. Bodin*, 28 La. Ann. 761, the lease was one under private signature, and duly recorded. The case of *Bank v. Ober*, 44 La. Ann. —, 10 South. Rep. 779, the facts were that the plaintiff claimed a proportionate share of rents in money that had been collected of tenants after date of seizure under a mortgage; the property having been cultivated by the sheriff subsequent to the seizure, who had leased the plantation to laborers, and collected rents as the crops were harvested. It was with reference to this state of facts that the court employed this language, viz.: "When a seizure takes place during the pendency of a plantation lease for the entire year, payable in kind out of the crops when gathered, the seizure only covers the proportion of rents due for the unexpired term after its date." In that case it seems to be conceded that the lessee's right was destroyed by the seizure, inasmuch as the sheriff was permitted to enter into peaceable and undisturbed possession after making seizure, and lease the plantation to the laborers, and to collect the rent; and it also appears that there was no contest as to the lease antecedent to the seizure, there being no question about the registry of a lease. The case of *Thompson v. Ratcliff*, 45 La. Ann. —, 12 South. Rep. 524, involved quite a similar state of facts. All of these cases essentially differ from the instant case and those quoted in its support. In this case there was taken, in the month of July, a

plantation, with the growing crops thereon immature, and attached to and forming part of it, the crops being immovable by destination of law; and the lessee, holding under an unrecorded lease, resists the seizure on the ground that he is owner. In such case his right as owner, while perfectly good and valid as to the attached debtor, is unavailing as to third persons and seizing creditors, without registry in the manner required by law for conveyances of real estate. Entertaining this view of the case, the judgment appealed from must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; it is further ordered and decreed that the demands of Cannon, intervener, be rejected at his cost in both courts; and it is further ordered and decreed that the plaintiffs' and appellants' attachment of the property claimed by the intervener be, and the same is hereby, sustained, and their privilege as attaching creditors thereon recognized and enforced.

(45 La. Ann. 836)

**FLOWER et al. v. SKIPWITH, (LEARNED, Intervener. No. 11,229.)**

(Supreme Court of Louisiana. April 24, 1893.)  
SEQUESTRATION—CROP PRIVILEGES—REGISTRY—  
SUBSEQUENT LEASE.

1. The facts shown in this case justify and sustain the writs of sequestration and attachment as against the defendant.

2. Under the present constitution, privileges on movables do not require to be recorded, but have the same validity and effect with or without registry.

3. Act 89 of 1886, establishing the rank and order of privileges on crops, cannot be given a retrospective operation so as to give a pledge of the crop under Act 66 of 1874 preference over an antecedent privilege, valid and subsisting at the date of the pledge. The latter takes effect on the property at its date, and subject to valid antecedent privileges, and the law only refers to privileges arising subsequent to the pledge.

4. When a plantation is held by a party under a conditional agreement of sale with authority from the owner to possess, use, and cultivate the same, and under no contract of lease or rent, a merchant who advances and acquires a privilege on the crop under such conditions cannot be affected by a subsequent change of arrangements, and the execution of a lease creating a lessor's privilege. The lessor's privilege only arose after date of lease, and took effect on the crop only as it then stood, subject to the antecedent privilege.

5. Plaintiffs' right to arraign the transactions between defendant and intervener is under the facts of this case, limited to the extent necessary to protect his privilege. They are valid against ordinary creditors.

(Syllabus by the Court.)

Appeal from district court, parish of Concordia; D. N. Thompson, Judge ad hoc.

Suit by Flower & King against J. R. Skipwith on an indebtedness for supplies and advances for cultivation accompanied by writs of sequestration and attachment. R. F. Learned, intervenes. Judgment, from which plaintiffs appeal. Affirmed.

J. N. Luce and Harry H. Hall, for appellants. S. L. Elam, for appellee.

FENNER, J. J. K. Skipwith had been the lessee of Ashland plantation, belonging to R. F. Learned, during the year 1890, and Flower & King had furnished him supplies and advances for the cultivation of same during that year. In September, 1890, an agreement was entered into between Learned and Skipwith, by which the former agreed to sell to the latter the plantation, with all buildings, improvements, mules, implements, crops, and movables, and all claims against hands or tenants, for the price of \$20,000, of which \$2,500 was to be paid in cash on December 1, 1890, \$2,500 in cash on January 1, 1891, and the balance in eight promissory notes, maturing annually. It was agreed that Skipwith was to go into immediate possession, but that title was not to pass until payment of the \$5,000 cash as stipulated. Skipwith paid \$2,000 on account of said cash payments, and it was agreed between them that the balance should be deferred until the fall of 1891. Under this agreement and extension Skipwith was in possession and control of the property, when in January, 1891, he applied to Flower & King for advances for its cultivation during 1891. He represented to them his purchase on long time, and his partial payment of the price, and obtained their consent to advance him \$3,000, to make his crop, obligating himself to ship them all cotton raised or controlled by him, guaranteed at 300 bales, and subjecting the crop to their privilege as furnishers of advances and supplies. Plaintiffs advanced the \$3,000 as agreed, and on May 19th they wrote to him the following letter: "J. K. Skipwith, Esq.—Dear Sir: Inclosed we hand you the itemized statement of account, showing a balance to your debit of \$3,356.00. Please examine and report upon at your leisure. You see the account is overdrawn three hundred and odd dollars. This year promises to be a very close one, and we must adhere closely to the contracts as made. We have taken every dollar's worth of business that our means will stand, and to extend contracts will take it beyond the limit of our ability, and we have already been compelled to decline a large amount of new business and applications to extend contracts as closed. Yours, truly, Flower & King." With the letter they inclosed an itemized statement of his account. They received no reply, but after the date to which the account was made up they received several drafts from defendant, which were duly paid. So matters stood until about the beginning of the shipping season, when Skipwith called on plaintiffs, and made some complaint of errors in the account, and then stated that he had a fine crop which would more than pay all his liabilities. The latter statement was repeated at another interview with the additional statement that cotton was low, and there

was no hurry about shipping. On November 3d, receiving no cotton, plaintiffs wrote him as follows: "We have not had a letter from you for some time, and no shipments. This is the season of the year when our load bears most heavily upon us, and we expect relief from those whom we have aided during the year." They still received no reply and no cotton, and subsequently, ascertaining that Skipwith was shipping the Ashland cotton to various other merchants in this city, they instituted this suit against him, accompanied by writs of sequestration and attachment, seizing under the sequestration cotton, cotton seed, corn, and other products, and under the attachment the same and other property. They thereafter learned, for the first time, that Skipwith and Learned had entered into the following transactions: On May 21, 1891, Skipwith sold to Learned all his mules on the Ashland plantation for the price of \$1,250, which was retained by Learned on account of cash payment on plantation. On the next day, May 22d, Learned leased to Skipwith the plantation, mules, etc., for \$3,000, payable on November 1st, with the following stipulation: "The said Skipwith being desirous of purchasing the Ashland plantation, and having entered into a written agreement with the said Learned, in which the latter has obligated himself to make title to said Skipwith on certain conditions, now, should the said Skipwith pay to the said Learned the amounts agreed to be paid in said contract, [to sell,] and comply fully and faithfully with the terms thereof, and with a certain supplemental contract relative to the extension of the terms of payment made in the original contract, etc., then this obligation is to be null and void; otherwise to remain in full force and effect." On the 1st of June, Learned entered into a contract by which he agreed to advance Skipwith \$2,000 for the cultivation of his crop, and took from him a formal pledge of said crop under Act 66 of 1874, which was duly recorded. On October 3, 1891, Learned took another similar pledge from Skipwith for a further sum of \$4,000, which was also recorded. On December 3, 1891, R. F. Learned, represented by same counsel who represented defendant, filed a petition of intervention, setting forth that he leased the Ashland plantation to defendant May 22, 1891, for \$3,000; that in June and October, 1891, defendant pledged to him his crop; that he advanced \$3,700 under said contracts of pledge, and he claimed a privilege as lessor and as pledgee and furnisher of supplies, superior to all persons. On December 9th the defendant, Skipwith, filed a motion to dissolve the attachment and sequestration on the ground that the affidavit on which they were issued was untrue. This motion was heard and overruled by the judge. On January 19, 1892, plaintiffs took out alias writs of attachment and sequestration, under which they seized the same property before seized, and also the

mules and other property. By an amended petition of intervention Learned avers the sequestration and attachments of mules, wagons, etc., and his ownership thereof, but says that, if not his property, he has a lessor's privilege thereon. The defendant moved to dissolve the alias writs of sequestration and attachment on the ground that the affidavit was untrue. Plaintiffs answered Learned's intervention, averring that the sale of stock and the lease were simulated and fraudulent, and that their privilege for advances primed and outranked the pledges of Learned on the crop. After hearing, the court rendered judgment maintaining the motion to dissolve the writs of attachment and sequestration, sustaining the intervention of Learned for lease and supplies, giving plaintiffs an ordinary judgment for the debt against defendant, and sustaining the demand of plaintiffs to have the expenses of gathering and shipping the crop seized as costs, from which judgment plaintiffs have appealed to this court.

We think the judgment was clearly erroneous in dissolving the writs of sequestration and attachment. The acts of defendant, as heretofore detailed, fully justified their issuance. Defendant had disposed and was disposing of his crop and property with the plain purpose of defeating plaintiffs' privilege and debt. As against him, the writs should have been sustained. We consider it equally clear that there was error in denying plaintiffs' privilege on the portion of the crop seized under their sequestration. Plaintiffs' privilege was antecedent both to the pledges of intervenor and to the lease, and was entitled to preference over both so far as the crop is concerned. Their privilege is granted by the express terms of article 3217 of the Civil Code. Article 177, Const. 1879, provides that "privileges on movable property shall exist without registration of the same, except in such cases as the general assembly may prescribe by law after the adoption of this constitution." No action on this subject has been taken by the legislature; therefore this privilege is perfect as to all the world without registry. Act 66 of 1874 authorizes the pledge of crops for advances and supplies, which take effect when recorded; but it does not repeal article 3217, Civil Code, nor does it require the record of such privilege as an essential to its validity. On the contrary, it expressly declares that the pledge is granted "in addition to the privilege now conferred by law." Great stress is laid on Act 89 of 1886, which provides that "privileges and pledges granted by existing laws of this state shall be ranked in the following order of preference: (1) Privilege of laborer; (2) privilege of lessor; (3) privilege of the overseer; (4) pledges, under section 1 of Act 66 of 1874, in order of recordation; (5) privileges of furnishers of supplies and of money and of the physician." It is claimed that under this statute a pledge of the crop, no matter when

made, divests the rank of all antecedent privileges. We cannot approve such a construction. Courts do not readily give retrospective operation to a statute. We think the act only refers to the future and gives a preference to the pledge over any privilege subsequently acquired. If Flower & King had continued to advance after recordation of the pledge, such advances might be subordinated to it in rank, even if made before the advances under the pledge had been actually made; and all privileges for supplies and advances subsequently acquired would share the same fate, even though, but for the recordation of the pledge, they might have been superior in rank. But to say that a privilege legally existent and valid as to all the world could be destroyed or impaired by a subsequent pledge shocks all sense of justice, and would open a door for fraud under which every merchant, after advancing to the near completion of the crop, might find his privilege destroyed by the recordation, at the last moment, of a pledge to some third person for future supplies. Obviously the crop passed under Learned's pledge, subject to the pre-existent privilege of plaintiffs, which was not displaced or affected thereby.

It is claimed, however, that in this case Learned should have a preference, because the crop on which the advances of plaintiffs had been expended had been destroyed by overflow; that they had refused to make further advances; and that, but for Learned's advances, there would have been no crop. This position cannot be sustained, for several reasons. In the first place, the advances of plaintiffs had not been expended merely in planting the destroyed crop. They had been used for organizing the place for cultivation during the year, in employing and feeding laborers, and in like necessary measures which must be taken in the beginning of the year, and without which no crop could be made. Moreover, Learned himself testifies that at the date of his pledge the crop had been planted, and was then on the ground. Finally it does not appear that plaintiffs had, or would have, refused to make further necessary advances. It is true they wrote the letter of May 19th, but their subsequent payment of further drafts shows that it was a mere letter of warning; and everything indicates that, if Skipwith had made a proper showing of his situation, they would not have refused him further necessary assistance. Skipwith's conduct towards them was, to say the least, uncandid and deceptive. Instead of first giving them the chance to protect themselves, he hastens to deal with a third person, and to take all possible steps to defeat their just rights. Nor can we exculpate Learned from complicity. He knew that plaintiffs had been advancing to Skipwith, and if he chose to act without informing himself as to the facts it was his fault, and he should bear the consequences. He

has already received and appropriated a large part of the crop, and he cannot contest the priority of plaintiffs' lien on the portion seized. We think the same reasoning applies to his claim for a lessor's privilege, so far as the crop is concerned. At the time when plaintiffs' advances were made, Skipwith held the place under an agreement of sale, and with the full consent of Learned, and with his authority, to use it and raise a crop thereon, without any lease or contract for the payment of rent. Learned could not thereafter impair the privilege acquired by plaintiffs by altering his arrangements, making a lease, and thus subjecting the crop to an *ex post facto* lessor's privilege. The latter privilege only came into being with the execution of the lease, and took effect on the crop only as it then stood, subject to the valid antecedent privilege of plaintiffs.

We think, however, that plaintiffs' right to arraign the transactions between Learned and Skipwith is limited to the extent necessary to the protection of their privilege on the crop. Considering the relations between them in regard to the plantation, there was nothing wrong in Learned's taking the mules as a partial payment, or in his making the lease, which does not seem to us to be unjust or unreasonable. It was fair that, in case the conditional sale was not carried out, Learned should receive a rent for the use of his property, and ordinary creditors have no right to complain thereof. Plaintiffs are therefore entitled to a superior privilege on the cotton, cotton seed, and other crops sequestered and attached, and to a privilege as attaching creditors on the balance of the property seized, subordinate, however, to the lessor's privilege of Learned, which is to be first paid out of the latter property. We may add, to avoid misapprehension, that plaintiffs take nothing by their so-called "seizure" of the interest in Ashland plantation and of store accounts. Defendant has no interest in the plantation subject to such seizure, and will have none unless the conditional sale shall be carried out. If not carried out, whatever claim he may have against Learned will be of a personal character, and, like the store accounts, is an incorporeal right, which cannot be seized in the manner here pursued.

We have considered all the other points made by counsel on all sides, but find nothing in them affecting our conclusions. It is therefore adjudged and decreed that the judgment appealed from be, and is hereby, amended so as to maintain the writs of sequestration and attachment against the defendant; and further so as to recognize their privilege on the crops sequestered and attached with preference over H. F. Learned, intervener, and with recognition of their privilege as attaching creditors on the other property seized herein, subordinate, however, to the lessor's privilege thereon of Learned,

intervenor; and that, as thus amended, and in other respects, the judgment be affirmed, appellee to pay cost of appeal.

On Rehearing.

(May 29, 1893.)

Plaintiffs call attention to failure in our decree to pass on costs in lower court, which was also omitted in judgment appealed from. They properly fall on defendant. They also complain of our failure to pass on their demand for recognition of their privilege on proceeds of cotton received by intervenor. These proceeds were not seized under any process, and were not in the hands of the court. We therefore did not consider or pass on that claim. It is therefore ordered that our decree be amended by condemning defendant to pay costs of the lower court, and that, as thus amended, it remain otherwise undisturbed.

(5 La. Ann. 799)

KERNAN v. BAHAM et al. (No. 11,212.)  
(Supreme Court of Louisiana. April 24, 1893.)

PETITORY ACTION—TITLE—ERRONEOUS SURVEY—  
CORRECTION—PAROL EVIDENCE OF IDENTITY—  
COMMUNITY RIGHTS—PRESCRIPTION—ACT OF  
PARTITION.

1. As against a defendant whose claims in a petitory action are found to rest only on possession, and prescription under it, plaintiff need not show a title perfect in all respects. One apparently good will suffice.

2. Where the officers of the United States, in the matter of the location of a cultivation and settlement right, have dealt with a person as the holder of the same under a derivative title, he will be entitled to hold such position, *prima facie*, as against a person contesting it collaterally, as a defendant in a petitory action, in which action he does not show title, but has to rely upon possession.

3. Where, in consequence of an erroneous survey of a cultivation and settlement right, which called for a location of 650 acres on the Tangipahoa river, the land has been located in wrong sections, township, and range, and by wrong numbers, far to the east, and away from the river, the owner, in granting a mortgage on the property, described it as a tract of 650 acres on the Tangipahoa river, but assigned to it the numbers of the sections, township, and range given in the survey, the error was not fatal; and when, subsequently, on discovery of the error, the government resurveyed, and properly located, the land, the resurvey and new location bound the owner, and inured to the benefit of his mortgage creditor. There was in this no change in the thing mortgaged, no substitution of one tract for another, but a mere yielding of some incorrect calls, by replacement, to bring them to conform to others, which, having been correct all the time, were not altered, but adhered to, by the government.

4. Parol evidence to establish identity is allowable, as is, likewise, parol evidence of possession in, and of a defective or ambiguous description of, land, in an act of sale, but this is only where there is a sufficient body in the description to leave the title resting substantially on writing, and not essentially on parol. A written title, with a reasonable degree of certainty of description, has to be produced.

5. The extent of the rights of the husband

and father regulate those of the widow and heirs, who succeed to all his rights, and those of the community, but they are transmitted with all their defects, as well as their advantages; the change in the proprietor producing no alteration in the nature of the title or possession.

6. An act of partition is not an act "translative" of, but only "declaratory" of, property. It does not create a new title, or give a new possession, and it does not serve as a basis for the prescription of 10 years.

7. The prescription of 10 years requires good faith as its basis, and the owner sufficiently shows bad faith in proving that the present possessors hold the property as heirs and widow in community of another, who was not himself in legal good faith. The widow, claiming community rights, is not a third person quoad the community.

8. Under its exceptional legislation relative to property bank mortgages, it was the intention of the legislature to protect those mortgages against any adverse right of ownership or possession subsequent to their date, and up to their maturity or enforcement.

(Syllabus by the Court.)

Appeal from district court, parish of Tangipahoa; James M. Thompson, Judge.

Petitory action by W. F. Kernan against J. N. Baham and others. Judgment, from which plaintiff appeals. Reversed.

Henry P. Dart, for appellant. Stephen D. Ellis, for appellees.

NICHOLLS, C. J. This is a petitory action begun December 2, 1886, in which plaintiff claims the ownership of 638 acres and 77-100 of an acre of land in the parish of Tangipahoa, being section 41, township 5 S., range 7 E., and section 39, township 5 S., range 8 E., Greensburg district. He avers that J. N. Baham has possession of the same, without right, shadow, or color of title, and has been occupying the same since June 19, 1863. He asks for judgment recovering the land, and condemning defendant to remove therefrom, and to pay revenues at the rate of \$150 per annum from judicial demand. J. N. Baham disclaimed title, and averred that he held possession for his mother, Marcelite Baham, widow of Honore Baham, with the exception of 100 acres, which he says she had previously donated to George Baham, who sold the same to Anatole O. Leaumont. Plaintiff, by supplemental petition, made Mrs. Marcelite Baham and Anatole O. Leaumont parties defendants, reiterating his allegations, and directing his demand and prayer against them. They filed separate answers, presenting defenses substantially identical. Mrs. Baham answered that she owned the land, less 100 acres donated by her to George Baham, and by him sold to A. O. Leaumont. Her chain of title, as alleged, is that her husband acquired said land in 1848; that he went into possession at that time, and so held until his death; that on the settlement of his estate she became the owner of said land, at the partition thereof; that the act was duly recorded; and that in good faith, as owner, she had since held undisturbed possession. Leaumont, in his an-

\*Rehearing refused, May 29, 1893.

swer, sets up the donation from Mrs. Baham to George Baham, and the act of sale from the latter to him. The defendants pleaded the prescription of 1, 3, 5, 10, and 30 years. The judgment of the lower court was in favor of the defendants, and the plaintiff has appealed.

Plaintiff claims to have acquired the land from the liquidation of the Clinton & Port Hudson Railroad Company, at a sale made on the 19th day of June, 1883, by the sheriff of Tangipahoa, under an order of sale procured by the liquidator from the sixteenth district court. He avers that the railroad company acquired the same at a sale made by the sheriff of St. Tammany January 7, 1860, under proceedings via executiva taken by the liquidator in the eighth judicial district court for the parish of St. Tammany against William Marbury and his heirs, upon a stock mortgage given by said Marbury in favor of the railroad company to secure the payment of 80 shares of stock, which mortgage bore upon the property in controversy; that Marbury acquired the property by survey and location from the United States government, he having located a settlement certificate, of which he was the purchaser, which had been issued to John Morgan in 1824, Morgan having settled on the land in 1812; that under this location and certificate a patent issued from the United States on the 18th day of April, 1871, to John Morgan, or his legal representative, and to his or their heirs; and that said patent inures to his benefit. Defendants contest plaintiff's pretensions very vigorously. They declare that he has, by his own evidence, shown the original title to have been in John Morgan, and that he has failed to show that Marbury, under whom he claims, ever acquired that title, but, assuming that he had, the description of the property mortgaged by Marbury to the railroad company was entirely different from that of the tract in litigation; that in the proceedings via executiva, and in the deed of sale thereunder, the mortgage description was followed, and the adjudicatee took under that description, and acquired nothing other than what was covered by it. This contention requires a statement of the facts connected with this title.

In the record is a certified copy of an affidavit of William Marbury, in which he declares that Sachy and Hancher obtained a certificate for 640 acres of land in the parish of St. Tammany by virtue of purchase from John Morgan, and that he (Marbury) became the purchaser of said land at sheriff's sale, and he cannot get possession of said certificate. The affidavit bears date September 6, 1884. On the same day, Samuel T. Rennels, register, and Will Kinchen, receiver, of the United States, issued from the land office of St. Helena their certificate No. 213, new series, in which they declared that "the claim No. —, in the report of the commissioners, marked 'C,' claimed by

John Morgan,—original claimant, John Morgan,—is confirmed as a donation claim, and entitled to a patent for 640 acres situate in the parish of St. Tammany, and claimed under habitation and cultivation since 1812." On the 20th September, 1825, the following order of survey was issued: "John Morgan. Certificate No. 213. Dated 6th September, 1824. St. Tammany, September 25, 1825. William Marbury claims a section of land situate in the parish of St. Tammany by virtue of a duplicate certificate granted to John Morgan, No. 213, dated September 6th, 1824, and signed 'Samuel T. Rennels, Register.' It is ordered that the claim of land be located as follows: To begin at White bluff, on the Tangipahoa river; and from thence to the line of William Hardens; thence to the improvement, in an easterly direction, southwardly across the Sweet Water; thence down said stream, and to the beginning, so as to include six hundred and fifty acres. Given under our hands this 25th September, 1825. [Signed] Samuel T. Rennels, Register. Will Kinchen, Receiver." In 1827 this claim was located by A. S. Womack, deputy surveyor, and figures on the map of 1828, in the name of William Marbury, as "section 39, township 5 south, range 8 east," containing 550 acres, and as "section 41, township 5 south, range 7 east," containing 90 acres. The land appears on that map as a rectangle, and not only does not touch the Tangipahoa river at any point, but it is a very considerable distance from it. On the 29th October, 1832, the United States surveyor general for Louisiana wrote as follows to Marbury: "Surveyor General's Office. Donaldsonville, October 29, 1832. William Marbury, Esq.—Sir: I send you herewith, inclosed, an order of the survey of your claim on the Tangipahoa, which, on inspection of the township plat, I see, was improperly located. The order of survey given by Rennels and Kinchen being on file in the office, I have thought proper to have the survey made in accordance with it. I can find neither certificate or order of survey of your unsurveyed tract. You can apply for same at St. Helena, and forward them to me. \* \* \* A copy of the order of survey by Rennels and Kinchen is forwarded. I am, etc., [Signed] H. B. T." On the 26th October, 1832, the following order of survey was issued from the surveyors general's office: "Surveyor General's Office, October 26, 1832. To Any Deputy Surveyor of Public Lands for the State of Louisiana: You are hereby authorized and required to survey, measure, and mark, for William Marbury, a tract of land granted to John Morgan by certificate No. 213, to contain 640 acres, in the parish of St. Tammany, in the district east of the island of New Orleans, and west of Pearl river, in conformity to an order of survey from the register and receiver of the land office at St. Helena, dated September 20, 1825. You will be careful



to make and locate all the necessary connections with the intersecting and adjoining lines of surveys, whether public lands or private claims, and you are not to interfere with any established lines. You will return the field notes and plat of the work, when completed, to this office. [Signed] H. B. T., Sur. Gen."

On the 16th September, 1838, Marbury executed, in favor of the Clinton & Port Hudson Railroad Company, the mortgage which has been referred to, covering, among other properties, the following: "One other tract or section, containing, by survey, six hundred and fifty acres, and situated on the waters of the Tangipahoa river, identified by a plat bearing on its face the name of William Marbury in two places, and as having five hundred and fifty acres in section 39, of township 5 south, range No. 8 east, and ninety acres in section No. 41, township 5 south, of range No. 7 east." There are several noticeable features in this description. The first is the call for the land as being situated on the waters of the Tangipahoa river; the second, the quantity of land; the third, the description, by numbers, of the township and ranges. A comparison of the map with the description thus given will show at once that the land intended to be mortgaged was the land covered by certificate 213, issued in the name of John Morgan, but referred by the numbers of township and range, as located by the survey of 1827. The congress of the United States, by act passed 29th August, 1842, declared all the entries of land made in the Greensburg district to be null, on account of the errors and imperfections of the public surveys, or of conflicting claims, and authorized the return of the purchase money on returning the certificates, and ordered a resurvey of the district, and when the resurvey should be confirmed the public lands (unreserved) therein specified should be subject to the laws for the disposal of the public lands, with the proviso: "Provided, that purchasers aforesaid may retain their certificates of purchase, and the surveys of said tracts shall be corrected, and, when said surveys are corrected, may receive their patents from the United States for the lands so purchased by them." The resurvey contemplated by this law was made and duly approved on the 15th August, 1845. *Waterston v. Bennett*, 18 La. Ann. 253. We find in the record a copy of the field notes of R. C. Brent, deputy United States surveyor, of a survey made by him in 1845, the heading of which is as follows:

"Township 5 south, ranges 7 & 8 east. Greensburg district, La. John Morgan, (confirmed.) William Marbury. O. & O. No. 213.

"Section 41, township 5 south, range 7 east.

"Section 39, township 5 south, range 8 east."

These field notes show that the survey commenced at White bluff, on east and left bank of Tangipahoa river, and after running eastwardly, northerly, eastwardly, southwardly, and westwardly, struck a second time the Tangipahoa, locating the John Morgan tract with the Tangipahoa river as its western boundary, and giving 638.77 acres as the area of the land. The land, as located by this survey, figures on the approved township maps as "section 41, township 5, range 7 east," containing 530.45 acres, and "section 39, township 5 south, range 8 east," as containing 108.32 acres, and not as originally located; as "section 41, township 5 south, range 7 east," with 90 acres, and as "section 39, township 5 south, range 8 east," with 550 acres. It appears beyond the possibility of a doubt that the certificate No. 213, in favor of John Morgan, was finally located on the Tangipahoa river under the Brent survey; thus showing the original survey to have been erroneous, and the description of location by numbers of sections and ranges to have been incorrect. The evidence in the case places beyond controversy the identity of the land claimed by the plaintiff with that claimed by the defendant. Defendant, independently of any question of her own title, contests that of plaintiff, as we have seen—First, because Marbury is not shown to have acquired the rights of Morgan; and, secondly, because, if Marbury did acquire them, he did not mortgage the particular property now in litigation to the Clinton & Port Hudson Railroad Company, but some other property, and therefore Marbury's title is still outstanding. In Marbury's mortgage to the railroad company the land is described as situated on the Tangipahoa river, as containing 640 acres, and as being "section No. 41, township 5 south, range 7 east," and "section No. 39, township 5 south, range 8 east." A reference to the maps will show that the calls for this land, so located, are irreconcilable. If the land lies on the Tangipahoa river, as the mortgage act declares, it certainly cannot be the sections of the township and ranges mentioned. One or the other of the calls is forced to yield. Under the exceptional facts, indubitably shown by the evidence, we think the call for the river must prevail over the mere statement by number of township and range. Marbury clearly intended to mortgage some property belonging to him. He was at the time of the mortgage recognized by the officers of the government to be the owner of the Morgan certificate, and Morgan's rights under it, but which, while calling for a tract on the Tangipahoa river, had been located improperly and erroneously, and under wrong numbers. When Marbury, describing the land which he mortgaged as situate on the Tangipahoa river, and as containing 640 acres, (both of which were correct calls for

the Morgan tract,) added to the description by giving number of sections, township, and ranges to which his only claim of ownership rested upon a location of the Morgan certificate, his intention to mortgage the land which he held under the Morgan title was very manifest; and, as between himself and the Clinton & Port Hudson Railroad Company, he was committed to the description of the land as being on the river Tangipahoa, (which was the correct call,) as the controlling call of the thing mortgaged by him. When, by subsequent resurvey of the Morgan location, the error in the original location was established, and any and all claims of Marbury to the particular section, as shown by the original survey, were annihilated, and his rights were fixed to correspond with the two correct calls of the Morgan certificate and Marbury's mortgage, showing a tract fronting on the Tangipahoa river, containing 638 acres and 77-100 of an acre, and placing the land as it should have been originally placed in other sections, township, and ranges, the correction and new location, while it bound Marbury, inured to the benefit of his mortgage creditor. There was in this no change in the thing mortgaged, no substitution of one tract for another, but a mere yielding of incorrect and improper calls, and a replacing of them by others, to bring them to conform to other calls, which, being correct all the time, were not altered, but adhered to, by the government. Neither in law nor equity could Marbury claim to have become the owner as under a new location of a new tract, and by so doing force his creditor to look to the enforcement of his mortgage upon lands which, as matters developed, were shown not to have belonged to the debtor. The only error in the mortgage was a partial error in description, merely. That error was corrected, and, as matters took shape, the identity of the land became absolutely certain, and the maxim, "*falsa demonstratio non nocet*," applied with full force to the original description. Thus holding, it follows that we recognize Marbury's mortgage act, as between him and the company, though imperfect in its description, to have been none the less a valid, legal mortgage, covering the Morgan tract as finally located. To hold otherwise would be to destroy the act, which we should not do. "*Magis valeat quam pereat*." The foreclosure of the mortgage, and the purchase made by it under the foreclosure, conveyed the property to the Clinton & Port Hudson Railroad Company, as between the parties. The subsequent sale of the tract in the matter of the liquidation of the Clinton & Port Hudson Railroad vested, in the same manner, the land under Marbury's title to the plaintiff. The fact that in this sale an exact and perfect description of the land was made is of importance, as giving certainty in future contracts in respect to it,

but ownership would have passed between the parties to plaintiff, even under the original partially incorrect description.

But the defendants say, however this may be true of Marbury and his heirs, there is nothing to show that Marbury had any title; his claims rest entirely upon an ex parte affidavit, which gives no number of the certificate, no description of the land, and which states neither *res*, *pretium*, nor *consensus*. Whether the government, in dealing with the Morgan certificate, and Marbury, in connection with it, acted exclusively upon the affidavit, we do not know. We understand Morgan not to have claimed under any Spanish or other perfect grant, but only under a settlement or cultivation right; and the action of the government relative to that claim was in respect to land which at the time of its action belonged to itself absolutely. Whether or not the government officers were justified, by the sufficiency of the evidence before them, in treating with Marbury as the assignee or holder of the Morgan claim, we cannot say. We only know, as a fact, that they did so act upon a matter which no one but Morgan had a right to question. Their conclusions are not open to collateral attack. Everything goes to show that the government, the holder of the fee, was willing to consider, and did consider, Marbury as entitled to Morgan's rights; and he, or any one under him, is entitled, *prima facie*, to hold that position, and all the rights flowing from the same, subject, of course, to any direct attack by persons holding title under Morgan. As between Marbury and his heirs, we hold plaintiff's title good. As between plaintiff and any one not holding under Morgan, but merely attacking collaterally plaintiff's title on the ground of a possible outstanding title in Morgan, we hold plaintiff's title good. We understand the rule to be that although the United States government always issues its patent, as was done in this case, in the name of the original claimant, his legal representatives, and his or their heirs, as the case may be, the patent inures to the benefit of those with whom the commissioners have dealt, as holders under derivative titles, and claims advanced by the latter, though not binding on the original grantee, or those claiming under him, are *prima facie* good against the rest of the world. *Hen. Dig. p. 1265, Nos. 9, 11, 12.* This last statement may be too broadly made, but not too broadly for the purposes of this case.

We now turn to the consideration of the claims advanced by defendant, and first to the title declared to have been in Honore Baham. Although the defendant alleged he had acquired the land about March, 1848, for a valuable consideration, and held and possessed the same as owner in good faith, publicly, continuously, and peaceably, from that time until his death, early in 1859, it

will be noticed that she nowhere states from whom, in what manner, and under what circumstances he did so, nor does she aver that the person under whom he may have held had himself title to the property. Defendant was, however, permitted to introduce evidence on the subject, which consists, first, of a promissory note to the following effect: "\$180. New Orleans, March 20, 1848. Three months after date I promise to pay to the Union Bank of Louisiana, at its office, one hundred and eighty dollars,

for value received. [Signed] Honore X<sup>his</sup>

Baham. Attest: T. S. Haley,"—and an "admission" found in the record, as follows: "W. F. Kernan vs. J. Norah Baham. No. 702. 18th judicial district court, Tangipahoa parish. It is admitted that defendant produced and filed the receipt marked 'U. B. No. 1,' and that it has been lost or mislaid. As it cannot be found, the parties make this admission and agreement to supply its place, and to complete the record, to wit: The said receipt bore date March 20, 1848, at New Orleans. It was in favor of Norah (or Honore) Baham, and was signed by the Union Bank of Louisiana. It stated the payment in cash of a sum of money, not definitely remembered, as the cash payment for certain lands in St. Tammany parish, sold that day by the bank to said Baham, and also stated the execution of the note for \$180 of same date, in the record, and marked 'U. B. No. 2,' as the balance of the price to be paid. This admission as to the contents of said receipt marked 'U. B. No. 1' is to be copied in the transcript of appeal. The record in this respect is to be held as complete, this admission supplying the lost receipt. \* \* \* [Signed] W. B. Kemp, Atty. for Plff. [Signed] S. D. Ellis, Atty. for Defts."

The writings which defendants present as establishing their title are not only insufficient per se for that purpose, but they are so defective as not to serve as a basis upon which a title could be built up or eked out by parol. The declaration that the promissory note was given as "the price of certain lands in the parish of St. Tammany" is entirely too general to justify the admission of parol evidence to establish possession of particular property by the party named in the instrument as the vendee, and from such possession to assume or infer it to be that referred to in the writing. Parol evidence to establish identity is allowable, as is likewise parol evidence of possession, in aid of a defective or ambiguous description; but this is only in cases where there is a sufficient body in the description to leave the title substantially resting on writing, and not essentially on parol, as it would have to rest, if at all, in the case at bar. When a person has title, and possession conformable to it, he is presumed to

possess according to the title, and to the full extent of its limits, but no such presumptions run merely from possession, back to conformity with a supposed written title. A title with a reasonable degree of certainty of description would have to be produced. *Green v. Witherspoon*, 37 La. Ann. 751. Holding, as we do, that Honore Baham has not been shown to have had a title to the land in litigation, he may be considered, for the purposes of this suit, as a trespasser, and the plaintiff is not held to establish, as against him, a title perfect in every respect.

We have now to inquire whether the rights of parties were affected, and, if so, to what extent, by the death of Honore Baham. In dealing with that question it must be borne in mind that the 30-years prescription is pleaded under Honore Baham's possession, joined to the possession of his widow and heirs as continuing as his successors, and that the 10-years prescription is pleaded under the title alleged to have been in Baham, and under the act of partition, which was itself expressly based upon that title, and also that the widow is claiming exclusively under community rights, and, as so claiming, does not stand as a stranger or a third person quoad that community. *Caldwell v. Hennen*, 5 Rob. (La.) 25. Such title and possession as Honore Baham had was acquired during his marriage, while he was head and master of the community. When he died his succession was at once opened, and his title and possession continued, and passed, unchanged, unbroken, and without interval, to his heirs, and to his widow in community. Civil Code, arts. 934, 940-942, 2405, 2406, 3496. The extent of the rights of the deceased and of the community regulates those of the heirs and of the widow in community, who succeed to all his rights, and those of the community, but they are transmitted with all their defects, as well as all their advantages, the change in the proprietor producing no alteration in the nature of the title or possession. When the widow and children of Baham partitioned among themselves the property left by him, they had no other rights, either by way of title of possession, therein than he had; and, when that partition was effected in kind, neither the children, who took the slaves, nor the widow, who took the land, acquired thereby any new title or possession.

In view of the necessity, in the matter of the prescription of 10 years, of the party pleading the same presenting himself as having possessed the property claimed as owner under a title translatif of property, in good faith, during the period required by law, and in view of the necessity of the title so presented being valid in point of form, being certain, and being proved, defendants, apprehensive that they could not rely upon the title of the father himself, have declared upon the partition proceeding,

as creating a new title, and giving a new possession, and the notarial act of partition, as evidencing an act translatif of property. In this, defendants are mistaken. An act of partition is not "translative" of, but merely "declaratory" of, property; each party giving up his existing rights in the particular thing which he "abandons" for the existing rights of the others in the thing which he takes. Civil Code, art. 1382. It is nothing more than a regulation inter se as to the property, in no wise changing the title or possession. We find in Dalloz's *Dictionnaire de Jurisprudence*, as bearing upon this subject, the following: "Le partage est declaratif et non transmissif de propriété. En d'autres termes, chacun est censé avoir succédé seul immédiatement à tous les effets compris dans son lot ou à lui échus sur licitation, et n'avoir jamais eu la propriété des autres objets de la succession." Civil Code, art. 883. "En vertu de la maxime, 'le mort saisit le vif,' on reputé l'heritier propriétaire de son lot depuis le moment de l'ouverture de la succession, et le partage ne sert qu'à déclarer quel est ce lot. Le système admis par le droit Romain, qui regardait le partage comme une acquisition faite par chaque heritier des parts de ses coheritiers dans les objets dependans de son lot ne l'était pas dans notre ancienne jurisprudence." "Le principe de l'art. 883 n'est pas restreint aux partages ou licitations entre coheritiers; il s'applique à toute propriété indivise, quelque soit le titre de la possession commune,—à la communauté,—à la société." See the author cited, verbo "Partage," article 7, Nos. 271, 272, and 303, and also, still further, under the heading "Prescription," No. 752: "Le partage n'est dans notre droit que declaratif, et par suite il ne peut servir de base à la prescription decennale." There may be divergent rights as between the widow and the heirs themselves, as resulting from a partition, but the title, possession, and prescription of the thing with respect to which they are acting remain unchanged, and go back to its origin as a unit. For an application in a different form of the same principle, see *Maurin v. Martinez*, 5 Mart. (La.) 435. "Quum ex una stirpe, unoque fonte," etc.

But aside from the character of an act of partition as being "translative" of, or merely "declaratory" of, property, an obstacle standing in the way of acquisition of the property by the widow and heirs springs from the nature of the possession required of a person setting up such a claim, viewed from the standpoint of its legal good or legal bad faith. The law requires, as a basis for the 10-years prescription, possession in good faith, and that the widow and heirs of Baham have not, from a legal standpoint, shown. As to the heirs, we refer to Dalloz, under the heading of "Prescription," No. 813, where it is said: "Le propriétaire établit suffisamment la mauvaise foi du possesseur en

prouvant que celui-ci détient la chose comme heritier (fut ce même comme heritier bénéficiaire) d'un possesseur de mauvaise foi." And, as to the widow, we refer to the decision of this court in *Caldwell v. Hennen*, 5 Rob. (La.) 25, already cited. Were Honore Baham alive, setting up in this action the prescription of 10 years, he would fail to do so successfully, and his widow and heirs occupy no stronger legal position than he would.

We next come to the prescription of 30 years. There is evidence showing that Honore Baham, about the year 1849, occupied a portion of this land, but precisely how much he actually took possession of originally is not shown. He seems at one time (not precisely fixed) to have fenced in a very considerable portion of the tract, and to have had a field in cultivation. There is nothing in the record by which the court could locate these portions, even were we to hold that prescription would cover them; but we have, aside from this, reached the conclusion that the plea of prescription filed is not tenable. This property was, as we have seen, mortgaged by Marbury to the Clinton & Port Hudson Railroad Company. The mortgage was foreclosed, and the land sold, on the 7th day of January, 1860. Between this last date and the date of the filing of the present suit, 30 years did not elapse. We concur in the opinion of the district judge,—that, under its exceptional legislation relatively to property bank mortgages, the legislature intended to protect those mortgages against any adverse rights, either of ownership or possession, subsequent to their date, and up to their enforcement or maturity. Adverse possession, therefore, did not commence in this case until after the 7th day of January, 1860. We are of the opinion that the plaintiff is entitled to a judgment and decree recognizing him as the owner, and entitled to the possession, of the property described in his petition, and that the judgment of the district court, rejecting his demand, should be annulled, avoided, and reversed.

For the reasons herein assigned, it is hereby ordered and decreed that the judgment of the district court be, and the same is hereby, annulled, avoided, and reversed, and it is now hereby ordered, adjudged, and decreed that the plaintiff, William F. Kernan, do have judgment in his favor, and against the defendants Mrs. Marcelite Baham, widow of Honore or Norah Baham, and Anatole O. Leaumont, recognizing and decreeing the plaintiff, William F. Kernan, to be the owner of, and entitled to the possession of, the property described in his petitions herein,—a certain tract or parcel of land lying and situate in the parish of Tangipahoa, containing 630 acres and 77-100 of an acre, and more fully described as follows: Section 41, township 5 S., range 7 E., and section 39, township 5 S., range 8 E., and ordering the

said defendants Mrs. Marcelite Baham and Anatole O. Leaumont to deliver possession of the said property to the plaintiff. It is further ordered, adjudged, and decreed that this case be remanded to the district court for the purpose of ascertaining, determining, and fixing the rights of the parties relatively to rents and counterclaims.

(45 La. Ann. 733)

McGUIRK v. MARCHAND. (No. 11,159.)  
(Supreme Court of Louisiana. Jan. 30, 1893.)

SUSPENSIVE APPEAL — SETTING ASIDE — BOND —  
PARAPHERNAL PROPERTY — SALE BY HUSBAND —  
DEPOSIT.

#### On Motion to Dismiss.

1. An order granting an appeal "on giving bond according to law," and without fixing any amount, can only operate as granting a suspensive appeal.

2. A bond filed "in the sum of — hundred dollars," without filling in the blank, might perhaps be considered as no bond at all; but, even if it were considered as a bond for \$100, the court retained the power to pass on its sufficiency for a suspensive appeal, and, on finding it insufficient, to set aside the suspensive appeal, and then, on application within the delay allowed by law, to grant a devolutive appeal; and appellant, having obtained and complied with such order, is protected in his appeal.

#### On the Merits.

1. Where the husband, who administers the movable paraphernal property of the wife, sells it to one who purchases in good faith, the latter will be protected from the claims of the wife on said property. She must look to her husband for reimbursement.

2. Where a person takes property on deposit, and sets up title to the property when it is demanded, and, when sued for the property, alleges that it had been destroyed by fire, his unsupported declaration may be disregarded.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Suit by Mrs. Elizabeth McGuirk against Alfred Marchand for household furniture alleged to be her paraphernal property. Judgment for plaintiff. Defendant appeals. A motion to dismiss the appeal was denied, and judgment reversed.

W. S. Benedict and Robert G. Dugue, for appellant. Farrar & Lake and F. S. Drolla, for appellee.

#### On Motion to Dismiss.

FENNER, J. The first ground of the motion is incompleteness of the transcript, by reason of the omission therefrom of the written opinion of the court. Before submission of the motion, appellant filed a certified copy of the missing document. This is sufficient, and there was no necessity for resorting to certiorari. *City of Baltimore v. Parlange*, 25 La. Ann. 336.

The other grounds will be better understood after the following statement: The judgment being for \$2,160, appellant applied for, and obtained, an order of

appeal "on giving bond according to law." He filed a bond "in the sum of — hundred dollars," not filling in the blank before the word "hundred." Thereupon the plaintiff took a rule to show cause why execution should not issue, on the ground that such a bond did not operate to perfect a suspensive appeal. As a matter of course, the rule was made absolute. Thereupon, defendant moved for a devolutive appeal, referring to the fact that the former order of appeal did not operate as such because it did not fix the amount of the bond to be given as required by law. The court granted the order for a devolutive appeal, and fixed the amount of the bond, which was accordingly given. The return day in both orders is the same, and the transcript was filed in due time. We are disposed to consider that the bond filed under the first order was no bond at all, and did not operate to divest the jurisdiction of the court, in which case no question could arise as to the right of the court to grant the second order of devolutive appeal. If, however, we should treat the first bond as one for a hundred dollars, and as given for a suspensive appeal, which is the only appeal authorized by the order, the court retained the unquestioned power to pass upon the sufficiency of the bond, and, on finding it insufficient, to set aside the appeal, and direct execution to issue, as it did. The effect of this was to destroy the first suspensive appeal, and if, notwithstanding the order, the transcript had been brought here under the order, we should have had nothing to do but to dismiss his appeal. *Baker v. Shultz*, 35 La. Ann. 524; *Weiser v. Blaese*, 34 La. Ann. 833; *Dumas v. Mary*, 29 La. Ann. 808; *Huppenbauer v. Durlin*, 23 La. Ann. 739. It is equally well settled that the dismissal of a suspensive appeal for want of a sufficient bond does not deprive the party of the right to take a devolutive appeal thereafter. *Johnson v. Clark*, 29 La. Ann. 762; *Verges v. Gonzales*, 33 La. Ann. 414. We conclude that the judge a quo had full authority, from every point of view, to grant the second order of devolutive appeal, and appellant, having complied with it, is fully protected. The motion to dismiss is therefore denied.

#### On the Merits.

McENERY, J. The plaintiff sued the defendant for a lot of household furniture which she alleges was her paraphernal property, acquired by donation from her father, and contained in the residence once occupied by her and her husband, corner of Jackson and St. Charles streets, which was taken possession of by defendant, and not accounted for by him. The furniture is alleged to be worth \$5,000. The defendant answered, alleging that he had acquired by purchase a portion of the furniture claimed by plaintiff, from the husband of plaintiff, who was in possession of the same, for a fair and ade-

<sup>1</sup>Rehearing refused May 29, 1893.

quate price; that the said furniture was purchased by him with the full consent of plaintiff, and for her benefit, and was destroyed by fire. The facts are that the property, or at least a part of it, was the paraphernal property of plaintiff, but it was not assessed in her name, and she never paid taxes on it. It was in the house occupied by her and her husband, and in his possession and control, and administered by him. This is shown by the lease of the house, and all the furniture in it, to one Young. There is no evidence that the defendant was ever informed, or had any knowledge of, the fact that the property belonged to plaintiff. During the time that the house and furniture were leased to Young, and during the absence from the state of the plaintiff, her husband sold the greater part of the furniture to defendant, who was to take possession of it after the expiration of the lease. On the same day he sold the furniture to defendant, —20th June, 1867,—Marchand, the defendant, gave to McGuirk, husband, the following document: "New Orleans, June 20th, 1867. I hold for Mr. A. McGuirk, in his house, corner Jackson and St. Charles streets, in front bedroom, upstairs, one large bedstead; one armchair,—and in parlor, downstairs, one Pleyel piano; one family portrait; one picture, by Galvani, (two females,)—which I shall deliver to him, when he desires me to do so, free of charge, subject only to the lease now upon it to G. B. Young. [Signed] A. Marchand." When plaintiff returned to the city of New Orleans, her husband had located in Galveston. He died there, and in 1869, or early part of 1870, she visited New Orleans, and called on the defendant, who had become the owner of the house in which the furniture was stored, and demanded to see her furniture. He denied having any furniture belonging to her, and stated that he was the owner of all the furniture, having purchased it from her husband. The above document was not then presented to Marchand, as it was subsequently found among her husband's papers by the widow. There is no proof as to the exact time when it was discovered, but we believe, with the district judge, that it came into the widow's possession after this demand, and that the defendant, knowing that McGuirk had died, took advantage of the supposed loss or destruction of the receipt to claim ownership of the furniture. On these facts the district judge gave judgment for the plaintiff for the value of all the property in the house, claimed by plaintiff; the value being \$2,160.60, the price fixed in the act of sale of the furniture to Marchand. As to the articles of furniture not included in the receipt, he was of the opinion that the sale to Marchand by McGuirk was a nullity, as he did not own the property, and had no right to sell it.

The plaintiff knew of the sale having been made. She was informed of the fact, and

the husband told her he would make it all right. During her husband's lifetime she made no objection to the sale. She made no effort to have the furniture restored to her, and we are of the opinion that she acquiesced in the sale. But, independent of this fact, the husband was in possession of the property, and administered it. A purchaser, therefore, in good faith, under such circumstances, is protected. There is, as the district judge says, an impression that the sale was simulated, but there is no evidence to prove this fact. This impression is made from the insolvent condition of the plaintiff's husband, and his taking the benefit of the bankrupt law, about this time. But this impression is weakened by the fact of the defendant's having given a receipt for a part of the furniture, which had been leased, but not included in the sale to defendant, on the day of sale, to be returned to plaintiff's husband. Why, if the sale was really simulated, was a receipt and an obligation to restore it not given for all of it? We have no doubt that the furniture described in the receipt belonged to plaintiff. When the plaintiff demanded to see her furniture, defendant denied her ownership of it, and claimed title to the property. He knew he had no title to this lot of furniture, and his pretensions were unquestionably based on the supposed disappearance of the receipt. He acted in bad faith, and, as there is only his unsupported declaration that the furniture was destroyed after the visit of the plaintiff to him, we feel authorized in disregarding this statement as to its destruction by fire, with his furniture, all of which was uninsured. We are unable to fix the value of the furniture contained in the receipt of June 20, 1867. There is no evidence in the record as to its value. The case will therefore be remanded in order to ascertain the value of the furniture. It is therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the case be remanded to be proceeded with according to law and the views herein expressed; plaintiff to pay costs of appeal.

(45 La. Ann. 765)

CALDER et al. v. THEIR CREDITORS.  
(No. 11,147.)

(Supreme Court of Louisiana April 24, 1893.)  
ACTION AGAINST SYNDIC — RESTITUTION OF PROPERTY UNAUTHORIZEDLY SURRENDERED.

Where the contract is that the surviving member of a commercial partnership has unauthorizedly surrendered, along with his own interest in its assets, the interest of a deceased member of the firm, which had previously passed under a separate administration, *held*, it is the correct course to pursue for the alleged legal representative of the said decedent to institute a direct action against the syndic of the insolvent for the restitution of the property, and not for the revocation of

the latter's letter of appointment, and the judge's order of acceptance of his surrender.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by John Calder & Co. and David R. Calder individually against their creditors, William Henderson and Leopold Loeb, syndics. From a judgment dismissing the case, plaintiffs appeal. Affirmed.

L. F. Suthon, H. S. Suthon, and Frank L. Richardson, for appellant executors of succession of John Calder. Horace E. Upton and Henry L. Lazarus, for appellee syndics.

WATKINS, J. This is an action to annul and set aside an order of court appointing two provisional syndics for the insolvent estates of John Calder & Co. and of David R. Calder, individually, in so far as it affects the one-half interest of the deceased member of the copartnership, John Calder, is concerned; and also the order of the judge accepting the surrender of the interest of said John Calder in the assets of John Calder & Co., consisting of real estate, described in the schedule as property of the firm; also to strike from the insolvents' schedule all of the real estate standing in the name of John Calder, as described in List B, annexed thereto; also to annul the order of court accepting the surrender of all the property of the deceased John Calder—reserving the rights of all parties having claims to assert against the same—in the succession of the deceased. Prayer is further made to the effect that the provisional syndics be enjoined from in any way interfering with petitioners, as executors of the deceased, in their possession and control of this property of his succession. To this proceeding the syndics tendered the plea of no cause of action, and the judge a quo sustained it, and dismissed the suit. Plaintiffs have appealed.

A fair summary of facts necessary to be stated is as follows, to wit: The commercial firm of John Calder & Co. was composed of John Calder, owning one-half interest, and of John H. Calder and D. R. Calder, each owning one-fourth interest. It was dissolved in 1884, by the death of John H. Calder; and in February, 1886, John Calder died, leaving David R. Calder as the only surviving member of the partnership. John Calder left at his demise a surviving widow and two minor children, and in his will he appointed three executors, all of whom were duly qualified. Subsequent to the death of his two partners, D. R. Calder conducted the business under the firm name, just as though no change had taken place, until business losses resulted in the cession and surrender above mentioned. The petition accompanying the schedules purports the cession and surrender of John Calder & Co., as well as of D. R. Calder, though the names of the members of the firm are not given;

and the order of acceptance of the surrender that is indorsed upon the petition includes the property of the firm of John Calder & Co. as well as that of D. R. Calder. The schedule of property of the insolvents includes that of the firm; that which, though standing in the name of D. R. Calder, is that of the firm; and that of John Calder individually. The judge a quo maintained the exception of no cause of action mainly on the ground, undoubtedly, that the plaintiffs had mistaken their action; or, in other words, that they should have sued the syndics for the property of the deceased partners they claimed the right to control, and not for the revocation of the order accepting the cession of the partnership because of its embracing, as they allege, property that did not legitimately compose a part of the assets of the insolvent who made the surrender. We are of opinion that the judge a quo properly maintained the exception. David R. Calder had, undeniably, the right to make a surrender of his individual property, and include therein his individual share or interest in the commercial firm or partnership of which he was or had been a member; and we think it equally undeniable that he had the right to make a surrender of the partnership property and effects, at least so long as it was a going concern, and all the partners living. It is a precept of the Code that, "If there be a commercial partnership, in which the deceased was concerned, the surviving partner, after the portion of the deceased in the partnership has been so ascertained, and the estimate of it made on the inventory, shall have a right to require that this portion remain with his own, in order that the whole may be disposed of for the common profit in the ordinary course of trade, and the proceeds applied, as far as it is necessary, to the payment of partnership debts." Rev. Civil Code, art. 1138. It is likewise a precept of the Code that "partnership property is liable to the creditors of the partnership, in preference to those of the individual partner." Id. art. 2823. While these precepts are not strictly applicable to the administration and settlement of insolvent estates per se, yet there is to be drawn from them a good, logical reason why the assets of a partnership should be controlled and managed by the surviving member of the firm, in order that they might be the more surely applied to the payment of partnership liabilities, for which he is himself responsible; and this reason suggests, at least, the propriety of the judge's acceptance of the surrender as it was made. There is another precept of succession law that, in our opinion, has a decided applicability, and that is the one authorizing a claimant to property in the possession of a succession representative to institute a direct action against the succession for its recovery. *Dubuch v. Wildermuth*, 3 La. Ann. 407; *Succession of Porter*, 5 Rob. (La.) 98; *Succession of Macarty*, 5 La. Ann.

434; *Cathey v. Kerr*, 15 La. Ann. 228; Succession of *Sanchez*, 41 La. Ann. 504, 6 South. Rep. 791; *Hen. Dig.* p. 1513, B, No. 1, and authorities cited. This principle is strictly applicable to the cession and surrender of an insolvent. It is undoubtedly better practice to regulate the question of ownership *vel non*, and all kindred questions to a direct action in which the rights and interests of all parties concerned, as well as creditors, can be legally and finally determined; for, if the plaintiffs should be successful in this suit, nothing could be determined by the right of the provisional syndics to exercise dominion over the property of the deceased, and the creditors of the partnership would be turned around to new proceedings, additional complications and expense. Judgment affirmed.

#### On Rehearing.

(May 27, 1893.)

Considering plaintiff's petition as one containing alternative demands—First, for the revocation of the order appointing the provisional syndics; and, second, for the recovery of certain properties therein described, if their appointment is maintained,—it is our opinion that, while adhering to the views expressed, our judgment should be amended so as to remand the cause to the lower court, reserving to both parties the right to alter their pleadings in respect to the claim of ownership, so as to try that issue without instituting a new suit, though a rehearing is unnecessary. It is therefore ordered, adjudged, and decreed that the judgment heretofore pronounced be so amended as to maintain the cause of action in so far as plaintiff's claim of ownership of certain property is concerned, reserving to the parties respectively the right to amend their pleadings; and that for this purpose the cause be remanded, the costs of appeal to be taxed against the estate of the insolvent.

Rehearing refused.

(45 La. Ann. 864)

STATE v. ROBERTSON. (No. 11,211.)<sup>1</sup>

(Supreme Court of Louisiana. May 8, 1893.)

MUNICIPAL CORPORATIONS—POWERS—REQUIRING INSPECTION OF STEAM BOILERS—VALIDITY OF ORDINANCE.

1. Under the general welfare clause to be found in all municipal charters, which is often implied from the other powers granted, the city or municipality cannot enlarge these powers further than necessary to carry into effect the specific power granted.

2. All that the city of New Orleans can do in relation to boilers and steam machinery, under its charter, is to locate them so that, in case of explosion, they will do the least injury.

3. Ordinance No. 6647, "an ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus," etc., "and to create a board of examiners and inspectors of engineers in charge of same, and to provide for penalties," is illegal, null, and void.

(Syllabus by the Court.)

<sup>1</sup>Rehearing refused May 27, 1893.

Appeal from recorder's court of New Orleans; John L. Smith, Judge.

Richard L. Robertson was convicted of a violation of an ordinance of the city of New Orleans regulating the inspection of steam boilers, etc., from which he appeals. Reversed.

O. B. Sansum, for appellant. E. A. O'Sullivan, for appellee city of New Orleans.

McENERY, J. The city council of New Orleans enacted ordinance No. 6647, Council Series, entitled "An ordinance providing for the inspection of steam boilers, tanks, pipes, apparatus," etc., "and to create a board of examiners and inspectors of engineers in charge of the same, and to provide for penalties." Section 1 of the ordinance creates the office of inspectors, and prescribes the qualifications of the members of the board. Section 2 fixes the term of office of the members of the board, and the amount of the bond to be furnished. Section 3 vests in the board the power to inspect and test every boiler and apparatus under steam pressure, used to propel or operate machinery, not subject to inspection under the laws of the United States, and they are required to notify all owners or users of boilers and apparatus under steam pressure of the time when an inspection or reinspection and test shall be made. Section 4, that the inspectors shall be furnished with an office at the city hall. Section 5 requires that the owners or users of boilers or steam generating apparatus under steam pressure must have the same inspected before use, and at least once a year thereafter, and for every neglect or refusal to have said inspection and test made they shall, upon conviction thereof, by the recorder having jurisdiction, be fined a sum of not more than \$25, and in default of payment of said fine shall be imprisoned for not more than 30 days or both. Section 6 requires every owner and user of a boiler, etc., to employ at least one competent engineer holding a license or permit from the board, and a neglect to conform to this requirement is visited by fine, and, in default of payment, imprisonment. Section 7 provides for the examination by the board of engineers, a certificate of license costing the sum of \$5 for the first year, and \$2.50 for each renewal, which is required annually. Section 8 regulates the amount of steam pressure as allowed by the certificate of the board of examiners. Section 11 regulates the fees for inspection, which are required to be paid by the owners of the steam machinery and boilers, and the fees for inspection are graduated from \$3 to \$17. The defendant, owner of the marine dry dock situated within the corporate limits of the city, refused to have his boilers and machinery inspected in accordance with the provisions of said ordinance, and he was arrested, tried, and convicted before the fourth recorder's court of



said city. He appealed on the ground of the illegality and unconstitutionality of said ordinance.

If the ordinance is legal and valid, the power of the recorder to inflict the penalty is undoubted, since the passage of Act No. 41 of 1890, which authorizes the recorder "to enforce obedience to or to punish the violation of all ordinances passed by the city council thereof in execution of the powers and duties indicated in sections 7 and 8, and the amendments thereof of Act No. 20 of 1882, known as the 'Charter of the City of New Orleans,' by fine or imprisonment or both, or by imprisonment in default of the payment of the fine, provided that the fine shall not exceed \$25 for each offense, nor the imprisonment more than 30 days, as provided by section 12 of Act 131 of 1877." The penalty, therefore, under said act can be enforced for the violation of a city ordinance, as the right has been expressly conferred by the legislature. The only question, therefore, which is presented is as to the power of the city council to enact said ordinance. It is admitted that there is no express power granted to the city in its charter to create the office of inspector and a board of inspectors of boilers and steam apparatus, and to require the owners and users of boilers and steam apparatus to employ engineers licensed by the city, and for said users of such boilers and machinery to submit them to inspection, and to pay fees therefor. The contention of the city of New Orleans is that its charter authorizes it to pass all ordinances necessary to preserve the peace and good order of the city, and to maintain its cleanliness and health; and therefore it has the power to enforce by fine and imprisonment the violation of an ordinance for the protection of life and property, and that said ordinance was enacted for the protection of the lives of the citizens of New Orleans. If said ordinance springs from a necessary and implied incident to the power expressly granted to preserve the public peace and to maintain the cleanliness and health of the city, it is a valid ordinance. There can be no doubt that it does not spring from the power to preserve the public peace as incident to the exercise of that power. Ordinances to preserve the public health have been liberally construed, and the authorities have gone to a great length in enumerating the implied powers of municipalities to enact laws to protect the community from infectious and contagious diseases, from bad water, against nuisances injurious to health, and noxious odors and gases. As the preservation of the public health and the safety of the inhabitants is one of the chief purposes of local government, all reasonable ordinances in this direction have been sustained. The ordinance in question does not pretend to preserve and promote public health. But it is claimed that it protects the life of the citizen

by providing for the inspections of steam boilers, etc., and this is implied from the power to legislate for the public health; and that its preservation is necessary to protect the life of the citizen. Ordinances of this character, to preserve public health, are generally directed to these objects which in themselves are presumed to be injurious to the public health; such as those enacted for the purpose of abating nuisances which are injurious to health, the location and regulation of markets, hospitals, slaughter-houses, cemeteries, etc.; those for the prevention of the introduction of contagious and infectious diseases and their dissemination in the community, and on all matters which may promote the cleanliness and health of the city. The establishment of steam machinery in a particular locality is not in itself injurious to public health. It is dangerous only either from coming into too close proximity to it, or from the explosion of boilers, or the breaking of the machinery. If the ordinance is a valid one, it must fall under the general welfare clause, either found in charters of municipalities, or inferred from the powers granted. Dangerous articles, such as gunpowder, oil, dynamite, or other such articles, composed of elements which are likely to explode from the slightest extraneous causes by the agitation of the particles composing them, are generally regulated under this implied or granted authority as to their location and sale; but even in these cases an enlargement of the powers granted will not be exercised further than necessary to carry into effect the specific power granted. In the instant case the power to create the office of inspector and a board of inspectors and examiners, with the power to examine engineers, and to grant certificates of competency, and to inspect boilers, etc., is nowhere to be found in the city charter, and the necessary implication for it cannot be inferred from any of the powers granted. Probably the only implication from the granted powers found in the charter would be the right to locate steam boilers, machinery, and apparatus in a safe place, where an explosion would do the least injury. It has been held, and properly so, that under the authority to make police regulations or to pass by-laws for the good government of the corporation, it has the right to require holstaways inside of stores to be inclosed by a railing, and closed by a trap after business hours of the day. It was regarded as a reasonable regulation, because it did not unreasonably interfere with private rights. But if these owners of the holstaways had been compelled to pay for their repeated inspection there can be no doubt that the exactions would have been held to be unreasonable. We have carefully examined the ordinance, and find it illegal in every feature. There was no power in the charter to authorize it. It is not a nec-

essary implication from the specific powers granted, and is unreasonable. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided, reversed, and annulled, and it is now decreed that said ordinance No. 6647, Council Series, be declared null and void, and the prosecution of defendant thereunder be dismissed.

(45 La. Ann. 778)

RANDALL et ux. v. NEW ORLEANS & N.  
E. R. CO. (No. 11,092.)

(Supreme Court of Louisiana. May 8, 1893.)  
CARRIERS—EJECTMENT OF PASSENGERS—CONTRACT  
OF CARRIAGE—LIMITING LIABILITY—DISMISSING  
APPEAL.

1. The judgment was signed on plaintiffs' motion, in order that they might exercise their right of appeal. They did not thereby acquiesce in the judgment. The motion to dismiss the appeal on the ground of acquiescence is overruled.

2. Any regulation the carrier may adopt, the effect of which would be to unjustly release him from that utmost care and diligence the law requires is nugatory.

3. The conditions of a ticket may be waived by an authorized officer.

4. The written extension of the time to return on a ticket indorsed before it had expired will be given effect unless it is established that the extension was subject to certain conditions or contingencies.

5. The company had no right to eject the passenger.

6. In order that there may be a foundation for an action, the wrong and the damage must be in sequence. If not in sequence, the damage will not follow from the wrong; the wrong and the damage not being sufficiently conjoined as cause and effect.

7. Damages are allowed for the ejectment only.

8. As to the other causes alleged, it is rejected.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Albert Voorhies, Judge.

Action by M. O. Randall and wife against the New Orleans & Northeastern Railroad Company. From the judgment on a verdict for plaintiffs of one dollar and costs, they appeal. Modified and affirmed.

W. S. Benedict and James D. Seguin, for appellants. Harry H. Hall, for appellee.

BREAUX, J. The plaintiffs sue to recover damages on account of the death of their son. They allege that their son purchased from the defendant company a tourist ticket from Cincinnati to New Orleans and return on the 8th day of February, 1890, which expired by limitation on the 28th of February, 1890. That he arrived in New Orleans on the 10th of February, 1890. That, his business having detained him, he obtained an extension of his ticket from the proper officer to the 5th March, 1890, and left on the afternoon of the 1st March, 1890, in the enjoyment of his usual good health, strength, and mental vigor. That at Slidell, a station on defendant's line, he was unjustly ejected by the

conductor, in the night, in freezing weather, and left in a forlorn and helpless condition in an uncomfortable place. That while suffering and exposed to the inclemency of the weather, a freight train of the defendant company came along, at a late hour of the same night, from the conductor of which he obtained permission to return to New Orleans, where he arrived chilled and sick from his exposure, having engendered in his system the illness of which he died. That he was furnished by the division passenger agent, who had extended his ticket, with a letter instructing the conductor to acknowledge his extended ticket. That, without adding anything to the extended ticket, which had been refused on March 1st, he took passage on defendant's train for Cincinnati on the evening of March 3, 1890, and arrived at his destination on the night of the 4th March, 1890, still quite ill from the effects of the severe cold settling on his lungs, dating from this ejectment. That he continued in the performance of his duties up to the 17th March, 1890, at which time he was forced to his room, on account of his illness contracted during his exposure to the weather, and his ejectment on the night of March 1st. That the illness resulted in his death on the 30th March, 1890. That they have been damaged by the loss of their son in the sum of \$25,000. That "he suffered injury and damage to his feelings in the pain he endured, in the expenses necessarily incurred, and the necessary loss of his support during his illness, in his anxiety of mind, and in the great suffering he was compelled to undergo, in the sum of \$25,000, and that same has of right descended" to them. In its answer the defendant pleads the general denial. It admits the issuance of a ticket; that it was about to expire by limitation; and that as an act of personal consideration and favor it was extended. That, the extension not being usual, and the late R. B. Randall, plaintiffs' son, not identified, the conductor, under his general instructions not to recognize such tickets, so notified him. That he was treated with courtesy, and was provided with comfortable and free transportation back to New Orleans. That upon his return he expressed his satisfaction at the extension of his absence from his business. The case was tried twice before the court a qua. The first verdict was for plaintiff in the sum of \$5,000. Upon defendant's motion, alleging erroneous instruction by the court to the jury, a new trial was granted. The second verdict and judgment thereon were for \$1 and costs. From this judgment the plaintiff appeals.

#### The Facts.

The decedent's health prior to his last illness had been excellent. He was not addicted to any bad habit. He was a good son, and in every respect a worthy young man. He was the holder of a ticket bought as al-

leged. It was printed on his ticket that, in consideration of the reduced rates at which it was sold, he agreed that it should be void at the expiration of 20 days from the time it was issued; that he would not hold the line liable for damages on account of any statement by any employe not in accordance with the contract, and that no agent had any power to alter, modify, or waive any of these printed conditions. On the 12th day of February, 1890, the general passenger agent issued instructions to the conductors not to honor tourists' and other tickets, stamped across face, extending the limit. This was followed on the 27th of the same month by a circular informing the conductors that the previous instructions, those of the 12th current, relative to tickets stamped across their face, extending the limit, did not refer to those bearing indorsements made with the autographic signature stamp of the general passenger agent, but referred to indorsements made with stamps not bearing such signature. Young Randall's ticket was genuine. The time was extended on the 28th February by an officer duly authorized. This officer states that he was on friendly terms with the young man, and that the limit of the ticket was extended as an act of accommodation and favor; that he informed him that it was not customary, and exposed him to its refusal, for there were scalpers' tickets in circulation. The witness states that the young man said he would assume all responsibility. That upon his return the day after he had been ejected he met the witness, and spoke of the matter lightly, as one to which he did not attach any importance. The officer handed him a letter addressed to the conductor, directing him to honor the ticket in question. On the day the young man left for Cincinnati the second time he accompanied him to the station, and personally introduced him to the conductor, who became willing to honor the identical ticket he had refused on the evening of the 1st of March, as being a scalpers' ticket, i. e. the conductor, who had said to this young man as a passenger that he could get off at Slidell, and that he would write a request to the south-bound passenger train to return him to New Orleans, and who also said to him that he believed that he held a scalpers' ticket. The young man on the night he was ejected remained at the station house at Slidell about an hour. The depot agent at the place testifies that the room was comfortable; that he was with him the whole time; that he did not suffer from exposure. The young man returned to New Orleans as a passenger in the caboose of a freight train. Witnesses differ in their testimony, both about the station house accommodation and that of the caboose. The train left Slidell for New Orleans at 6:35, and made the usual time between the two places. The young man was at his parents' home at about 10 o'clock. It was a cold night. He complained of chilliness. The two days fol-

lowing he complained of a cold, and of indisposition. He left New Orleans on Monday, the 3d day of March, and reported to his employer for duty on March 5th. His cold was severe. He complained of illness. One of his employers states that a few days after his return he spoke to him at his desk; that he was suffering. He remonstrated. The young man answered he would feel better at work, particularly as his work had accumulated during his absence, and that he decidedly preferred to continue busy. His ailment increased from day to day, until the 17th of March he left work, and remained in bed to the day of his death, March 30, 1890.

Dr. J. T. Whitaker, of Cincinnati, was the first physician called. By his testimony, and that of the other witnesses who testified upon the subject, it is proven that the patient died of typhoid fever, and that that fever prevails in Cincinnati every fall and winter. There were no reported cases of that disease in New Orleans or Slidell at the time. This physician testifies that he saw the patient the first time. He took it to be at the end of the first week of the disease. "If that be true," he adds, "he must have received the poison of the disease two weeks previously. This is the period of incubation, during which time the patient is still able to go about, at the end of which time the symptoms become so marked as to confine him to his bed." In a letter to the father, plaintiff in this case, he states: "Your son had the disease in him when he left, and before he started on his journey here," i. e. before he left Cincinnati for New Orleans. The patient had been in bed a day or two before I saw him." Two other physicians gave medical attention to the deceased. Their testimony is to the same effect as that of Dr. Whitaker. The witness above examined states as his opinion that the disease was contracted in the ordinary way; that is, by drinking water contaminated with typhoid poison; and that it was not the result of exposure to cold or to the weather. Another of the attending physicians, Dr. Robert W. Stewart, testifies: "When I first saw Mr. Randall he was in the second week of typhoid fever, greatly prostrated, indifferent to his surroundings, with low, muttering delirium, high and continuous fever, weak and rapid pulse; in short, his condition was such as to make me give a 'probably fatal prognosis' upon my second visit. I knew nothing about 'exposure' until some time after his death. He had an undoubted attack of typhoid fever, and died of the exhaustion consequent upon this disease." Those physicians who testified as experts limited their testimony to the causes of typhoid fever, and to exposure to the weather as aiding or not the disease in its development. All except one of the number state that it is a germ disease. Dr. Stanford E. Chaille states that the disease is due to special causes located in a germ. In reference to the effect of ex-

posure the witnesses do not greatly differ. Only a few attach some importance to it as an aggravating cause, without, however, tracing any of the symptoms of the case to exposure to the weather. Dr. J. B. Elliott, of the exposure, says: "My opinion is he could not have had typhoid fever unless he had the germ in him before. If he was a healthy man at the time, I shouldn't think the exposure sufficient for the development of fever. My experience is that a man in a healthy condition is not affected by those exposures, and they don't, as a general rule, injure him. I repeat again that a man in perfect health,—that an exposure of that sort,—in my opinion, would not certainly produce disease. Question. What would it produce? Answer. It would have no effect whatever, in my opinion." There is other medical testimony in the record, of which the above is a general outline. Question by plaintiffs on cross-examination: "Assuming as a fact that a young man holding a through ticket to a point of destination designated thereon was ejected from a passenger train of cars of defendant, and forced to remain hours at a station not lighted nor heated, and then by sufferance enabled to return to his point of departure when the thermometer was below the freezing point, and then, on account of business arrangement, after having obtained such additional authority as could not be obviated by any conductor of a passenger train proceeding on his way on the following day to Cincinnati, what would be the effect of said exposure, under the circumstances, upon a young man, when typhoid fever was prevalent at point of arrival or place of his destination? Answer. None at all. It could have no effect at all." Dr. J. T. Davis, another attending physician, says: "Exposure may have a tendency to make the disease more dangerous." He does not refer to any exposure, or to any symptom establishing that in the case there was any evidence or symptom of exposure which acted as an aggravating cause of the disease.

#### Motion to Dismiss the Appeal.

The date of the verdict is June 3, 1891. It was followed by a motion for a new trial on the part of the defendant. The judgment was signed on motion of counsel for plaintiffs, and on his producing the verdict rendered in favor of plaintiffs on the 2d day of July, 1892. The defendant moves to dismiss on the ground that plaintiffs have acquiesced in the judgment. No action had been taken upon the verdict during more than a year. The plaintiffs desired to avail themselves of their right of appeal, a right it was not possible to exercise without the judgment. They, through counsel, moved to have it signed. Immediately after the judgment had been signed, they moved for the appeal, and obtained the order of the court. They directly applied for the signature of the judge, which

they might have obtained indirectly, without any question of acquiescence. By thus applying they have not subjected themselves to a dismissal of the appeal. Nothing shows that the purpose was to execute the judgment; to acquiesce, or to do aught save to appeal. In *New Orleans City R. Co. v. Crescent City R. Co.*, 33 La. Ann. 1273, the appellant acquiesced in the judgment by executing it. He took up the record to the United States circuit court, and moved for the dissolution of the injunction in that court, and thereby acquiesced in the order removing the case to that court. In *Barnwell v. Harman*, 6 Mart. (La.) 722, the jury found the issues submitted by the defendant, and on his motion the judgment was entered. These cases relied upon to dismiss the appeal did not present the question of the signing of a judgment only to exercise the right of appeal. The motion is overruled.

#### The Ejectment From the Train.

There was an error committed in ejecting plaintiffs' son. With his ticket, the limit of which had been duly extended by an officer of the company, he had acquired the right of a passenger on the train of the defendant company. Extending the limit of the ticket was a matter of business. Favor can play no part, and is of no avail to lessen defendant's responsibility. The willingness of the young man to incur risk of passing on the ticket at the time he applied for the extension, as expressed in conversation with the agent here, is not of such a character as to change the relations of the parties. "But where a person rides free at the invitation of an agent of the carrier, although the agent has violated his duty by inviting him, yet, if there is no collusion on his part with the agent to defraud the company, he is not deprived of his rights or remedies as a passenger as to injuries received through the negligence of the company." *Wood, Ry. Law*, p. 1039. The written extension indorsed on the ticket was conclusive of the holder's right. The general passenger agent issued a circular to conductors, notifying them that these tickets should be honored, and that previous instructions were never intended to apply to such tickets as the one in question; thus confirming that an error had been committed in refusing to consider them as binding. The local agent testifies that he was authorized to extend the time of return. Not only his authority is not denied, the allegations lead to but one conclusion, i. e. that he was duly authorized. The answer of defendant admits the issuance of a round-trip ticket as set forth in plaintiffs' petition, and that the ticket was about to expire by limitation. Not only the defendant does not disavow the authority of its agent, but in reality approves his act in extending the ticket before the limit had expired. Passing over all possible dif-

ferences in relation to the facts upon this point, and conceding all that the local passenger agent stated, the following propositions have arrested our attention: (1) The defendant did not in its pleadings rest any part of its defense upon any assumed responsibility of the passenger. (2) The local passenger agent was duly authorized to extend the time. The company is bound by his action. (3) The instructions did not refer to the ticket in question. It was properly stamped and indorsed. Having reached this conclusion in matter of the expulsion, we will affirm the jury's finding of facts in this respect.

The amount of the verdict shows that it must have been limited to the ejectment. The verdict will be amended so as to increase the damages for the ejectment exclusively.

There was nothing harsh about the ejectment. No indignity nor force. The passenger was given passage to return.

#### The Cause of Death is not Traced to the Ejectment from the Train.

All the experts except one testify that it is universally established that the cause of typhoid fever is a specific poison; a micro-organism known as the "typhoid bacilli." "The infection can be produced by the air we breathe, and by the water we drink," (Ziemssen, p. 56;) that it is insidious in its attacks. The course of the disease is characterized by certain stages. There is a stage of incubation, or the period elapsing between the reception of the fever poison into the system and the special manifestation of the disease. The evidence clearly shows that exposure will not produce typhoid fever; that in a case infected with the typhoid poison or germ the period of incubation may be affected by accidental causes, such as exposure producing cold, pneumonia, and other kindred diseases. It may increase the predisposition, and we are led to infer that in certain cases it may be that, without these causes, the poison would not take effect, but it would be going too far to hold that the poison would not have taken effect in this case without the exposure, which was not great. The attending physicians do not testify that there was the least manifestation of disease resulting from exposure, or that there was the least weakening of the system from any other cause than typhoid fever. We will not assume that the exposure was an inciting cause without testimony connecting the disease in its course with such a disease as exposure may produce, or without the least showing that the exposure had a lowering effect upon the system, or predisposed him to take the disease. If he had received the typhoid poison previous to his return to Cincinnati, the conditions on his return were not such, so far as the evidence discloses, to favor its development. They were not assisting causes. The case of Lap-

leine v. Steamship Co., 40 La. Ann. 661, 4 South. Rep. 875, is relied upon by plaintiffs' counsel, as in point. In that case the court found that the child was struck and hurt by the lumber which fell from a running car; that up to the accident she had been a bright, intelligent, active, and a thoroughly healthy child; that from the moment she was struck she became, and has remained, a constant invalid, seriously affected in mind and body, her nervous system shattered, subject to headaches, to attacks of nausea and vomiting, to frequent and sudden fainting or falling fits, emaciated, indisposed to physical or mental exertion, dragging her limbs in walking, and otherwise affected. "But for the accident," says the court, "she might never have suffered from the latent constitutional taint—that is, the inheritance of a hysterical diathesis,—if it existed. It is very certain that the child had never exhibited the slightest symptoms of hysteria, or the constitutional taint prior to the accident." The court traced the disability to the blow she received. The effect of a wound is generally traceable to its cause. In the case at bar the death is traced to one cause with which it does not appear that any other combined. Death, Ziemssen says, (page 132,) may occur in any stage of the disease. In cases not actually complicated it happens by far the most frequently towards the end of the third or the beginning of the fourth week. It rarely happens as early as the second week in uncomplicated cases. This work is highly recommended by the members of the medical profession. Considering that typhoid fever was prevalent at Cincinnati, where the young man died; that there is no evidence that the disease was engendered at the time he was ejected from the train; that damages must be the legitimate sequence of the wrong committed,—we are forced to the conclusion that the ejectment had no real share in producing the disease or in predisposing him to receive typhoid poison. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount of the judgment of the lower court from one dollar to two hundred and fifty dollars damages for the wrongful ejectment of plaintiffs' son from the train, and that in every other respect the judgment is affirmed, at appellee's costs.

#### On Rehearing.

(May 27, 1893.)

The application for a rehearing is confined to the demand for damages on account of the ejectment of plaintiffs' son from the train. The testimony does not bear out the charges of plaintiffs against the defendant presented in the application for a rehearing. The statements of defendant's witnesses, not contradicted, are consistent with truth. The relations between the local passenger agent and the young man Randall, were friendly. As a favor, his request was complied with; and

the return extended. The agent expressed apprehension that it would not be honored, as there were worthless tickets in circulation, that might cause his act in thus extending the ticket to be discredited. It is not proven that the conductor was rude on examining the ticket on the train. He, in error, it is true, declined to honor the ticket. The holder said he would return to the city, and apply to the local agent. He was offered facilities to return to New Orleans, which he accepted. Meeting the local agent on friendly terms, the occurrence was referred to without the least reproach. He called upon the agent socially, at his residence, the night before leaving for Cincinnati. The next day the agent accompanied him to the depot, and introduced him to the conductor of the train upon which he returned to his home in Cincinnati. The jury evidently concluded that an error had been committed in not honoring the passenger's ticket, not attended, however, with aggravating circumstances. We have reached a similar conclusion. The application for a rehearing and for a larger amount of damages caused by the ejectment is denied. Rehearing refused.

(46 La. Ann. 736)

**MOISE v. MUTUAL RESERVE FUND  
LIFE ASS'N. (No. 11,160.)**

(Supreme Court of Louisiana. May 15, 1893.)

**CONFLICT OF LAWS — APPOINTMENT OF TUTOR —  
ADMINISTRATION — INSURANCE — ASSIGNMENT OF  
POLICY.**

1. A tutor of minor heirs appointed in Louisiana, whose father was domiciled and died in Kentucky, has no powers of administration over property not located in this state.

2. A debt due by a New York debtor to a Kentucky creditor does not acquire a situs in this state because the nonnegotiable evidence of the debt is found here.

3. A Louisiana court has no valid authority to appoint an administrator to a person who was domiciled and died in Kentucky, and who left no property in this state.

4. When a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Suit by W. H. Moise, tutor, against the Mutual Reserve Fund Life Association on a policy of insurance. Suit dismissed. Plaintiff appeals. Affirmed.

D. B. H. Chaffe and Moise & Cahn, for appellant. Bayne, Denegre & Denegre, for appellee.

FENNER, J. Sydney L. Guyol, a resident and citizen of Louisville, Ky., took out a policy of life insurance for \$5,000 with the defendant company, a corporation domiciled in New York. By the terms of the policy the loss was "payable to the executors or administrators of said member." Guyol died at his home in Kentucky. He left a surviv-

ing widow and certain minor children by a first marriage. After the death of his first wife, these children had been sent by Guyol to their maternal relatives in New Orleans, and were here at the date of his death. The present plaintiff, their maternal uncle, applied to the civil district court of this parish, and was appointed and confirmed as tutor of said minors. An inventory was taken, which showed no other property except the policy of insurance above referred to and another policy in a different New York company. The defendant company does business in this state through an agent, who, as required by the law of the state, represents it for purposes of suit in this state. The tutor, being in possession of the policy of insurance, brings this suit thereon against the defendant company through its aforesaid agent.

The defendant filed exceptions of no cause of action, and lack of capacity in plaintiff to stand in judgment because the policy was payable to the executors or administrators of Guyol, who was domiciled and died in Kentucky, where alone his succession could be opened, and a judgment in favor of plaintiff would not be res adjudicata against an administrator of Guyol appointed in Kentucky. These exceptions were properly maintained, and plaintiff's suit dismissed. We have no concern with the propriety or validity of plaintiff's appointment as tutor of the minors, nor with his right and power, in that capacity, to take possession of and administer the estate of their deceased parent, whose heirs they are, in this state. Guyol was domiciled and died in Kentucky, and, so far as appears, he left no property, real or personal, in this state. This policy of insurance is a mere nonnegotiable evidence of a debt due by a New York debtor to a Kentucky creditor. The appointment by the insurance company of an agent in this state through whom it may be sued, does not change the domicile of the company. Under no possible view can such a debt be said to have a situs, real or fictitious, in this state. There is no possible ground for an administration of Guyol's succession in this state. The policy, by its terms, is payable only to Guyol's "executors or administrators," to whom alone is the company bound to pay. Under the facts of this case, the courts of Louisiana have no valid authority to appoint such an administrator, and, if they had, by reason of presence of other property in this state, his authority would not embrace the administration of this foreign asset, which belongs to the domicile of the decedent. The alleged assignment of the policy by Guyol need not be considered, because the policy contains an express clause that no assignment "shall be valid without the consent of the association, and upon such terms as shall be approved by its secretary or assistant secretary," and no such consent is alleged or proved. Other matters

alleged are impertinent to the issue, and need not be discussed. The company was not required to prove that Guyol had creditors. It is entitled and bound to stand on its contract, which obliges it to pay only to Guyol's "executors or administrators," and, whatever powers plaintiff's commission as tutor might confer on him over property situated in this state, they cannot embrace any power to administer or collect this debt due by a New York corporation to a decedent who was domiciled and died in Kentucky. Judgment affirmed.

(45 La. Ann. 759)

LOUISIANA LAND & FISHERIES CO.,  
Limited, v. GASQUET et al. (No. 11,165.)  
(Supreme Court of Louisiana. May 8, 1893.)  
TRESPASS—GENERAL DENIAL POSSESSION—STATE  
PROPERTY—SALE OF OYSTER BEDS.

1. In an action for trespass, under the general denial, defendant can show that the plaintiff was not the owner, and not the possessor, of the property.

2. Possession alone will support the action, but where property is owned by the state, which, it has declared, it holds for the common benefit of all its citizens, one citizen cannot obtain possession, so as to exclude another, except under regulations prescribed by the state.

3. Act No. 110 of 1892 prohibits the sale, by the register of the land office, of natural oyster beds in the bays, lakes, bayous, inlets, and coves bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of the state. No one can acquire title, therefore, from the state, of natural oyster beds located in any of the above-described waters.

(Syllabus by the Court.)

Appeal from district court, parish of Plaquemines; A. E. Livaudais, Judge.

Action of trespass brought by the Louisiana Land & Fisheries Company, Limited, against Marcellus Gasquet and others. Judgment, from which both parties appeal. Reversed.

Leovy & Blair and James Wilkinson, for plaintiff. E. Howard McCaleb and Edwin H. McCaleb, for defendants.

MCKENERY, J. The plaintiff company alleges that it is the owner of certain sea-marsh land, acquired from the state, in pursuance of Act No. 86 of 1878, by Robert S. Leovy, and by said company, from Leovy, on 17th March, 1892. Petitioner further alleges that for the purpose of creating oyster beds, and cultivating and selling oysters, the plaintiff company has planted on said lands large quantities of oysters, and that said oyster beds have grown and increased in value since the oysters were planted thereon; that the defendants illegally combined and conspired for the purpose of willfully slandering petitioner's title to said lands, and have denied that the plaintiff is the owner of the same; that they have taken and removed oysters from said lands, and, pretending to

some legal right on said lands, have combined for the purpose of taking plaintiff's oysters, planted on the company's property, and have publicly stated that, on 1st September, following the filing of the suit, they would take oysters from the company's beds, and sell the same. The plaintiff company alleges damage to the amount of \$1,000, and prays, also, for an injunction restraining defendants from trespassing upon the lands claimed by the company, and prays to be declared the legal and true owner of said lands, and be quieted in the title thereto. The injunction issued as prayed for. The defendants filed peremptory exceptions, and answered. Some of the exceptions need no notice, and others may be with propriety referred to the merits. Their defense is that the locus in quo where the trespass was said to have been committed was the bay Conquette and the bayou Jacques, arms of the sea, where the tide ebbs and flows, and that they are navigable waters and are not susceptible of private ownership; that said bays, Jacques and Conquette, being natural oyster beds, were reserved from sale, to be held by the state for the common benefit of all its citizens, for the purpose of fishing and catching oysters. There was, with these special defenses, a general denial. The defendants also filed a plea in reconvention for damages. There was judgment decreeing the plaintiff to be the owner of the sea marsh described in his petition, except the bay Conquette, which was declared to be the property of the state. The injunction was dissolved, plaintiff's demand for damages rejected, and the defendants' reconventional demand dismissed. The defendants appealed, in which the plaintiff joins.

Plaintiff objected to all evidence showing that bay Conquette was not a part of the purchase from Leovy, who acquired from the state, on the ground that the state register of the land office had exclusive power to determine the extent of plaintiff's purchase, and also that defendants could not set up special defenses under the general denial. The defendants do not pretend to question plaintiff's title to the sea marsh, but contend that the bay Conquette, where the trespass was alleged to have been committed, formed no part of plaintiff's lands, as it was public property, incapable of private ownership. They were assuredly entitled to show this as a defense. In trespass *quare clausum fregit* it is always competent for the defendant to show that the plaintiff was not the possessor of the locus in quo. The locus in quo was alleged by defendants to be the property of the state, declared to be the common property, by Act No. 110 of 1892, of all the citizens of the state, to which they had the right to resort for the purpose of taking oysters. If their contention is well founded the plaintiff could not acquire ownership of the property, nor could it acquire adverse posses-

sion of the same. No one citizen can acquire, except under the regulations made by the state, an adverse possession, so as to exclude another. This reasoning will apply to both objections. The whole controversy is in relation to the bay Conquette, where plaintiff planted oysters, and where defendants are said to have committed the trespass. It will therefore be unnecessary to pass upon plaintiff's title to the sea marsh claimed by the company, as no question is raised concerning it. Besides, the record shows that the confirmation to this part of plaintiff's property has not been made by the federal government to the state of Louisiana. The testimony shows that the bay Conquette has an average depth of 1 to 2½ feet, which is the measure of the ebb and flow of the tide. It receives its water through the bayou Jacques, and is navigable for luggers of seven tons' burden during the highest tide. But it is landlocked, in the interior of the state, and is in fact an inlet bordering on the Gulf of Mexico, and a "part of the Gulf of Mexico within the jurisdiction of this state." R. S. Leovy, from whom plaintiff purchased the land, acquired the same from the state September 28, 1892, after the passage of Act No. 110 of 1892. Section 1 of the act provides "that all the beds of the rivers, bayous, creeks, and lakes, coves and inlets, bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this state, shall continue and remain the property of the state of Louisiana, and may be used as a common by all citizens of the state for the purpose of fishing and taking and catching oysters and other shellfish, subject to the reservations and restrictions hereinafter imposed; and no grant or sale or conveyance shall hereafter be made by the register of the state land office to any estate or interest of the state in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not; and the citizens of this state shall have the exclusive privilege to fish or take oysters in any natural oyster bed or shoal, subject to the restrictions hereinafter imposed." Section 2 provides "that the rights of the owner or occupant of land on any of the shores or bays, bayous or inlets, and lakes shall extend to ordinary low-water mark; but it is not intended thereby to deprive them of the privilege of bedding or planting oysters, extended to all citizens of this state under the several sections of this act, and subject to the restrictions hereinafter imposed." The above act repeals all acts on the same subject-matter. But if it be contended that the patents issued in September, 1892, in pursuance of a previous location of the sea marsh, Act No. 106 of 1886 will apply with greater force, as the second section of said act is in the nature of a proviso relating only to those who were the owners of land prior to the passage of said act.

The question, then, presented, is one of fact,—whether or not the bay Conquette is a natural oyster reef or bed. There are several reefs in the bay, and the testimony is almost unanimous, by witnesses for plaintiff and defendant, that these reefs are hard, shell bottoms,—ideal locations for the planting and growth of oysters. For many years it was the resort of the residents of the Buras settlement in Plaquemines parish for a supply of oysters for domestic use. Many were also taken for the purposes of sale. Defendants' witnesses are unanimous in stating that oysters existed on the reefs in considerable quantities when plaintiff took possession of the reef on which the company planted its oysters. Plaintiff's witnesses state that there were few oysters on the reefs, and that they were scattered. The preponderance of testimony is with the defendants, and, even according to plaintiff's witnesses, these reefs were not exhausted. There were oysters there in sufficient quantities, if undisturbed, to replenish the reefs. To protect such natural oyster beds, and to prevent their exhaustion, and to provide for the increase and growth of oysters upon them, was the object contemplated by Act No. 110 of 1892, by prohibiting their sale, and regulating their use in the hands of the state. We agree with the district judge that the testimony shows that the defendants have not slandered plaintiff's title, except as to the ownership of the bay Conquette, and that there is also an absence of testimony to show the quantities of oysters taken by the defendants, or that those taken could be identified as the oysters planted by plaintiff. Although plaintiff's oysters were planted in a public place, this did not authorize defendant to appropriate them. The proof is wanting as to the quantity and identity of oysters taken, but the inference is that the defendants appropriated some of plaintiff's planting. They are not entitled to damages for the dissolution of the injunction. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to dissolve the injunction entirely, restricting the decree to the locus in quo, the bay Conquette, which was never sold by the state to R. S. Leovy, and by him to plaintiff. In all other respects the judgment is affirmed; plaintiff to pay costs of appeal.

On Rehearing.

(May 31, 1893.)

The defendants, without applying for a rehearing in this case, suggest an amendment of the decree so as to apportion the costs in the lower court. It will be necessary to reverse the decree heretofore rendered. It is therefore ordered, adjudged, and decreed that the decree heretofore rendered be set aside, and in lieu thereof the following be entered: It is therefore ordered, adjudged, and decreed that the judge



ment appealed from be annulled, avoided, and reversed, and plaintiff's demands be rejected, and the injunction dissolved. It is further ordered that the reconventional demand of defendants be rejected; plaintiff to pay costs of appeal and in the lower court on principal demand, and defendants to pay costs in lower court on reconventional demand.

(45 La. Ann. 928)

STATE v. WEST. (No. 11,274.)

(Supreme Court of Louisiana. May 15, 1893.)

CRIMINAL LAW—CONFESSION—TAKING OF EXCEPTIONS—VERDICT OF "GUILTY, WITH MERCY"—NEW TRIAL—MOTION—PRESENCE OF DEFENDANT.

1. Evidence that a person other than defendant confessed that he himself committed the crime is inadmissible; it being hearsay, and irrelevant. *State v. West*, 12 South. Rep. 7, 45 La. Ann. —; *Gray's Case*, 1r. Cir. 76; *Welsh v. State*, (Ala.) 11 South. Rep. 451; *People v. Hall*, (Cal.) 30 Pac. Rep. 7.

2. Objections cannot be brought before this court through bills of exceptions taken for the first time on a motion for a new trial, which should have been reserved during the progress of the trial itself.

3. A verdict of "guilty, with mercy of the court," will be held to be one of "guilty of manslaughter," in a case where the accused, having been indicted for murder, and convicted of manslaughter, had succeeded in having the verdict and sentence set aside, and was placed on trial a second time, under the original indictment, but with an announcement from the district attorney and a charge from the court that the prisoner was only on trial for manslaughter. Accused will not be listened to in claiming (for the purpose of setting aside the verdict) that the verdict was one of "guilty of murder," and therefore not responsive to the charge actually advanced by the state.

4. The presence of the defendant in court is not essential either at the trial of a motion for a new trial or one in arrest of judgment. The fact that on the trial of a motion for a new trial testimony is taken in behalf of the defendant does not alter the case. There may be instances where counsel might desire the attendance of the client. In such cases counsel should so suggest to the court.

(Syllabus by the Court.)

Appeal from district court, parish of Lafourche; L. P. Caillouet, Judge.

Arthur West, having been convicted of manslaughter, appeals. Affirmed.

Beattie & Beattie, for appellant. M. J. Cunningham, Atty. Gen., and M. J. Cunningham, Jr., for the State.

NICHOLLS, O. J. The defendant was indicted for the murder of Thomas Lyall, at the September term in 1892 of the district court for Lafourche. He was tried, found guilty of manslaughter, and sentenced to the penitentiary for one year. He appealed to this court. On appeal the verdict of the jury and the judgment of the court therein were set aside, and the case remanded. 12 South. Rep. 7. He was tried a second time, and again sentenced to hard labor in the state penitentiary at Baton Rouge for the term of one year. From this judgment he has appealed, relying upon objections urged in

three bills of exceptions, a motion in arrest of judgment, and an assignment of error.

The first two bills cover the same ground, and are to the refusal of the district judge to allow certain testimony to be taken, the object of which, the bills declare, was to show that one James Baptiste had been suspected of killing Thomas Lyall; that he had been arrested upon a warrant issued on an affidavit made against him; that he had resisted arrest, saying he would not be arrested, and sent to the penitentiary for the said killing, and other things admitting the killing; that in resisting arrest the said Baptiste was shot, and afterwards died from the wounds so received; and that it was only after the death of the said Baptiste that the defendant, West, was arrested for the murder of said Lyall. The objection urged by the state, and sustained by the court, to the introduction of this testimony was that it was irrelevant and hearsay. Testimony of this character was by the court declared to be inadmissible when the case was first before us, as being hearsay. Defendant on the last trial offered it as *rem ipsam*. In his brief it is said: "The object of it was not to prove the truth of the statements made by Baptiste, but to prove the fact of his having made them to show the jury his belief and opinion as to the party who fired the shot that killed Lyall, and consequently to raise and substantiate any doubts in their minds as to the guilt of the defendant." We think the ruling of the court was correct. The testimony was irrelevant. In *Welsh v. State*—an Alabama case reported in 11 South. Rep. 451—the court said: "The proposed testimony of the witness Warren Lancaster to the effect, or which would have tended to show, that one Lee Lancaster had admitted or confessed to the witness that he (Lee Lancaster) killed Will Welsh, for whose murder defendant was being tried, was the merest hearsay, wholly irrelevant and incompetent, and the court properly excluded it from the jury. 3 Brick. Dig. p. 287, par. 592; *State v. Duncan*, 6 Ired. 236; *State v. Haynes*, 71 N. C. 79." In *People v. Hall*, (Cal.) 30 Pac. Rep. 7, defendant and one Kingsberry were arrested for an alleged burglary at the same time and place, and by the same persons, and while under arrest they attempted to escape, and were fired upon by their captors. A physician was sent for to treat their wounds, and Kingsberry died from the effects of his wounds before any complaint was filed against either of the parties. In his own behalf defendant offered to prove that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized he was mortally wounded, was on the point of death, and had given up all hope of getting well; that he was conscious of death, and that, thus having a sense of impending death, and without hope of reward, he made a full, free, and complete confession to said physician in

relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it, and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter. This evidence was objected to and excluded. Rectifying these facts, the supreme court said: "The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declarations is mere hearsay evidence, and is always excluded, whether the person making them be dead or not;" citing *Whart. Crim. Ev. (9th Ed.)* par. 225; *Greenfield v. People*, 85 N. Y. 75; *Snow v. State*, 58 Ala. 372; *Lyon v. State*, 22 Ga. 400; *Kelly v. State*, 82 Ga. 444, 9 S. E. Rep. 171. Stephen, in his *Digest of the Laws of Evidence*, (article 22), refers to *Gray's Case*, Ir. Cr. 76, as maintaining the same position, and that such evidence was irrelevant.

The third bill is to the action of the court in overruling a motion for a new trial made by the defendant on the ground "that the verdict of the jury was contrary to the law and the evidence, and that it was rendered in opposition to the law in such cases made and provided, and in opposition to the charge as to the law laid down by the judge, and that a continuance applied for by the district attorney and granted by the court was inadmissibly and illegally granted for certain reasons. The statement of the court appended to this bill is that the new trial was refused because it was of opinion that there was no error in the order granting the continuance, and because, even if there had been error, no exception was taken at the time to the ruling of the court, but, on the contrary, the accused, through his counsel, consented to go to trial, and did go to trial, under an agreement to use the testimony of the absent witnesses of the state, taken before the committing magistrate in the presence of the accused. The court considered that the verdict of the jury was responsive to the charge of the court, the court having distinctly instructed them that the accused was on his trial, and could only be tried for manslaughter; that that was the only charge against him, and that the only verdict they could find against him was one of guilty or not guilty, as the case might be." Where, during the progress of a trial, under the rules of practice, objections are to be raised and bills of exception reserved as occurrences take place by which a party conceives himself to be aggrieved, and he fails to make such objections and reserve such bills, he cannot, after verdict, for the first time raise such objections, and, through bills of exception then taken, hold the position which he would have done originally. The lost ground cannot be regained. The record bears the court out in its statements, and its ruling was correct.

Defendant moved to arrest the judgment

for the reason that the verdict is illegal on the face of the record, and is in no wise responsive to the matters at issue herein, in that the verdict is written upon an indictment for murder and finds respondent "guilty, at the mercy of the court," when in truth and in fact your respondent was simply on trial on a charge of manslaughter, he having been hitherto acquitted of the charge of murder found and contained in the indictment found against him, and on which the present verdict is written. The court overruled this motion, and sentenced defendant to one year's imprisonment, as has been stated. Defendant says of this motion: "It is based on the ground that the verdict of guilty, with the mercy of the court, is the verdict found against the accused on the last trial, and that this verdict is written upon an indictment for murder, thus appearing to convict the accused unqualifiedly of murder, when, in point of fact, having been once tried under the same indictment, and found guilty of manslaughter, he could only have been tried for, and found guilty of, manslaughter." "True it is that the judge charged the jury that they could find him guilty of only manslaughter, and true it is that some days previous to the trial there was an entry upon the minutes in which it is stated the accused would be tried only for the crime of manslaughter; but the jury in this case had no reason to know of such entry, and, looking at the verdict as it is written, it is evident that the jury were heedless of the charge of the judge." We do not understand defendant's counsel to claim that when this case was remanded by us to the lower court for a new trial it was necessary for the state to frame a new indictment for manslaughter against the defendant, and to arraign and try him upon that indictment. We understand him to recognize that he was properly tried under the original indictment and arraignment, and that the effect of the first verdict was, at most, to entitle him under the indictment for murder to be tried for manslaughter, and to only contend that when the jury returned into court with a verdict it should have been specifically "guilty of manslaughter," and not "guilty," which he claims is the verdict under the indictment for murder. On the 8th of March, 1893, we find the following minute entry: "*State of Louisiana v. Arthur West*. No. 1,232. Indictment for murder. The accused, Arthur West, being present in court, and represented by his counsel, Beattie & Beattie, Esqs., on motion of the district attorney and by consent the court ordered that the trial of this cause be fixed for Monday, March 12, 1893, the district attorney stating in open court that he would try the accused on the original indictment for murder, but only on the charge of manslaughter. In opening his charge the district judge used this language: "The accused is on trial for the

manslaughter of Thomas Lyall. An inspection of the indictment shows that he was originally charged with murder, but on a former trial he was acquitted of that crime, and he is now only charged with manslaughter, and can only be tried for that crime." Having made this statement, he, throughout the whole of the balance of the charge, confined himself to instructing them on the law of manslaughter. Defendant's counsel concedes that he was on trial for manslaughter, the district attorney at no time took position otherwise, the district judge in his charge so advised the jury, and in his sentence he has acted on that fact as unquestionable. The jury was thoroughly informed of the issue it had to pass on, and its verdict cannot reasonably be held to apply to any other than that submitted to it. No one but the defendant himself insists that he was convicted of murder. He cannot successfully take such a position to set aside the verdict. There is no significance in the fact that the verdict was written upon the indictment; no one could misunderstand its purport. It could have been returned orally, and in the same words. Its meaning was not changed from what it would have been had it been so rendered. Defendant assigns as error that during the trial of the motion for a new trial wherein testimony was adduced for and against him, he was not in court, but was confined in the parish prison, and was thus refused the privilege of being confronted with the witnesses, in violation of article 8 of the constitution of the state; and, further, that upon the trial of the motion in arrest of judgment he was not present in court, but was confined in the parish prison. The record shows that testimony on behalf of the defendant was taken on the motion for a new trial, but no witnesses for the state appear to have been placed on the stand. We do not think that any constitutional provision was violated by defendant's absence at that time. This court has on several occasions declared that the presence of the accused on the occasion of trials of motions for a new trial and in arrest of judgment was not essential. Defendant finds in the fact that, on the trial in this case of the motion for a new trial, testimony was taken, a reason for making a distinction between it and the cases cited. It is true there may be instances where the attorney of an accused might desire the presence of his client, but such cases happening it would be a very simple matter for him to make a suggestion to that effect to the court. A request to have the defendant brought into court would certainly not be denied. In *State v. Simien*, 38 La. Ann. 924, where the accused claimed he was entitled to be present on the trial of a motion on his behalf for a continuance, at which it was asserted testimony was taken, the court said: "The transcript fails to show that any testimony was taken on the day mentioned

on an application for an attachment for a witness. Even had it been shown, and the prisoner was absent at the time, it was a proceeding of that character that his presence thereat was not essential;" citing *State v. Clark*, 32 La. Ann. 558, and *State v. Somnier*, 33 La. Ann. 237. We see nothing in the record which would go to show that the prisoner was refused the privilege of being present. Had he asked to be present, there is no ground for assuming he would have met with a refusal. For the reasons herein assigned it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(45 La. Ann. 376)

SCHNEIDER et al. v. BURNS. (No. 11,236.)  
(Supreme Court of Louisiana. May 15, 1893.)

ADMINISTRATION OF MINOR'S PROPERTY—CERTIFICATE—EFFECT AS MORTGAGE—ERASURE FROM RECORD—ACCOUNTS.

1. The recording in the office of the recorder of the certificate of the clerk of court of the amount of the minor's property, according to the inventory on file in his office, operates as a legal mortgage, in favor of the minor, for the amount therein stated, on all the immovable property of the tutor, as a security for his administration, from the day of his appointment until the liquidation and settlement of his final account.

2. This mortgage is not only to cover administration of the particular money or property included in the inventory, but covers the eventual balance which will be due by the tutor at the close of the tutorship. All the property owned by the tutor during the tutorship is struck by this mortgage, whether acquired by him before or after the receipt of particular funds, and whether it had been sold prior to such receipt, unless said property had been withdrawn from the operation of the general mortgage by restricting the latter upon specific property under the statutes specially providing for and governing such cases.

3. The inscription of the clerk's certificate, having been once made, cannot be erased from the records until the close of the tutorship, although its effect may be restricted to particular property under conditions specially affixed by law.

4. Accounts of tutorship, presented during minority, and homologated contradictorily with the undertutor, are not final judgments, fixing absolutely the relations between tutor and pupil up to a certain date. They are provisional in character, merely *prima facie* correct, and subject to revision and correction up to the final account of tutorship. When revised and corrected the amount actually due is supported by the mortgage resulting from the inscription originally made.

5. There is no law authorizing the absolute release of the tutor's personal responsibility or of the tutor's property from the legal mortgage securing that responsibility until the termination of his functions.

(Syllabus by the Court.)

Appeal from district court, parish of Orleans; Frederick D. King, Judge.

Suit by Elizabeth Schneider and others against James Burns to compel defendant to accept property adjudicated to him at pub-

\*Rehearing refused May 29, 1893.

lic sale. Judgment for plaintiffs. Defendant appeals. Reversed.

H. C. Cage, for appellant. James Timony, for appellees.

NICHOLLS, C. J. Plaintiffs allege that at a public sale made by Baumgarten & Fredericks, auctioneers, on the 25th January, 1893, certain property described in their petition was adjudicated to James Burns for the price of \$2,200; that they are the owners of said property; and that they tendered a good, unincumbered title to said adjudicatee, but that he refuses to accept the same, and to comply with the adjudication. They pray that he be cited, and that they have judgment ordering him to comply with the adjudication, and pay the price thereof, and, on his refusal to do so within 10 days from judgment, that they have execution against him for \$2,200, with interest from January 25, 1893, and costs. Defendant pleaded first the general issue. Further answering, he said that the property described was duly exposed at public auction, and was adjudicated to him at the price and sum of \$2,200, as the last and highest bidder; that a title was offered him to said property, but he specially denied that the same was clear and unincumbered, for the reason that Mrs. Elizabeth Schneider, one of the vendors, was married to one Andrew Schneider, who died on the 8th day of November, 1890, leaving separate and community property in the parish of Orleans, and leaving a minor child, Antonia Schneider, aged about 11 months, being the issue of the marriage between him and said Elizabeth Schneider; that the said succession of Schneider was opened in the civil district court for the parish of Orleans; that an inventory was taken, which showed the said minor's interest to amount to the sum of \$1,440; that a certificate of said inventory was filed in the mortgage office of the parish of Orleans upon the application of Mrs. Schneider to be confirmed and qualified as natural tutrix of said minor, and said inscription became a general mortgage upon all the property of said Mrs. Schneider, and especially upon the piece referred to, for the amount shown by said certificate, there to remain and act as such until the final settlement between Mrs. Schneider and her said pupil; that Mrs. Schneider has illegally and wrongfully caused said minor's mortgage to be nominally canceled and erased from the books of the recorder of mortgages, and, notwithstanding said illegal and wrongful cancellation, said minor's mortgage remains in full force and effect, and the property tendered to respondent is liable, under said mortgage, to secure and make good to said minor whatever sum or sums may be due to said minor upon final settlement with the tutrix. He therefore prayed that the demand of plaintiffs be rejected. The case was tried upon

an agreed statement of facts, which was as follows: "(1) Mrs. Elizabeth Schneider filed an attested account, which is signed by the undertutor, and which was duly homologated by the judgment of the court. This account shows that the tutrix owed the minor nothing, the succession of Andrew J. Schneider being insolvent. (2) Mrs. Elizabeth Schneider took a rule upon the undertutor and the recorder of mortgages, alleging the facts as herein stated in No. 1 of the statement of facts, 'to show cause why the inscription in the mortgage office resulting from the filing of the clerk's certificate of the amount of the inventory should not be canceled,' and the rule was made absolute, and the inscription canceled. (3) The paternal grandmother of the minor is aged, and when she dies there will probably devolve upon the minor an inheritance amounting to about one thousand dollars." The district court rendered judgment in favor of plaintiffs, against defendant, as prayed for by them, and defendant has appealed.

The proposition contended for by the plaintiffs is that "if at any period between the appointment of a tutor and his discharge, at the termination of his trust, he should file an account which, after due proceedings, would be homologated contradictorily with the undertutor, by which it would appear that at the date of filing and homologation there was nothing due by the tutor to his pupil, and nothing for which he was then responsible, the tutor would be authorized to ask a subsequent decree, on proceedings also taken contradictorily with the undertutor for the erasure from the mortgage records of the inscriptions which up to that time evidenced a mortgage in favor of his ward, and a judgment declaring the nonexistence of any mortgage on his property; that a decree to that effect would enable the tutor to sell his property, and a purchaser from him to acquire his property free from the minor's mortgage." The proposition is not sustainable in law. It rests upon false premises and false assumptions. In the first place the account which is rendered by a tutor pending the tutorship, and which may be homologated contradictorily with the undertutor, is not a final judgment, and does not definitively fix the situation or condition of affairs even up to the date at which it is rendered. It is at best only *prima facie* correct, and is subject to be reopened by the minor when he becomes of age, and is subject to amendment or correction to the full extent of error. In *Stafford v. Villain*, 10 La. 329, this court said: "Tutors under an order of the court of probates must, and without it may, exhibit an account of their administration, and the court may make certain orders thereon, but nothing authorizes it to homologate such accounts so as to render them conclusive and binding on the minor; for the law gives the latter the right, until the

expiration of a certain delay after he becomes of age, to examine and contest all the accounts of his tutor. The court, therefore, can in no case relieve and discharge the tutor from his responsibility." The first error in plaintiffs' proposition is in ascribing to a provisional account, homologated during the tutorship, the effect of determining absolutely the relative position of tutor and ward at any given fixed period. The next error is in assuming that the inscription of the certificate of the district clerk furnished by him in compliance with article 3351 of the Civil Code, showing the amount of the minor's property according to the inventory on file in his office, operates a mortgage in favor of the minor for the amount therein stated, to secure his faithful administration of the tutor for the property thereon stated, and that, upon showing that that particular property or money has been legally expended or accounted for, the mortgage, being a secondary or accessory obligation for that particular sum or property, falls and disappears, leaving the future rights of the minor to be secured as they arise by a new inscription as to their existence to be made by the tutor or undertutor. It has been repeatedly held by this court that the legal mortgage of the minor was not for the accounting of any particular sum of money or property, but for his faithful administration during the whole period of the tutorship. Speaking of this general mortgage the court in *Barnard v. Erwin*, 2 Rob. (La.) 407, said: "A general mortgage, says the Code, is that which binds all the property, present and future. A special mortgage is that which binds only certain specified property. A mortgage may be stipulated for the fulfillment of any obligation whatever,—even for the completion of an act. It may be given for an obligation which has not yet risen into existence, as where a man grants a mortgage by way of security for indorsements which another promises to make for him. It was clearly the intention of the legislature to secure to the minor the faithful administration of the tutor up to the moment of his final discharge, and therefore the amount secured by the mortgage is not necessarily to be ascertained at the moment the mortgage was executed. If other sums should come into the hands of the tutor the property mortgaged would stand as security. The amount found due by a settlement in the court of probates during the minority of the pupil is not conclusive upon him. It may be examined into afterwards, on settling the tutorship, and rendering a final account. It was as clearly the duty of a faithful tutor to correct such an error as was discovered in this case (an error in the tutorship account) as it would be to recover from a third person the same amount discovered to be due. In both cases the sum found to be due is the property of the minor, and its administration, and final payment to the

pupil, at his age of majority, are secured, in our opinion, by the mortgage in question." And in *Holmes v. Hemken*, 6 Rob. (La.) 53, the court said: "The mortgage of a minor can be enforced against a tutor only at the termination of his functions in one of the modes prescribed by law." In *Skipwith v. Glathary*, 34 La. Ann. 33, the court, discussing the effect of the constitution of 1868 upon minors' mortgages, said: "It becomes necessary to determine whether the general mortgage resulting from the registry of the inventory extract secured all rights of the minors,—as well those in existence at the date of the inventory, and therein specified, as those accruing thereafter. \* \* \* The convention did not propose to destroy existing laws and jurisprudence on the subject-matter, but merely to render express a mortgage which was previously tacit or occult; the registry being intended solely to notify third parties of the existence of the tutorship, and of the eventual liabilities of the tutor at the end of the tutorship, in order that, when contracting with the tutor, they might be on their guard. The requirement of registry was intended for the protection, not only of third persons, but also of minors; but not beyond the amount so recorded, in any event, except by new or additional inscription. The law has always been, and is, that minors have a legal mortgage upon the property of their tutors from the day of their appointment until the liquidation and settlement of their final account. Civil Code, art. 3314. That mortgage, now, to exist, must be recorded, and takes effect against third persons only from the time of inscription. The registry does not liquidate the amount appearing in it, but warns such parties, that on a settlement with their tutors the minors' claim may rise to the amount stated in the registry. The mortgage formerly existing, without registry, in favor of minors, has been held to cover, not only amounts due, and the liabilities of the tutor at the time of the appointment, but also the rights of the minors accruing subsequently, the mortgage being allowed as a security for the tutors' administration from the time of qualification, and continuing until the liquidation and settlement of their account, when it is ascertained what amount is due to the minor." "The mortgage, which springs into existence at the date of the tutorship, and of the registry of the certificate or bond, has this remarkable feature: That it is assimilated to, and operates like, the conventional mortgage given to secure obligations which have not yet risen into existence, (Rev. Civil Code, art. 3292,) and affects third persons, who have had knowledge of it, so as to subject property incumbered by it, when it is necessary to do so for the satisfaction of the rights of the minors, as liquidated and found at the end of the tutorship."

We think it beyond question that the mortgage resulting from the inscription of the certificate of the clerk was not intended by the lawmakers to represent simply a debt then due to the minors, but was to secure, up to the amount mentioned, the faithful administration of the tutor, and to cover his eventual liability when the tutorship shall terminate, and a settlement with his ward shall be made. Succession of Kuntz, 34 La. Ann. 855. We are of the opinion, likewise, that from the date of the inscription up to the closing, finally, of the tutorship account, the minor's mortgage, up to that amount, will strike all of the immovable property of the tutor owned by him during the tutorship, whether it was acquired before or after the receipt by him of particular funds, and whether at the time of that receipt he was still owner of the property, or had already sold the same. What we here say does not, of course, extend to cases in which the tutor has been permitted to restrict the legal mortgage to specific property by the giving of a special mortgage. Cases of that kind would fall under the operation of the statutes providing for and regulating them, and would not be controlled by general principles. We can only apply such rules to cases before us whose actual facts fall under the statute. The proceeding is statutory, and we cannot act outside of the precise terms of the law. We cannot reason or act by analogy. When, therefore, the plaintiff argues, as we understand her to argue, that, had the account which in this case has been homologated shown a balance in favor of the minor of \$50 to \$75, she could have applied for, and obtained, a decree for the substitution, for the legal mortgage on all her property, of a special mortgage on particular property, and limiting the amount of the special mortgage to the small amount as shown by a present liquidation of the minor's affairs, and releasing the balance of her property from the mortgage, we simply answer that while that may be true, for the reason that *ita lex scripta est*,—and we could point to the source of our authority for so doing,—her argument fails, as she has not in fact done the thing from which she argues, and we know of no law which would justify us in entirely releasing, or declaring entirely released, prior to the end of the tutorship and final settlement, the legal mortgage on a tutor's property, resulting from his tutorship. Even in cases where, by law, in consequence of a substitution of a special mortgage on specified property for the general mortgage of the minor on the balance of the tutor's property, the court is authorized to relieve all but the property specially mortgaged from the minor's mortgage, its decree would have to conform in its terms to the wording of the law, and nothing in the law would justify courts in declaring the legal mortgage of the minor entirely released. The actual result of a decree properly rendered would in each case

have to be governed by its own facts. There is no inconsistency in the legal mortgage and the special mortgage coexisting on the specific property specially mortgaged. See *Barnard v. Erwin*, 2 Rob. (La.) 407; *Guliet v. Jure*, 15 La. Ann. 417; *Fleetwood v. Bordis*, 19 La. Ann. 56; *McDaniel v. Guillory*, 23 La. Ann. 544; *Isaacson v. Mentz*, 33 La. Ann. 595; *Skipwith v. Glathary*, 34 La. Ann. 33; *Succession of Kuntz*, Id. 854.

We have alluded to the radical error which plaintiff has fallen into as to the conclusive character of tutorship accounts homologated during minority. As we have seen, they are subject to revision and correction up to, and after, the majority of the pupil. When so corrected, the lawmaker contemplated that the minor, now come of age, should find in full force, standing as a security for the correction of this error, the minor's mortgage, given for the faithful administration by the tutor of his trust, from the commencement to its end. *Barnard v. Erwin*, 2 Rob. (La.) 407. The defendant is not called upon to take any risk in this matter. If plaintiff desires to have this particular property declared relieved from mortgage, it is possibly in her power to do so, by giving the special mortgage, on the right to give which she argues to her conclusions. As matters stand, we are not authorized so to declare, nor was the district judge. *Stafford v. Villain*, 10 La. 329; *Fleetwood v. Bordis*, 19 La. Ann. 56. For the reasons herein assigned it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that plaintiff's demand be, and the same is hereby, rejected, at her costs.

(45 La. Ann. 889)

HURLEY v. SOUTHERN EXP. CO. et al.  
(No. 11,225.)<sup>1</sup>

(Supreme Court of Louisiana. May 15, 1893.)  
ACTION TO RECOVER LOTTERY TICKET — DEFENSE  
OF ILLEGALITY OF TRANSACTION—EVIDENCE.

1. The facts of the case are fully discussed, and the findings of the district judge approved.

2. The defense that plaintiff acquired the lottery ticket involved under a contract of sale reprobated by the law of Massachusetts was not alleged in the pleadings, and is not sustained by any proof of Massachusetts law; and, moreover, even if originating in a reprobated transaction, the transaction is completed, and the results fully accomplished, and the defendant is such a particeps criminis as cannot avail himself of such a defense, under the doctrine of *Brooks v. Martin*, 2 Wall. 80, and *Antoine v. Smith*, 4 South. Rep. 321, 40 La. Ann. 567.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Charles P. Hurley against the Southern Express Company, George E. Un-

<sup>1</sup>Rehearing refused May 27, 1893.

derwood, and others. Plaintiff had judgment, and defendants Underwood and another appeal. Affirmed.

L. C. Quintero and Clegg & Thorpe, for appellants Underwood et al. Rouse & Grant, for appellee.

FENNER, J. This suit was brought by Charles P. Hurley, of Boston, Mass., against the Southern Express Company, the Louisiana State Lottery Company, and George E. Underwood, also of Boston, this last named being made party to the suit by amended petition. The petition sets forth that Hurley is the owner of one-fifth part of ticket No. 43,807 of the Louisiana State Lottery Company, for the monthly drawing of July 12, 1892; that it is entitled by said drawing to \$15,000, and is in possession of the express company for collection, without title,—and prays for judgment of possession and ownership of said ticket against the express company and Underwood, and money judgment against the lottery company of \$15,000. Upon affidavit and bond the ticket was sequestered in the hands of the express company, and is in the custody of the civil sheriff of Orleans. The express company answered that it held the ticket for collection for account of Underwood, and was interested only as stakeholder. The lottery company answered that the ownership of the ticket was in dispute, and it stood ready to pay the money to the party to whom such ownership should be finally adjudged. Underwood answered that he received the ticket from James W. Sullivan, of Boston, its true owner, as whose agent he lodged it with the express company for collection. He prayed judgment rejecting plaintiff's demand, and, in reconvention, for damages. The demand in reconvention was withdrawn, with leave to sue for damages on the sequestration bond. The evidence was submitted to the judge of the district court, and judgment was rendered in favor of plaintiff. George E. Underwood, the titular defendant, and James W. Sullivan, the real defendant, prosecute this appeal.

The case presents a conflict of evidence, so irreconcilable as to leave no doubt that there is a fraudulent conspiracy between one of the parties and his witnesses to rob the other of this winning lottery ticket. If Hurley and his witnesses are not lying conspirators, Sullivan and his witnesses are undoubtedly such, and vice versa. The question is, which are the guilty perjurers? The testimony of Hurley and Sullivan and that of Fitzpatrick and Underwood was taken in open court, and the judge saw and heard them testify. The other material testimony was taken under commission. The judge weighed the testimony, and sums up his conclusions as follows: "James W. Sullivan and George E. Underwood contradict each other on three material facts in this

case, about which they could not be mistaken. Their manner upon the witness stand, the narrative they relate, and the way they related it,—contradicted as it is by Hurley, Donahoe, and Mr. M. J. Linnehan,—convince the court that their testimony is not only untrue, but given, in conjunction with that of Daniel J. Linnehan, to carry out a conspiracy to steal the lottery ticket sued for in this case from the plaintiff, and to collect the prize payable on its presentation, and that it is therefore the result of fraud and collusion. The testimony of Whicher is laconic, evasive, and therefore unreliable. Arthur Saucier, a waiter in the liquor saloon in which Sullivan and D. J. Linnehan work, was evidently the tool they used to steal the ticket, and his evidence is pointedly contradicted by Hurley, Donahoe, and M. J. Linnehan. The court is convinced that Charles P. Hurley told the truth on the witness stand. He is corroborated by Donahoe and Michael J. Linnehan,—two disinterested witnesses, in different occupations from that pursued by plaintiff and defendant. He is corroborated by his own acts when he discovered the fraud that had been perpetrated upon him. He is corroborated by the suspicious acts and conduct of Sullivan and of Underwood, Sullivan's brother-in-law and witness. He is corroborated by the appearance and condition of the lottery tickets offered in evidence, and, further, he is corroborated by all the facts proved, and the circumstances surrounding the case. The court therefore finds from the testimony that Charles P. Hurley is owner of the lottery ticket, No. 43,807, sued for in this case, having purchased it from Daniel J. Linnehan on the 9th of July, 1892; that it was in his possession until the afternoon of July 16th, when it was obtained from him on the pretext of comparing it with the prize list, by a fraud conceived and planned by Sullivan and Daniel J. Linnehan, and carried into execution by them, with the aid of Arthur Saucier, their tool, after they knew that said ticket had drawn a prize."

Without exaggerating the weight naturally and justly due to these findings of the district judge, our patient study of the voluminous testimony has only served to confirm them. Hurley's story may be condensed as follows: That on July 9th he bought the ticket, No. 43,807, from Daniel J. Linnehan,—an old friend and acquaintance; that he folded the ticket, and put it in the fob pocket of his trousers; that he went to New Hampshire on his annual vacation, carrying the ticket in his pocket; that he returned to Boston on Saturday, July 16th; that, on that afternoon, Saucier, a waiter in the saloon where D. J. Linnehan and Sullivan were employed, came to him, and said that Linnehan had sent to get the ticket, to compare it with the lottery list, and see if it had drawn a prize; that he took the ticket out of his pocket, tore a piece of paper out of

a blank book, and, in the presence of M. J. Linnehan and Donahoe, wrote on the paper the number of the ticket,—43,807,—and then handed the ticket to Saucier, with directions to bring it back; that on the following Monday morning he saw a list of the Louisiana lottery drawing, which had taken place on July 12th, and, taking out the paper on which he had inscribed the number of his ticket, discovered that it had drawn one-fifth of the capital prize, amounting to \$15,000; that he immediately went to D. J. Linnehan, at Engelhart's saloon, and demanded his ticket; that Linnehan said he had given it to Sullivan; that when asked why he had done so he said he had got it from Sullivan, and had not paid him for it; that shortly afterwards he met Sullivan, and demanded the ticket, who made denials and excuses which need not be repeated; that he then went to the office of the lottery agent, was informed that Sullivan had presented the ticket, and was advised to telegraph, and stop payment of the ticket, which was done, and this suit was brought. Now, most of the facts stated by Hurley are admitted by defendants' witnesses. They do not deny that he bought a ticket from D. J. Linnehan; that he did go to New Hampshire; that he returned on the 16th; that on that day Saucier was sent for the ticket, and received it from Hurley, and gave it to D. J. Linnehan; that on Monday morning Hurley called on Linnehan for his ticket, claiming that it had won the prize; and that he afterwards called on Sullivan, and demanded the ticket that he had got from Linnehan. The appearance of the ticket, which is produced in the original, corroborates Hurley's statement that it had been folded and carried in his fob pocket for several days, and we are most unfavorably impressed with Sullivan's statement, made after Hurley had testified, that he (Sullivan) had folded the ticket, and carried it in his fob pocket for several days. Hurley's statement as to his interview with the messenger, Saucier, and particularly as to his having copied the number of the ticket on a paper, is confirmed by the evidence of M. J. Linnehan and Donahoe. It is infinitely more reasonable and natural than that given by Saucier, which is, on its face, almost incredible; and, moreover, the message which he says he delivered from Linnehan is entirely different from that which Linnehan says he sent. Hurley's taking down the number of his ticket before delivering it to this irresponsible messenger certainly accords with the commonest dictates of prudence. It is further confirmed by another undisputed and significant fact,—that on Monday morning, after seeing the prize list, he knew and claimed that his ticket had won the prize. How did he know that, if he had not preserved the number of the ticket? Linnehan denies that he told Hurley that he had given the ticket to Sullivan, yet Sullivan admits that shortly afterwards Hurley demanded of

him the ticket which he had got from Linnehan. Why should Hurley have applied to Sullivan, if Linnehan had not told him that he had given it to Sullivan? Linnehan claims that the ticket which he sold to Hurley, and received back from him, was one of ten that he had taken from the ticket dealer, Whicher, and was returned to Whicher as unpaid for. But Whicher, though he testifies for defendants, and tells all about tickets that he sold to Sullivan, does not say a word about having given any tickets to Linnehan, or having received back any from him. Indeed, one of the most significant facts against defendants' testimony is the entire failure to identify or account for the ticket which it is admitted was sold to Hurley, and received back from him. We agree with the district judge that Hurley's story is in harmony with every undisputed and independent fact in the case. On the contrary, the testimony of Sullivan and his witnesses arouses suspicion at every step. In the first place, they admit that they knew the result of the drawing on the 14th or 15th of July, and that the ticket No. 43,807 had won, and claim that it was then in Sullivan's possession. If that be true, there does not seem to be any adequate motive for the promptness with which the messenger was sent after Hurley's worthless ticket immediately after his return on the 16th, or, at least, none comparable in adequacy with that which would have resulted from a knowledge that Hurley's ticket was a winner. In the next place, it is not altogether natural that, with knowledge that Sullivan held the winning ticket on the 14th or 15th, he did not approach the lottery agent until the 18th,—the first business day after Hurley's ticket was returned. The anxiety to get the agent to cash the ticket at a discount, and the instant forwarding of the ticket by express in the name of Underwood instead of his own, are also suspicious circumstances. It is difficult to define very accurately the reasons which produce on the mind the impression of vraisemblance, or the reverse, in the estimate of testimony, oral or written. We might extend our analysis and criticism of the testimony in this case, and exhibit additional grounds for our concurrence with the district judge, but it would only incumber the pages of our Reports, without profit to any one. It is claimed that we should not convict a party and his witnesses of criminal fraud and conspiracy without the clearest proof; but the stress of that proposition, in this case, is relieved by the inevitable alternative presented to us, of pronouncing such a sentence upon one party or the other. It is urged that Sullivan's possession of the ticket affords too strong a presumption of his title to be overcome without the strongest proof, but in this case we consider his possession so accounted for as to be quite as consistent with Hurley's title as with his own. His possession has no bearing on the question of title. Its only effect is



to place Hurley under the necessity of becoming plaintiff, and thereby assuming the burden of proof. He has discharged this burden in a manner which convinced the judge a quo, and satisfies our own minds.

An attempt is made in this court to impugn plaintiff's right to stand in judgment on the ground that he is seeking to recover property acquired by him under a contract of sale of a lottery ticket made in Massachusetts, and in violation of the law of that state. No such defense was set up in the pleadings, and no proof is made of the law of Massachusetts. Until the expiration of its charter the Louisiana Lottery Company is authorized by the constitution and laws of the state to issue lottery tickets, and dealing therein is within the protection of the law. If the law of Massachusetts is different, that should have been alleged and proved. We think, in any case, defendant would fail in such a defense under the principles laid down in *Brooks v. Martin*, 2 Wall. 80, and in *Antoine v. Smith*, 40 La. Ann. 567, 4 South. Rep. 321. The transaction, even if reprobated, is complete, and the results fully accomplished, and it does not lie in the mouth of one of two parties equally guilty to set up such a defense against the title of the other. See, also, *Gipson v. Knard*, (Ala.) 11 South. Rep. 482. Judgment affirmed.

(45 La. Ann. 960)

STATE ex rel. CITY OF NEW ORLEANS  
v. JUDGE OF TWENTY-FIRST JUDICIAL DIST. (No. 11,297.)

(Supreme Court of Louisiana. May 22, 1893.)

CERTIORARI—WHEN LIES.

1. It is no longer an open question that certiorari can only be resorted to when proceedings are absolutely null.

2. It cannot be made use of as a substitute for a motion to dismiss an appeal antecedent to the return day thereof.

(Syllabus by the Court.)

Original application in the name of the state, at the relation of the city of New Orleans, for certiorari to the judge of the twenty-first judicial district, parish of St. John the Baptist. Application denied.

J. L. Bradford, for relator. William S. Benedict and Robert G. Dugue, for respondent.

WATKINS, J. The following are the grounds on which relator claims relief at our hands, viz.: "John McDonogh, Jr., and Joseph Sonlat Dufossat, Jr., on August 27, 1841, brought suit No. 20,505 in the first district court in the parish of Orleans against Alexis Fontenot, Jean Pierre Fontenot, Joachim Fontenot, Reine Fontenot, (widow of Alexis Millet,) Justine Fontenot, (wife of Jean Batiste Audisson,) and Felix Becnel, for slander of their title to lands in St. John the Baptist parish, held in indivision,—one-third by McDonogh, and two-thirds by Sonlat Du-

fossat. The defendants were duly cited, but before answer the case was removed by New Orleans and Dufossat, under an act of the legislature, to the district court for St. John the Baptist parish, by supplemental petition filed therein July 11, 1859, alleging that since the filing of the original petition in 1841 McDonogh had died testate, and that New Orleans had succeeded to his rights, and also that Joseph Le Bourgeois and Felix Becnel had succeeded to the claims and pretensions of the original defendants, and praying citation against them, etc. They were cited in 1859, but no answers or exceptions were filed, no defaults taken, or other proceedings had, and the cause was regularly continued, and stood so until February 26, 1892, when New Orleans filed a supplemental petition alleging the death of Dufossat, leaving a large number of unknown heirs; that the claims and pretensions of Becnel and Le Bourgeois in the lands had vested in Joseph L. Le Bourgeois, Jr., residing in St. John the Baptist parish, who continued to slander the title of plaintiff, and refused and failed to bring suit to try the same, etc.,—praying for service upon him, Le Bourgeois, Jr., and for judgment on title, and for damages, etc. He was cited, and in due time filed exceptions and answer, and from time to time certain other persons, alleging themselves heirs or other representatives of the original defendants, came in voluntarily as defendants, and filed exceptions and answers. This jactitation suit is yet untried, and is now No. 713 of the docket of the twenty-first judicial district court for St. John the Baptist. March 2, 1892, New Orleans brought suit against all the heirs of Dufossat for partition of the same lands in the district court for St. John the Baptist parish, then twenty-sixth district, under the number 474, but, when the district was changed to No. 21, the docket number became 40. The title of defendants to an undivided two-thirds of the lands was admitted, petitioner's own right to an undivided third was alleged, and partition by sale prayed. The defendants were all cited, and after several supplemental petitions were filed for appointment of curators ad hoc, etc., all answered, admitting plaintiff's title to one-third, and taking issue only on the mode of partition. The case was regularly tried March 24, 1893, and, after taking testimony as to the proper mode of partition, the court, in proceeding to judgment, was interrupted by an attorney at law who represented Mr. Joseph L. Le Bourgeois, Jr., then also present in court, and read to the court and counsel for the parties a 'protest' alleging the protestant was one of the defendants in suit No. 713, and protesting against further proceedings in the partition suit until all parties therein made themselves parties plaintiff in suit No. 713, and until all the defendants in said suit No. 713 were made defendants in the partition suit. On oral objection by counsel for plaintiffs and defendants

in suit No. 40, the court refused to allow the protest to be filed, or to consider the same, or make it a part of the record in same, on the ground that protestant had not alleged any interest in the partition suit, or asked any order in the premises. To this ruling protestant filed his bill of exceptions, and the court pronounced and signed judgment on the issues made in suit No. 40, decreeing the partition by sale, and making the usual orders for the execution of the judgment. Thereupon the protestant moved the court for an order of suspensive appeal to the supreme court, and the same was granted instantly, on a bond for costs, in the sum of \$200, the return day being fixed on the 3d Monday in January, 1894. No other steps have been taken in the district court, and the judgment in partition remains inoperative. On May 5, 1893, New Orleans filed her petition in this court for a writ of certiorari to the judge of the twenty-first judicial district court for St. John the Baptist, and on May 6th the same issued, returnable the 11th of May. The prayer of the petition is that the record in the partition suit No. 40 may be certified and sent up, in order that the validity of the proceedings may be inquired into and determined, and the order of appeal be declared illegal, and the appeal dismissed, and for costs."

The respondent judge returned that the protest of Joseph L. Le Bourgeois, Jr., referred to by the relator, was prepared and read by his counsel as soon as the partition suit was called for trial, as stated in the bill of exceptions, and not, as stated by the relator, after the testimony and argument had been heard. He admits that a third person, not party to the original suit, filed, in open court, a motion for a suspensive appeal from the judgment rendered in the partition suit, and that he granted the appeal, returnable on the proper return day to this court, which is the proper appellate tribunal, conditioned upon the appellant furnishing bond. He further represents that he granted the appeal under and in conformity to the provisions of article 571 of the Code of Practice, as he was bound to do; that his court had jurisdiction of the parties and of the subject-matter of the partition suit; that the appeal has been perfected, and that his action in the premises is not open to review by certiorari. He further shows that certiorari cannot be substituted for a motion to dismiss the appeal in question antecedent to the return day thereof.

There is no escape from the conclusive force of the reasons assigned by the respondent judge. In *State v. Riley*, 43 La. Ann. 177, 8 South. Rep. 598, the court said: "It is no longer an open question that 'certiorari' can only be resorted to when proceedings are absolutely null. *State v. Koenig*, 39 La. Ann. 776, 2 South. Rep. 559; *State v. Judge*, 32 La. Ann. 1222." The only purpose of the writ is to test the validity of the proceedings

of another court extrinsically. Code Pr. arts. 855, 857. The case brought is an appealable one, and the relator's complaint is that it has been appealed to this court, but improperly. The orderly and proper course for relator to have pursued was to await action in this court on the appeal. It has mistaken its remedy. It is therefore ordered and decreed that the demand of relator for certiorari be rejected at his costs, and the restraining order be set aside.

(45 La. Ann. 385)

**HUGHES v. MURDOCK et al.** (No. 11,243.) (Supreme Court of Louisiana. May 15, 1893.)

**PLEADINGS—INTERPRETATION—LEGISLATIVE POWERS—LEGITIMATION OF CHILDREN—VESTED RIGHTS.**

1. When, by subsequent order of court, imperfections in a transcript are cured, a pending motion to dismiss will be overruled as matter of course.

2. Up to judgment the pleadings are taken most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor.

3. The legislature of a state, unlike congress, which cannot do anything which the federal constitution does not authorize, may do everything which the state constitution does not prohibit, and constitutional prohibitions are not enlarged by construction beyond their terms.

4. Article 118 of the constitution of 1868, prohibiting the adoption of children by special legislative act, does not prohibit legitimation by such an act. The two subjects are separate and distinct.

5. No one can be said to have any vested right in any existing legal capacity, in reference to any future contract or advantage to result from that capacity. He who to-day is by law a forced heir, in expectancy, may to-morrow, by a new law, be declared liable to be disinherited by will, or incapable even of succeeding ab intestato. It may be assumed, as a general rule, that the mere capacity or incapacity of particular classes of persons to contract or to inherit depends upon the legislative will.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Action by M. G. Hughes against Myra C. Murdock and others. Judgment, from which A. J. Thomas appeals.

James Wilkinson, for appellant. J. P. Blair, for appellees.

(45 La. Ann. 311)

**GUNNING GRAVEL CO. v. CITY OF NEW ORLEANS.** (No. 11,252.)

(Supreme Court of Louisiana. April 10, 1893.)  
**STREET PAVING—MATERIAL—REJECTION OF BIDS—RIGHT OF COUNCIL.**

1. The city council of New Orleans has the right to designate the material with which a street may be paved.

2. The city charter requires that the furnishing of material for public works shall be given to the lowest bidder, but there is a proviso that the council may reject any and all bids. This proviso in the charter was to obtain the material and the work at the lowest possible cost to the taxpayer, after competition

among bidders; and the proviso was intended for the same public interest, to protect the taxpayer from imposition, and, while inviting competition, to secure good material, and responsible contractors.

3. While the city council would not be justified, and the courts would intervene to protect the taxpayer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled, when exercised with prudence, in the public interest.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by the Gunning Gravel Company against the city of New Orleans. Judgment for defendant. Plaintiff appeals. Affirmed.

E. M. Hudson and Gilmore & Baldwin, for appellant. E. A. O'Sullivan, for appellee. Farrar, Jonas & Kruttschnitt, as amici curiae.

McENERY, J. Under specifications submitted to it by the city engineer, the city council of New Orleans, by ordinance, directed the comptroller to advertise for sealed proposals for the paving of the wood side of St. Charles street from its intersection with Louisiana avenue to the terminus of the present pavement, on the river side of St. Charles avenue, with Rosetta or Hoskins gravel. On the 26th day of October, 1892, the comptroller advertised for sealed proposals, as directed by the city council, to be received at his office until the hour of 12 M. on Wednesday, November 2, 1892. The advertisement required a deposit of \$50, and a certificate of said deposit to accompany each bid. On the day, November 2, 1892, before the hour of 12 M.,—the limit when said sealed proposals were to be received,—the plaintiff, a foreign corporation, domiciled in the city of Vicksburg, state of Mississippi, owner of beds of gravel in said state, having previously made the deposit of \$50, presented and filed a sealed bid for paving said St. Charles street in accordance with the advertisement. The Rosetta and Hoskins Gravel Companies also presented bids. The plaintiff's bid was the lowest, but was rejected by the city council, and the bid of the Rosetta Gravel Company accepted. There was no answer filed by the city on the rule to show cause why an injunction should not issue, and there is no evidence in the record, other than that of the existence of the plaintiff corporation, the bid, and the acts of the council and the comptroller. There was judgment for the city, and the plaintiff corporation appealed. We are therefore compelled to decide this case mainly upon the facts alleged by plaintiff, and the official acts of the city government.

We infer from the petition that the Rosetta, Hoskins, and Gunning gravel are about of the same quality, and that the names given to the gravel are more to distinguish the several companies than to des-

ignate any particular superiority of the gravel. They are not patent processes, exclusively controlled by the owners of the patent, which would exclude competition. They are natural deposits, and there is nothing in the record to show that the bidding was intended to be confined to the two companies designated in the resolution of the city council and the comptroller's advertisement. The council had the undoubted right to say with what material the streets should be paved. It selected the Rosetta or Hoskins gravel, but did not say that the companies owning the gravel should be awarded the contract. Other persons could have bid to do the paving with this material, and there is no evidence to show that it could not be procured by the bidder from the companies owning the material. The city charter requires that the furnishing of material for public works shall be given to the lowest bidder, but there is a proviso that the council may reject any and all bids. This proviso in the charter was to obtain the work and material at the least possible cost to the taxpayer, after competition; and the proviso was intended for the same public interest and economy, to protect the taxpayer from imposition, and, while inviting competition, to secure good material, and responsible contractors. While the city council would not be justified, and the courts would intervene to protect the taxpayer in such event, to arbitrarily reject a bid, and thus defeat the object to be attained by competition, it is vested with a certain discretion in rejecting bids, which will not be controlled, when exercised with prudence in the public interests. In rejecting plaintiff's bid, we are of the opinion that the city council acted with prudence, and in the interest of the taxpayer, to get material which had met with the approval of the taxpayers, and to obtain a responsible contractor. We presume from the circumstances of the case, and the absence of complaint by the taxpayers of New Orleans, although there is no direct proof of the fact, that the two rival companies—the Rosetta and the Hoskins—were well-known contractors and dealers in gravel in the city. The plaintiff is a foreign corporation, and put in an appearance on the last day on which bids were to be received. There is no evidence that it had shown that the gravel owned by it was equal or superior to that of the Rosetta Gravel Company, or that it had given any evidence of its ability to do the paving with skill, and to respond in damages for inferior work. The statements to this effect are ex parte, and its ability to do the work skillfully, and to respond in damages, is speculative. Judgment affirmed.

On Rehearing.

(May 27, 1893.)

NICHOLLS, C. J. It would appear from an inspection of plaintiff's petition that it con-

tains two distinct demands, presented in the alternative. On averments by it deemed sufficient to carry with them the nullity of the ordinances authorizing the paving of St. Charles avenue, and everything done thereunder, plaintiff prayed that those ordinances, and all said proceedings, be decreed null and void; but, anticipating a possible adverse decision upon this demand, it set out allegations of a different character, and prayed that, in the event the ordinances be held valid, then in that event the contract under the ordinance be awarded to it. In refusing plaintiff's accompanying prayer for an injunction the district judge assigned no special reasons, and we are left in doubt as to the grounds upon which he based his action. The opinion which we have rendered in the case shows on its face that we passed by, almost unnoticed, the first branch of the petition, and went directly to the consideration of the second. It was perfectly obvious to us that quoad the action for the declaration of the nullity of the ordinances the plaintiff had no standing in court. The plaintiff described itself as a corporation organized under the laws of Mississippi, and having its domicile at Vicksburg. It did not aver it was doing business in this state, that it had any agent here, that it had any property in New Orleans, or that it paid a dollar of taxes there; and it is quite likely that the judge of division B, finding no allegation tending to show any legal interest in the plaintiff, such as to authorize it to invoke the nullity of the ordinance in question, refused the injunction for that reason. When this court reached (as it did reach) itself that conclusion, the effect of its doing so was, of course, to defeat that portion of plaintiff's demand, independently of any question of the sufficiency, otherwise, of plaintiff's allegations as to the nullity of the ordinances. As throwing the plaintiff out of court on the score of want of legal interest in the question would leave still in court its allegations that the ordinances were null, the logical result, in view of that fact, would have authorized us, under the pleadings, to entirely do away with a discussion of the second branch of plaintiff's petition. Be that as it may, we did in fact discuss it, and held that the district judge acted correctly in refusing the injunction. In discussing the question we took it up in the order and on the "theory" of plaintiff's petition,—that the first branch of the case had been examined into, and passed upon adversely to plaintiff's views, and that it was before us as one where, the ordinances being assumed legal, the rights of the parties were to be determined on other issues. In the very nature of things arising from a discussion from the new standpoint, the court had to do away with every hypothesis and every allegation which had been urged, or could have been urged, on the first branch of the case, and to deal with matters as being (up to the opening of the bids) in

all respects legal. It was only at that point, and from that point, our discussion began, on the hypothetical premises assumed, of perfect legality in all things prior to that time. Taking up plaintiff's pleadings, and dealing with them as applicable to the second demand, we reached the conclusion that it was impossible for the district judge to have ruled otherwise than he did. In the application for rehearing filed by the plaintiff, it falls into the error of seeking to carry over, and make available for the second or "contingent" prayer, allegations which, for the purposes of that prayer, have necessarily to disappear.

For the purposes of the second branch of the case, we have to "assume" that the Rosetta Gravel Company, the Hoskins Gravel Company, and the Gunning Gravel Company were each and all fairly allowed to enter into free competition with each other for the paving contract under a valid ordinance, but that the Gunning Gravel Company's bid was the lowest bid of the three, and yet, in spite of that fact, and its ability to furnish all necessary security, the city council awarded the contract to the Rosetta Gravel Company, and that the mayor would sign the contract, under orders from the council, unless restrained by injunction. It was upon this state and condition of the pleadings, and nothing more, that we were called upon to say, "on the face of the papers," whether the district judge was wrong in refusing the injunction. The opinion which we have rendered was from that point of view. Only a few days since, in the case of *Hughes v. Murdock*, 13 South. Rep. 182, we cited the well-recognized doctrine in pleading that up to judgment the pleadings will be taken most strongly against the pleader, and that unknown, unrecited facts would not be assumed in his favor, particularly in the face of an adverse ruling of the district judge. The case at bar falls directly under that principle. The plaintiff asks us to "assume," as an absolutely necessary consequence of its being the lowest bidder for the contract, that it should be awarded to him, and he asks us to assume that fact in presence of the repeated declarations of courts, everywhere, that sworn officers will be presumed to have done their duty,—certainly, at least, until they have been "alleged" to have done otherwise. There is not one single word in plaintiff's petition accusing the common council of New Orleans with having acted arbitrarily, fraudulently, or improperly, in any manner. The plaintiff relies upon the naked fact, advanced by it, that its bid was the lowest, and that its material was equal or superior to that of the other bidders, and that it could furnish security. We are left absolutely in the dark as to the reasons upon which the council acted. We are bound, in the absence of direct charges and statements of facts, to presume that their action was honest and legal. We cannot eke out a case

for the plaintiff by inferences of wrongdoing, and make suspicions and conjectures take the place of allegations. While it is possible there was such wrongdoing, it might also well be that the council acted after a very strict examination into all the facts and circumstances which it had the legal right to examine into, in order to determine whether plaintiff's bid was a proper one, or not, and that these conclusions thereon are justified and right. It may well be that, although the plaintiff "alleges" his ability to furnish security, he may, in fact, never have tendered it at all, or that the security furnished was insufficient. Plaintiff's petition is silent on these points. If the council was guilty of wrongdoing, plaintiff should have directly so alleged, and stated facts and circumstances to show in what way, and from what cause, that wrongdoing arose. We repeat here what we said in the Hughes Case,—that when a plaintiff selects an act as the object of his attack which is not per se necessarily wrongful and illegal, but which may exist consistently with honesty, fair dealing, and legality, it is the duty of the attacking party to set out specifically the facts which would give to the act an illegal or wrongful character. Whatever expressions were used in our opinion to the effect that the council had acted prudently and rightly must be read and construed from the standpoint and from the circumstances under which they were employed. We did not intend to say, as a fact, that the council had so acted, but that for the purposes, exclusively, of this case, as presently placed before us, we were bound to assume they had done so. The fear which plaintiff entertains, that we have committed ourselves to holding that an arbitrary selection by a common council of three or four favored individuals, to whom, and to no others, it would extend invitations to give in bids for contracts, or to a selection of gravel at any particular point or locality, under circumstances such as to make the bids, in reality, but under disguised pretexts, to be nothing more or less than the bids of the particular persons owning the same, or that we have recognized and given our sanction to the doctrine that a common council, under a grant to accept or reject bids, has the right to arbitrarily and finally reject the lowest bid, or to accept the higher, without any facts justifying such action, is totally unfounded. There is high authority for holding to the contrary. In the case of *People v. Gleason*, 25 N. E. Rep. 5, the court of appeals of the state of New York said: "The claim is made on behalf of the relator that there is a conclusive presumption that the common council adjudicated that his bid was that of the lowest responsible bidder. If this claim be well founded, then provisions like that above quoted [providing that contracts should be let to the lowest bidder] from the city charter are of little use, and they can always be effectually disregarded and vio-

lated. It is true that the common council, where there are several bidders, have jurisdiction to determine who is the lowest responsible bidder, but in order to give its action any legal effect it must exercise its jurisdiction, and make a determination based upon some facts. If it refuses to accept the lowest bid for work or supplies, there must be some facts tending to show that it is not that of a responsible bidder, or there must be at least some pretense to that effect. An arbitrary determination by such a body to accept the highest bid, without any facts justifying it, cannot have the effect of a judicial determination, and must be denounced as a palpable violation of law." It was doubtless the intention of the plaintiff to bring this case within the doctrine just announced, but it has not done so in its pleadings, and it is by these that we are now testing matters. Rehearing refused.

(45 La. Ann. 942)

STATE ex rel. REID v. FOURNET, Judge.  
(No. 11,289.)

(Supreme Court of Louisiana. May 22, 1893.)

WRIT OF PROHIBITION—WHEN DENIED—REMEDY BY APPEAL—REMOVING SHERIFF FROM OFFICE—JURISDICTION OF DISTRICT COURT.

1. Prohibition is not a writ of right, and in cases where the jurisdiction is even doubtful it is not readily granted when there exists an adequate remedy by appeal.

2. The nature of a cause of action is not to be confounded with its sufficiency. The nature of the action determines jurisdiction, and, when that sustains the jurisdiction, the latter cannot be defeated by mere insufficiency of the allegations or of the proofs.

3. The petition in this case alleges acts committed under the present as well as under the former terms of relator in office; and, even if the latter were open to relator's exception, (on which we express no opinion,) that would only eliminate them from the petition, without abating or defeating the action.

4. If the respondent judge has committed error in overruling relator's exception, that error does not lie in maintaining jurisdiction, but in sustaining a partially insufficient cause of action; and for such error the only appropriate relief would be by appeal.

(Syllabus by the Court.)

Original petition in the name of the state at the relation of D. J. Reid for certiorari and prohibition to G. A. Fournet, district judge, to review proceedings on which relator was removed from the office of sheriff, and for other relief. Judgment for respondent.

Olegg & Thorpe, William Schwing, and E. N. Pugh, for relator. E. D. Miller, Dist. Atty., D. B. Gorham, R. P. O'Bryan, and F. C. Zacharie, amicus curiae, for respondent.

FENNER, J. Article 196 of the state constitution provides: "The governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, superintendent of public education, and the judges of all the courts of record in this state, shall be

liable to impeachment for high crimes and misdemeanor, for nonfeasance or malfeasance in office, for incompetency, for corruption, favoritism, extortion, or oppression in office, or for gross misconduct or habitual drunkenness." Article 201 provides that "for any of the causes enumerated in article 196, district attorneys, clerks of court, sheriffs, etc., shall be removed by judgment of the district court of the domicile of such officer, and it shall be the duty of the district attorney to institute suit in the manner directed by article 200, on the written request and information of twenty-five resident citizens and taxpayers. \* \* \* In all such cases the defendant, the state, and the citizens and taxpayers, \* \* \* or any one of them, shall have the right to appeal, both on the law and the facts, from the judgment of the court." In full conformity with these provisions, a suit was filed in the district court of defendant's domicile, presided over by the respondent judge, to remove him from office as sheriff and ex officio tax collector of the parish of Calcasieu. The petition set forth that relator had been thrice elected to said office for successive terms, having been elected for his present term in April, 1892. The petition alleges that "during his incumbency for former terms, and during his present term of office, the said Reid has been guilty, both as sheriff and as tax collector, of repeated acts of nonfeasance and malfeasance and incompetency and corruption and favoritism and extortion and oppression in office, and of gross misconduct." The petition then proceeds to set forth various specific acts done by him as sheriff. It then further alleges that "as tax collector said Reid has been guilty of many and repeated acts of nonfeasance, malfeasance, corruption, favoritism, incompetency, extortion, and gross misconduct, said acts extending through the former years of his said incumbency down to and including his present term of office," and it sets forth various specific acts in support thereof. Most of the specific acts set out are laid as dating under his prior terms of office; but at least two are not so laid, but may well have occurred during his present term, viz. the charge of not keeping correct cash books, as required by law, and the charge of gross misconduct and oppression based on his arrest of members of a committee of the police jury appointed to investigate his accounts, which is simply averred to have occurred in 1892. The petition concludes with the following allegation: "Your petitioner therefore avers that, considering the many acts of extortion, favoritism, and corruption as detailed in the foregoing, and his wanton disregard of the laws enacted for his guidance and for the protection of the citizens, the said D. J. Reid should be removed from his said office;" and it concludes with a prayer for that relief. The defendant appeared, and filed a plea or exception to the following effect, viz.:

"That the petition charges him with acts of commission and omission, alleging them to have been done or omitted prior to the commencement of his present term of office. \* \* \* and this defendant shows that this court has no right, authority, or power under the law to inquire in this suit into said acts laid as of dates anterior to his said present term of office, or by reason thereof to adjudge him to be removed from his said present office; and, further, that the petition aforesaid shows no cause of action. Wherefore defendant prays that as to all such alleged acts of commission and omission charged in said petition as of dates prior to the commencement of defendant's present term of office this suit be dismissed, at plaintiff's cost." Subsequently, and after the exception had been submitted, the plaintiff filed an amended petition, setting forth sundry additional charges based on acts done during the defendant's current term of office. The exception or plea in bar was thereafter decided by the judge, who overruled the same. The defendant thereupon filed the present application for writs of certiorari and prohibition, alleging substantially that the grant of power to the judiciary to remove elective officers is limited to the cases provided in the articles of the constitution; that said cases only refer to and embrace acts committed by an officer during the term of office from which he is to be removed; that outside of these cases courts have no power or jurisdiction, *ratione materiae*, to entertain suits for removal; that, therefore, in overruling his exception, and in assuming jurisdiction over the suit in question, the district judge transcends his authority, and is guilty of usurpation, and that his proceedings therein would be *coram non iudice* and void, and would inflict on relator an irreparable injury. The respondent judge files answer, maintaining his jurisdiction, and denying relator's title to the relief sought.

After much reflection, we have come to the conclusion that the case presented by relator does not successfully impugn the jurisdiction of the respondent's court over the cause in which his action is arraigned. The constitution undoubtedly confers upon that court the power to entertain an action for the removal of relator from office for any of the causes enumerated in article 196. No other court has authority to entertain such an action. The quotations which we have made from the petition show beyond question that the action brought against relator was an action to remove him for the very causes enumerated in article 196. It is specifically and repeatedly alleged that he has been guilty of "acts of nonfeasance, malfeasance, incompetency, corruption, favoritism, extortion, and oppression in office, and gross misconduct;" and these are the very causes enumerated in article 196. To say that the court had not jurisdiction over such

an action is simply to disregard the express authority conferred by the constitution. These allegations alone, taken in connection with the prayer of the petition, establish and fix the jurisdiction of the court. If the petition contained no other allegations, and had set forth no specific facts whatever, its deficiency in that respect would give rise to no question of jurisdiction, but simply to an exception of vagueness and insufficiency. So, if the specific acts charged are not such as, if proved, would sustain the action, this also would not raise a question of jurisdiction, but would only authorize an exception of no cause of action; and that is really the substantial character of relator's exception in the court below. The nature and the sufficiency of a cause of action are not to be confounded. The nature of the action determines the question of jurisdiction, and when it sustains the jurisdiction all questions of its sufficiency, under the allegations or the proofs, pass under the proper cognizance of the court with power to determine them according to the law and the facts. This action is, in its nature, an action to remove relator for causes enumerated in article 196 of the constitution. As to whether the special facts alleged establish the existence of any one of those causes, that is a question going, not to the jurisdiction of the court, but to the merits of the cause, and the court has the same power to decide those merits whether presented by exception on the facts alleged, or, after trial, on the facts proved. In neither case can the decision be arraigned under our supervisory power when within the court's jurisdiction. The constitution, in enumerating the causes for removal in article 196, uses very general language, and abstains from defining the particular acts which constitute them. In applying the remedy provided, much discretion is necessarily left to the judiciary in determining the kind and degree of acts which are embraced within the spirit and meaning of the constitution, and sedulous precautions are taken to prevent the abuse of this discretion by granting the right of appeal and providing for the summary disposition thereof. The judge may have been right or may have been wrong in overruling relator's exception. On that question we do not hint our opinion. Even if he had maintained it, the quotations we have made from the petition and from the exception itself show that it would have eliminated only part of the cause of action, and would not have involved an entire dismissal of the action. If he was wrong, his error consisted not in maintaining his jurisdiction, which was incontestable, but in maintaining a partially insufficient cause of action. In that case relator will find his only appropriate relief in an appeal to this court, which the law secures to him. Prohibition is not a writ of right, and even in cases of doubtful jurisdiction we do not readily grant it when there is adequate rem-

edy by appeal. *State v. Judge*, 32 La. Ann. 1182; *State v. Skinner*, Id. 1092. It is therefore ordered that the provisional writs herein issued be dissolved, and that relator's application be denied.

(45 La. Ann. 717)

STATE v. FOURCADE. (No. 11,148.)<sup>1</sup>

(Supreme Court of Louisiana. May 8, 1893.)

MUNICIPAL CORPORATIONS—POWERS—PROHIBITING ADULTERATION OF MILK—CONSTITUTIONAL LAW—APPEAL FROM MUNICIPAL TRIBUNAL—JURISDICTION OF SUPREME COURT.

1. The powers conferred upon the common council of New Orleans by the seventh section of Act No. 20 of 1882 (the city charter) are not suspended by the provisions of Act No. 82 of 1882.

2. The legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, though general statutes exist, relating to the same subjects.

3. The same act may constitute a crime against the public law of the state, and also a petty offense against a municipal regulation. The two offenses in such a case being different, each may be punished without violation of the constitutional inhibition against placing one twice in jeopardy for the same offense.

4. Violations of municipal ordinances constitute a class of offenses that are, in general, throughout the country, proceeded against summarily, and the right of trial by jury, in connection therewith, cannot be constitutionally demanded.

5. The questions of facts which the supreme court is required, under article 81 of the constitution of 1879, to examine into, in respect to the legality or constitutionality of a fine for forfeiture or penalty, are those which are necessary to be investigated for the purpose of determining those questions as to fine, forfeiture, or penalty imposed in an ordinance of a municipal corporation, not that imposed by a recorder, under the ordinance, upon the facts of a special case.

6. The general assembly, in conferring upon the common council of New Orleans the powers it did in its charter, contemplated that it would adopt a standard of adulteration, as to drinks; and that adopted by it, not being shown to be unreasonable or arbitrary, or as passing beyond a fair measure of correction for the evil against which it seeks to guard, is upheld.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Edward S. Whitaker, Judge.

M. Fourcade was convicted of violating an ordinance prohibiting the adulteration of milk in the city of New Orleans, and appeals. Affirmed.

P. L. Fourchy and Albert Voorhies, for appellant. Louque & McGloin, for appellee board of health.

NICHOLLS, O. J. The defendant was charged with having, on the 20th of November, 1892, violated Ordinance 8506, Council Series, by selling watered or adulterated milk in the city of New Orleans. Through his counsel he filed an exception or demurrer in which he declared that he was ready

<sup>1</sup>Rehearing refused May 29, 1893.

and willing to be tried under the laws of the state of Louisiana for the state offense charged against him as a municipal offense, but that he demurred to the pending municipal prosecution, on the grounds: (1) That said city ordinance, under which this prosecution is carried, is unconstitutional and illegal, as it conflicts with the constitution of the state of Louisiana, (articles 5-8, 92, 155;) as it conflicts, also, with Acts of Louisiana of 1880, No. 20, and with Acts of 1882, No. 82, and other state laws in pari materia. (2) That said City Ordinances, Administration Series, No. 6022, (1879,) No. 6533, (1880,) No. 6596, (1892,) annexed to the exception, are in conflict with the federal constitution, (amendment 14, § 1,) in this: That it deprives the accused, as one of a class of retail milk vendors, from the equal protection of the laws of the state; that it singles out one occupation, (milk commerce,) and submits it, as a class, to a special mode of prosecution, before a recorder's court, without the benefit of jury, while, on the other hand, all other classes or occupations are to be prosecuted for a state offense, and to be tried by jury. (3) That the same act imputed to defendant under the laws, both organic and ordinary, of this state, cannot be made a double offense, punishable twice, either simultaneously or otherwise; that the state laws cannot create such an anomaly, nor can the municipal ordinance of a creature of the state, having no authority but that which is specially delegated to it by the state itself, be an exception, but, on the contrary, the case is more objectionable. (4) That said city ordinance is ultra vires in so far as it is in conflict with Acts of 1880, No. 20, and Acts of 1882, and other state laws in pari materia, and also to the extent that it attempts to duplicate the action of the state, with new methods of prosecution, and that, in face of these statutes punishing the adulteration of milk as a state offense, the municipality cannot constitutionally make it a municipal offense, and that said first recorder's court is without jurisdiction in the premises. (5) That the accused cannot thus be put twice in jeopardy for acts which, if true, would constitute the same offense, for which he will be undergoing trial simultaneously in a state court and a municipal court. Article 5, Const. (6) That by said municipal ordinance the accused is deprived of liberty and property without due process of law. Article 6. (7) That the municipal ordinance divests the accused of his vested rights of property in his merchandise without due process of law, and without adequate compensation previously made, (article 155,) and makes it an offense for him to give away his said property at the bidding of a police officer. (8) That said ordinance establishes a test in the adulteration of milk which is unconstitutional and illegal, in violation of the laws of the state of Louisiana, and more particularly of the Acts of 1882

No. 82. This demurrer was overruled by the court. Defendant then filed a second demurrer, to the effect "that City Ordinances No. 6022, Administration Series, No. 6533, Administration Series, and No. 6596, Council Series, are illegal, because the state of Louisiana has, by Acts of 1880, No. 20, and by Acts of 1882, No. 82, and by other acts in pari materia, taken and resumed exclusive control and jurisdiction for itself of all the matters of offense and punishment contained in said state legislation, in antagonism with, or on the same subject-matter of, these municipal ordinances; that the passage and effect of said statutes are to render illegal, null, and void, for the time being, said ordinances; and that as long as said statutes are in force the said city ordinances are branded with illegality, and unsusceptible of enforcement.' The court overruled these objections. On the trial of the case on its merits the court found the accused guilty as charged, and sentenced him to pay a fine of \$25, and, in default of payment, to imprisonment in the parish prison for a term of 30 days. He appealed to this court.

The first point made in defendant's brief is that by reason of his having, in the lower court, drawn in question the constitutionality and legality of the ordinance for the violation of which he has been convicted, this case has been brought to us in all its details of law and fact, including the evidence taken on the trial, on which, assuming the ordinance to be legal and constitutional, the recorder founded his judgment touching the guilt of the accused under it. In support of that position he relies upon the phraseology of article 81 of the constitution of 1879, and upon an expression found in the case of *State v. Dean*, 12 South. Rep. 489, (not yet officially reported,) where, referring to that article in connection with the cause then before us, we said: "The case must involve a question of the unconstitutionality or the illegality of the city ordinance under which the defendant and appellant is being prosecuted, and hence the constitutionality of the fine or penalty which is imposed is drawn in question; otherwise, the appeal is not examinable, in either law or fact." "If, however, the appeal presents such a question of constitutionality or legality of ordinance and penalty, the facts, as well as the law, are open to examination." Article 81 of the constitution declares that the supreme court's jurisdiction shall extend "to all cases in which the constitutionality of any tax, toll, or impost whatever, or of any fine, forfeiture, or penalty, imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof, and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the supreme court." Counsel of defendant is mistaken



in giving to the sentence in the case of *State v. Dean* the scope he does. Only a few months prior to this we had said in *State v. Callac*, 45 La. Ann. —, 12 South. Rep. 119, which was an appeal from a conviction under a city ordinance: "In such case our jurisdiction is confined to an examination and determination of the legality and constitutionality of the ordinance under which said fine and imprisonment were imposed. With the evidence in the case, on which the recorder founded his judgment, we have nothing whatever to do." The only object the court had in the *Dean* Case was to show that, as presented to it, there was involved in it neither questions of law nor fact, under article 81 of the constitution. When it declared that should a case come before it, involving a question of law or of fact, or of both, under that article, it would deal with it, the court simply followed the wording of the article itself. The fine, forfeiture, or penalty whose constitutionality or legality this court is directed to examine into and pass upon, regardless of the amount, is that imposed by the city council in the ordinance, and not that imposed by the recorder under it, on the evidence and facts of a special case, going to show that a particular person had violated its provisions. Were defendant's position correct, this court would be converted, practically, into a court of appeals as to infractions of the most trivial ordinances of all the municipal corporations in the state, at the instance of persons convicted thereunder, while persons convicted of state crimes are permitted to appeal simply on questions of law, and then only where the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding \$300 has been actually imposed. The "questions of fact" which we are called upon to examine are those which are essential to be examined for the purpose of determining the constitutionality or legality of the fine, forfeiture, or penalty imposed by the city itself. A municipal ordinance imposing a fine or penalty may, from the standpoint of the regularity of all the proceedings leading up to, and inclusive of, its enactment, be absolutely faultless, and yet the ultimate act done or enacted may be inherently or intrinsically illegal or unconstitutional. On the other hand, the latter may be perfectly unassailable, and yet the ordinance be illegal or unconstitutional by reason of some fact or circumstance connected with its passage. It may, for instance, have been presented in a wrong manner, at a wrong time, or not voted for as directed by law. It is to facts of this latter class or character that article 81 of the constitution refers when it says that "the appeal on the law and the fact" shall be directly to the supreme court. The distinction between the illegality of the fine, forfeiture, or penalty imposed by the municipal corporation and that imposed by the

recorder, and between the illegality of the ordinance and that of proceedings or action taken under it, is plain and broad, and has been repeatedly recognized by us. The two cases already cited, of *State v. Callac* and *State v. Dean*, both referred to it. In *Favrot v. Baton Rouge*, 38 La. Ann. 230,—a suit which presented the question of the legality of a tax, and in which the tax was resisted on the further ground of illegality of the assessment, and irregularities in the mode of levying and collecting the tax,—this court said it would entertain the appeal on one branch of the contestation,—the illegality of the tax,—and ignore the appeal on the other branch of the case. The same doctrine is announced, substantially, in *Gillis v. Clayton*, 33 La. Ann. 285; *Stubbs v. McGuire*, Id. 1089; *State ex rel. Rivet v. Judge*, 36 La. Ann. 286; *Oobb v. McGuire*, Id. 801; *Adler v. Board, etc.*, 37 La. Ann. 507; *State ex rel. David v. Judge*, Id. 898; *Minor v. Budd*, 38 La. Ann. 99; *City of New Orleans v. Schoenhausen*, 39 La. Ann. 237, 1 South. Rep. 414; *Bush v. Police Jury*, 39 La. Ann. 899, 2 South. Rep. 790. If, on an examination of this case, we find the ordinance attacked to be illegal and unconstitutional, the judgment of the recorder will necessarily have to be set aside, and the defendant will have no interest in presenting to us the evidence taken on the trial. If, on the other hand, we maintain the legality of the ordinance, then, in so doing, we exhaust our powers, and reach the limit of our inquiries.

The next position maintained by the defendant is that the city of New Orleans has no powers but such as are delegated to her by the state; that the state may at any time, in its own discretion, withdraw, modify, suspend, or supersede, for a limited time or absolutely, the exercise of such delegated power, and therefore, while the section of the city charter (section 7 of Act No. 20 of 1882) which authorizes it "to prevent the sale of adulterated drinks" is not repealed by Act No. 82 of 1882, yet in that act (No. 82) the state took jurisdiction itself over the subject-matter, and by so doing the powers of the city were suspended, and would remain in abeyance and dormant so long as the state statute was in force, but "awaking the moment it is repealed." In defendant's brief it is said that the power delegated to the city would have justified it in passing Ordinance 6596, (the ordinance attacked,) had not the state superseded or qualified the exercise of the power by exercising it itself, in its sovereign capacity. In the cases of *State v. Labatut*, 39 La. Ann. 514, 2 South. Rep. 550, and *State v. Callac*, 45 La. Ann. —, 12 South. Rep. 119, we held that the powers of the city of New Orleans under the section referred to were not repealed by the act of 1882. That statute has no repealing clause, and therefore it was urged that there was such a "conflict" between its terms and those

of the city charter that there was an implied repeal, and the powers of the city could not longer be legally exercised. The same argument is urged in the case at bar, though under a change of expression. Instead of claiming that the powers have ceased by "repeal," it is now contended that they are withdrawn by "suspension." In all the cases, however, the argument rests upon a "conflict" which we have held does not exist. We see no reason for altering our views, as expressed in the opinions rendered in the decisions mentioned.

Defendant contends that he is charged with an act which the city contends she has the right to punish, although the identical act is for the same purpose denounced and punished as a state offense, and that for the same act which the state has made a state offense the municipality has no right to institute a municipal prosecution, and punish as a municipal offense, and that, the state having now constituted the offense one against the state, he cannot, through the instrumentality of the ordinance, be deprived of his constitutional rights of being charged only through an indictment or an information, and of being tried by jury. Defendant, in this position, assumes that the offense charged as a violation of the city ordinance is identically the same as that which would be charged by the state for the same act through an indictment or information, and further assumes that the moment the legislature declares that the commission of a particular act shall be punishable by the state, as a state offense, the commission of the same act, which up to that time, as being violative of a municipal ordinance, would be, in the strictest sense, a municipal offense, and triable as such, must cease to be so triable, and the procedure in regard to the prosecution be forced to conform to the constitutional requirements which govern state crimes. In the case of *McInerney v. City of Denver*, 29 Pac. Rep. 516, this subject received a very exhaustive examination, and from the opinion rendered therein by Mr. Justice Helm we quote very freely. He said, speaking for the supreme court of Colorado: "Great reliance is placed upon the proposition that since, by general statute, the act with which petitioner is charged is made a misdemeanor, punishable by indictment or information, trial by jury, etc., the ordinances involved are obnoxious to a number of constitutional provisions touching criminal cases. The legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special importance, even though general statutes exist, relating to the same subject. An ordinance must be authorized, and must not be repugnant to a statute over the same territorial area, but if there be no other conflict between the provisions of the statute and ordinance, save that they deal with the same subject, both may be given

effect. The resulting or correlative doctrine is now too firmly established to admit of serious question,—that the same act may constitute two offenses, viz. a crime against the public law of the state, and also a petty offense against a local municipal regulation. The weight of authority, likewise, fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other, though, if it be not so provided by statute, every fair-minded judge will, when pronouncing judgment in the second prosecution or proceeding, consider a penalty already suffered. Since the act constitutes two offenses against separate jurisdictions, it is analogous to those cases where the same act is punishable under a congressional statute, and also under a state law. The offense being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense. These views are sustained by the following, among other, authorities: *Cooley*, Const. Lim. (5th Ed.) 241, 242, and note 1; *Dill*, Mun. Corp. pars. 367, 368, note 1; *Bish*, St. Crimes, par. 23; *Whart. Crim. Pl.* par. 440; *Hughes v. People*, 8 Colo. 536, 9 Pac. Rep. 50; *State v. Lee*, 29 Minn. 453, 13 N. W. Rep. 913; *Waldo v. Wallace*, 12 Ind. 569; *State v. City of Topeka*, 36 Kan. 76, 12 Pac. Rep. 310; *Greenwood v. State*, 6 Baxt. 567; *Howe v. Treasurer*, 37 N. J. Law, 145; *Mayor, etc., v. Allaire*, 14 Ala. 400; *Hamilton v. State*, 3 Tex. App. 643; *Shafer v. Mumma*, 17 Md. 331; *State v. Sly*, 4 Or. 277; *Johnson v. State*, 59 Miss. 543; *Wragg v. Township*, 94 Ill. 11; *McLaughlin v. Stephens*, 2 Cranch, C. C. 148; *City of St. Louis v. Cafferata*, 24 Mo. 96; *Rogers v. Jones*, 1 Wend. 238; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47." To these may be added 17 Amer. & Eng. Enc. Law, p. 252, and *People v. Lead Works*, 82 Mich. 471, 46 N. W. Rep. 735; *State v. Recorder*, 30 La. Ann. 454.

When we come to the second branch of the question we have just alluded to, we find that Ordinance No. 8596 of the common council does not attempt to determine how, or before what tribunals, persons charged with its violations shall be tried. It simply declares that said fine or imprisonment is to be enforced by any court of competent jurisdiction within the corporate limits of the city of New Orleans. If this case was lodged in the recorder's court, it was not by virtue of any authority to that effect given in the ordinance itself, but under the authority of section 49 of the city charter, (Act No. 20 of 1882,)—a state law. Under that section, recorders have the jurisdiction of committing magistrates, and to enforce all the city ordinances, and to try, sentence, and punish all persons who violate any legal and valid ordinance; and in section 50 all fines, penalties, and forfeitures imposed by said recorders are to be collected by them, and paid to the city treasurer. The power or right of the legislature to con-

fer such authority is expressly provided, as was said in *Mayor v. Meuer*, 35 La. Ann. 1193, by articles 92 and 136 of the present constitution. In that case the court said: "The distinction between crimes against the state, and mere violations of municipal ordinances, and the bearing of the constitutional provisions referred to, touching the respective modes or methods for the prosecution and punishment of offenses against the same, is clearly recognized by elementary writers on the subject, and confirmed by frequent adjudications,"—and in support of that statement cited numerous authorities. The matter had been fully examined before that case, in *State v. Gutierrez*, 15 La. Ann. 193, and *State v. Noble*, 20 La. Ann. 328. In the case of *McInerney*, already cited, this particular question was investigated, and the court announced its views as follows: "Whatever may be the view concerning the gravity of the offense against a state law, the very fact that the legislature authorizes the city to deal with the same subject by ordinance indicates that to the legislative mind the act also properly constitutes one of those petty offenses regarded as local injuries. The public welfare, requiring the maintenance of peace and good order, as well as of careful sanitary regulations, in cities and towns, renders summary proceedings, in many cases, a necessity; and we are not now prepared to inaugurate the revolution that must follow the announcement of the doctrine that a jury trial is an indispensable prerequisite. It is hardly necessary to say that such a trial is not always essential to 'due process of law.' \* \* \*

An ordinance is not, in the constitutional sense, a public law. It is a mere local rule or by-law,—a police or domestic regulation,—devoted in many respects of the characteristics of the public or general laws. The inquiry, therefore, is not, was the act complained of a public misdemeanor by statute or at the common law; but, does the offense charged belong to a class of offenses that were usually proceeded against summarily? A careful examination of authorities has led us to the conclusion that both in this country and in England the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order, and otherwise promoting the general welfare, within cities and towns, had for more than a century prior to the adoption of our constitution been generally prosecuted without a jury." See cases already cited; *Sedg. St. & Const. Law*, pp. 496, 497, also notes on pages 487 and 491; *Pom. Const. Law*, par. 246; *Proff. Jury*, par. 95; *Ex parte Hollwedell*, 74 Mo. 400; *State v. Conlin*, 27 Vt. 318; *Byers v. Com.*, 42 Pa. St. 89; *State v. Greene Co.*, 54 Mo. 572; *Ex parte Kiburg*, 10 Mo. App. 447; *People v. McCarthy*, 45 How. Pr. 97; *McGear v. Woodruff*, 33 N. J. Law, 215; *Inwood v. State*, 42 Ohio St. 186; *Hill v.*

*Mayor*, 72 Ga. 319; *Ward v. Farwell*, 97 Ill. 593.

Defendant, in general terms, attacks the city ordinance as being unconstitutional, illegal, and violative of the laws of the state,—particularly of Act No. 82 of 1882. He should have pleaded and shown with particularity in what respect it was unconstitutional and illegal. We gather from his brief that the specific objection made is that the state having, as he declares, adopted a standard of adulteration, it was the duty of the municipality to have made its standard identical with that of the state, and that, the two standards not being identical, that of the city, by reason of that fact, is illegal. We have already said that the offense charged against the defendant is a separate and distinct offense from that which would have been charged under the state law. The standard which defendant relies upon is, by the very terms of the law, adopted exclusively for the class of cases falling under it, and as descriptive of a state offense. When the general assembly conferred upon the city of New Orleans the several powers it did over the subject of the health of that city, and its maintenance, there was no state law on that subject, and the legislature contemplated that the council should adopt some standard. It was not only the right, but the duty, of the council to adopt a standard. The dealers in milk had the right to have a well-defined rule of action by which to be governed, and to which they could conform. It would be a grievance of which they would unquestionably complain if each case had to be submitted to the recorders, and determined by them according to their own ideas as to whether an article sold is or is not adulterated, and is or is not hurtful or prejudicial to the public health; making the recorders' judgment, and not the council's judgment, to be taken as a standard of right and wrong. It is not shown that the ordinance is unreasonable or arbitrary, nor (as a standard of some kind has to be adopted) that it passes beyond a fair measure of correction for the evil against which it seeks to guard. For the reasons herein assigned it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(45 La. Ann. 791)

HENDERSON et al. v. MEYERS et al., (A. MEYERS & BRO. CO., Limited, Intervener. No. 11,146.)<sup>1</sup>

(Supreme Court of Louisiana. May 15, 1893.)

LANDLORD AND TENANT—SUBLEASE—LIQUIDATION PROCEEDINGS—PROVISIONAL SEIZURE—INTERVENTION.

1. The lessors' rights are not affected. The lessees of plaintiffs organized a corporation, limited. They transferred their stock in trade

<sup>1</sup>Rehearing refused May 30, 1893.

and their business establishment, on the premises leased, to the company, limited. Upon the change from a partnership to a corporation, of which the partners were the owners of seven-eighths of the shares, they gave no notice to their lessors. It is not proven that the lessors knew that the corporation was the subtenant. The corporation is not entitled to the right of subtenants. They were third persons, and their goods were covered by the lessors' privilege.

2. The corporation, while occupying the property leased, alleging its financial embarrassment, applied to liquidate its affairs. Liquidators were appointed, and an order was granted by the court, authorizing liquidation immediately after plaintiffs obtained a writ of provisional seizure. The corporation intervened. The provisional seizure legally issued, and is maintained.

3. Plaintiffs were not bound to intervene in the liquidation proceedings, to prevent removal of the goods, and to assert their rights as lessors.

4. Before defendants had answered plaintiffs' suit, the corporation discontinued its liquidation proceedings, and resumed business under its charter. The corporation, as intervener in plaintiffs' suit and provisional seizure, furnished a forthcoming bond to the sheriff, and received possession of the goods from that officer. The bond represents the goods.

5. The judgment is amended by allowing execution for the amount due at the time it will issue, and for the balance payable from month to month in accordance with the terms of the lease.

6. The fee of attorney, stipulated in the contract of lease, is due; also, interest, as allowed in the judgment of the lower court, on the amount actually due and unpaid.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by William H. Henderson and others against A. Meyers & Bro. (A. Meyers & Bro. Company, Limited, intervener) on certain rent notes. Judgment for plaintiffs. Defendants and intervener appeal. Affirmed.

Lazarus, Moore & Lemle, for appellant intervener. Farrar & Leake, for other appellants. Henderson, Spencer & Fenner, for appellees.

**BREAUX, J.** Plaintiffs, domiciled in Kentucky, leased, for the period of five years, beginning October 1, 1890, to the defendants A. & J. Meyers, clothiers, the premises in which they conduct their business, at an annual rental of \$5,250, payable in monthly installments, for which they furnished 60 promissory notes, of \$437.50 each, and obligated themselves to pay 5 per cent. attorney's fee in case of suit. The lease contains the stipulation that the lessees should not sublet the property without the consent of the lessor. It also stipulated that, in case of the nonpayment of one of the notes at its maturity, the whole rent would become due. A corporation was organized in 1891, the capital stock of which amounted to \$32,000. The defendants owned shares in the company to the amount of \$28,000. In August of that year the defendants, A. Meyers & Bro., sold and delivered to the corporation styled the A. Meyers & Bro. Company, Limited, its stock, which consisted of clothing, of

cloths, gentlemen's furnishing goods, etc., on the leased premises, and the latter assumed the obligations of the firm of A. Meyers & Bro., and continued the business as successor of the firm. The agents of the plaintiffs, in this city, deposited the rent notes in bank for collection. The Meyers & Bro. Company, Limited, paid those due monthly from date of its possession, August, 1891, to July, 1892. The agents received the collections from the bank, and the member of the agent firm who testifies says that they gave themselves no concern as to who paid the rents. He answers as follows the questions propounded to him as a witness: "Question. You are generally familiar with the business of those who occupy stores on that street, are you not? Answer. Yes, sir. Q. Then for some time prior to the suit you were aware of the fact, were you not, that A. Meyers & Bro. Company, Limited, was occupying, and doing business in, these premises? A. Yes, sir. Q. Were you aware that they were paying the rent? A. Well, that I don't know. Q. You don't know? A. As long as the rent was paid, I did not inquire who paid it. Q. You did not care who paid it? A. I did not care who paid it. I went to bank on the 4th of every month, and inquired of the amount that had been paid. Q. And you were told at each time, up to date of filing this suit, that they had been regularly paid? A. That they had been regularly paid." Since the month of August, 1892, the monthly rentals, as they became due, were tendered to plaintiffs' agent, who refused to receive them. In July, 1892, the above-named corporation, setting forth that it was unable to meet its obligations, applied for the appointment of commissioners with authority to sell the property, and liquidate the affairs of the company. The order was granted, and the commissioners and liquidators assumed the duties devolving upon them. In August, 1892, the liquidating proceedings were discontinued, the property was turned over by the liquidators to the company, and the company was authorized to resume business under its charter.

#### Pleadings.

A few days after the application had been made, as above mentioned, to liquidate the affairs of the corporation, plaintiffs brought suit upon the rent notes, and obtained a provisional seizure against the defendants, A. Meyers & Bro. The plaintiffs, in an affidavit not objectionable as to form, averred apprehension of the removal of the property away from the premises. The defendants interposed the plea of no cause of action and prematurity, no rent being due. At the time the liquidators were no longer in possession. The liquidating proceedings had been discontinued, and the corporation had resumed business. The exception was referred to the merits, on plaintiffs' motion. The corporation of A. Meyers & Bro. Company, Lim-

ited, intervened, and alleged that it was the subtenant of the defendants; had paid the rent, and, being the owner of the property, was entitled to its release upon the execution of a forthcoming bond. In compliance with the court's order, it furnished bond to the sheriff's order, and took possession of the property; the value of which, it admitted in the bond, is in excess of the amount of the bond. The defendants, in their answer, pleaded the general denial. Admitting the sale made by them to the intervener, and that the latter assumed their obligations, and continued to occupy the premises leased, they allege that immediately after the sale it assumed the position of subtenant of the premises. They also allege that plaintiffs have accepted payment of rent of the A. Meyers & Bro. Company, Limited, from September, 1891, to July, 1892, and recognized it as subtenant; that they are estopped, and cannot repudiate said corporation as subtenant; that there has been tendered to plaintiffs the amount of rent falling due; that plaintiffs had no good reason to believe that the defendants would remove the property out of the premises; that, instead of resorting to a provisional seizure, plaintiffs' remedy should have been sought by intervening "in Re Liquidation of A. Meyers & Bro. Company, Limited,"—of the docket, by rule or third opposition in the liquidation proceedings; that the rent does not become due until a failure to pay the rent of any one month. Plaintiffs filed a supplemental petition setting forth that since the suit was instituted the defendants and the A. Meyers Bro. Company, Limited, have removed the property from the store. They claim interest, and fee of attorney. The defendants objected to the supplemental petition on the ground that it came too late, after issue joined, and that it contradicts the allegations of the original petition. The judgment of the court a quo condemns the defendants, A. Meyers & Bro., and individually, in solido, to pay the entire rent, interest, and fee of attorney, and decrees that plaintiffs' (lessors') lien and privilege for the amount be recognized and enforced. The intervention of the A. Meyers & Bro. Company, Limited, is dismissed. From the judgment the defendants and the intervener appeal.

#### Bill of Exceptions.

The objections to the amendment of plaintiffs' petition, as reserved in defendants' bill of exceptions, present themselves preliminarily for decision. In reference to the stage of the proceedings at which it was filed, the judge a quo may exercise a broad discretion. He may allow the amendment after issue joined, and the case is fixed for trial, if no injury be done. "The general rule that governs even the strictest practice of the courts of Great Britain on the subject of amendments is that they shall be granted or refused as they may best tend to the further-

ance of justice, with these exceptions, only: That the amendment be not wholly foreign to the case; that the plaintiff has not been guilty of any unusual delay or vexatious practice; that the defendant be not surprised or oppressed." *Aston v. Morgan*, 1 Mart. (La.) 178; *Vavasseur v. Bayon*, 11 Mart. (La.) 640; *Abat v. Bayon*, 4 Mart. (N. S.) 518; *Gasquet v. Johnson*, 1 La. 433; *Succession of Rouzan*, 7 Rob. (La.) 436. The nature of the action was not changed by the amendment. It was only setting out facts of removal of the property, not inconsistent with the petition. We therefore think the court did not err in allowing the amendment.

The following are the issues propounded by the defendants and by the intervener: (1) The property was in custodia legis, and the plaintiffs had no reason to believe that it would be removed; (2) the intervener is the subtenant of the property, and not a third person; (3) the terms of payment not having matured, the plaintiffs are not entitled to the payment of the whole rental.

The defendants, we have seen, had transferred all of their goods, on which plaintiffs had a lessor's privilege, to a corporation of which they were the principal organizers, and of which they owned at the time seven-eighths of the shares. This corporation, in its application to liquidate, alleged its embarrassed condition. It applied for an order to sell the property. This involved its removal. The plaintiffs were not bound by the proceedings in liquidation. The sale of the liquidators of a partnership or of a corporation, with the view of settling its affairs, cannot have the effect of compelling the lessor to resort to a rule or third opposition to assert his rights. It does not affect the lessor's right to keep the things pledged until he be paid. It detracts nothing from the lessor's right to distrain them for rent. It was not such a custody of the law as to bring to an end the exercise of all privilege upon the goods, save as against the liquidators and commissioners. They are to be looked upon as goods removed. When the corporation petitioned to discontinue the proceedings in liquidation, A. & J. Meyers were the owners of 265 of the 320 shares,—the entire number. They had a controlling interest. They could not, as owners of this controlling interest, make a disposition of property to the prejudice of their firm or personal indebtedness. The corporation was a separate entity, but these shareholders did not, because of a separate judicial being, escape all their obligation as debtors. They sought, through the agency of the corporation, the removal of the property. In thus seeking, they became subject to the provisional seizure that was issued.

This brings us to the second proposition,—that relating to the rights of the lessors against third persons, and to the rights of a sublessee. If the corporation of A. Meyers & Bro. Company, Limited, was the subles-

see, it devolved upon it to disclose the title on which it occupied the premises. It does not satisfactorily appear that the corporation was the subtenant. There is nothing in the proof directly defining the relations between this company and the defendants. The former succeeded to the business—continued as the successor—of the latter. It is not stated in evidence that, by contract or stipulations of any kind, it became the subtenant of the vendors of the goods. "The fact that a person other than the lessee is found in possession of demised premises is presumptive evidence that he is an assignee, and not an under-tenant, especially if he has paid rent to the original landlord. 4 Walt, Act. & Def., verbo "Lease." There was a prohibition, in the lease, to sublease. The lessors have the right to renounce the prohibition expressly, or even tacitly. As to the latter, if the property had been subleased, to the knowledge of the lessors, and they had approved the sublease, this directly implies their consent to remove the prohibition. But the mere silence of the lessors will not have that effect. The lessors, in this case, have remained silent, but have not either directly or indirectly given consent to any sublease. "Le fait de toucher les loyers," says Laurent, (volume 25, p. 258,) "n'est pas le seul d'où résulte l'approbation du sous-bail sans une autorisation par écrit du bailleur."

Our attention is directed to the case of *Freeland v. Hyllested*, 24 La. Ann. 450. The record of the case in the clerk's office discloses that the defendant, by contract in writing, had subleased the property to Vinton, the intervener, to which the plaintiff consented, and, after having consented, directed his agent to suggest to the sublessee the propriety of holding the rental subject to his order. The intervener was therefore a subtenant. The intervener in the case at bar was not a subtenant, with the consent, either expressed or implied, of the plaintiffs. This right of pledge affects third persons, where their goods are contained in the house or store by their own consent, express or implied. Civil Code, art. 2707. The contract of lease expressly excludes the right of subleasing. Without the consent of the owner the premises could not be subleased, and the proprietors were not bound to take any action further than necessary for the protection of their interest. This court, interpreting the concluding clause of article 2696, holds that the prohibition to sublet is always construed strictly against the lessee. *Cordeviolle v. Redon*, 4 La. Ann. 40. The tender does not appear to have been unconditionally made in the name of the defendants. *Prieur v. Depouilly*, 8 La. Ann. 399. Considering these propositions, supported as they are by a number of decisions of this court, we conclude that plaintiffs' action was properly maintained.

The plaintiffs claim that all the rent is

due; that defendants' action has the effect of changing the indebtedness to a cash basis. In deciding this point we take into consideration the circumstances of the abandonment, some time after the suit had been instituted; the facts that the goods were sold under an order of court; and the payment of rent as it became due. They are not sufficient to defeat or lessen any of plaintiffs' rights to prosecute their claim against the defendants, and maintain an action in rem against the property subject to their lease in the possession of the intervener, but present good grounds not to change the terms of the indebtedness, and to let them remain as stipulated in the lease. The intervener furnished bond, accepted by the sheriff as good and solvent, to produce the property to meet the judgment of the court, or pay its amount. This bond represents the goods. In decreeing recourse upon this bond the obligations remain until payment, and plaintiffs' right remains unaffected until payment. We do not desire, by our ruling, to weaken the authority of *Christy v. Casanave*, 2 Mart. (N. S.) 451; *Roumagne v. Blatrier*, 11 Rob. (La.) 107; *Ledoux v. Jones*, 20 La. Ann. 539. The state of facts in these cases is not in all respects similar to the facts of the case under consideration. The abandonment in the cases just referred to was complete, and no bond to secure the claim was on file. As precedents, *Reynolds v. Swain*, 13 La. 193, and *Prieur v. Depouilly*, apply. The terms of payment in these cases remain the same as they were before judgment was pronounced.

In reference to the fee of attorney, to which objection is urged, it having been stipulated in the contract of lease as one of its conditions, the difference between the parties justified the proceedings instituted to secure plaintiffs' rights. We think the fee is due.

It is therefore ordered and decreed that the judgment appealed from be amended by allowing execution to issue, as decreed in that judgment, for the sum actually due at the time the writ of *fi. fa.* will be applied for, and that for the balance a writ of *fi. fa.* issue from month to month until the judgment is all paid. The judgment is also amended by allowing, as in the judgment of the court a qua, interest on the notes due and demandable as to payment, and rejecting all demands for interest on the notes not matured. The judgment is also amended by setting aside the order of dismissal of the court a qua, and it is further amended by rejecting intervener's demand, without prejudice, however, to its liability, and that of its sureties, on the forthcoming bond for the restoration to the sheriff of the property seized, or for the satisfaction of plaintiffs' judgment. After amendment as above, the judgment appealed from is affirmed, at appellees' costs.

(45 La. Ann. 347)

JOHNSON v. CARRERE. (No. 11,208.)

(Supreme Court of Louisiana. May 15, 1893.)

PRINCIPAL AND AGENT — AUTHORITY — RATIFICATION — FINAL SETTLEMENT OF SUCCESSION — IRREGULARITIES — JUDGMENT.

1. The principal's acts will be liberally construed in favor of a ratification.

2. A principal notified of the acts of his agent must disapprove them within a reasonable time, or he will by his silence ratify them.

3. A judgment carried on a final tableau of distribution, and partly paid in the final settlement of the succession, and duly homologated, after notification binds the heirs, who will not be heard to plead its nullity on the ground of defective citation served upon their ancestor, the judgment debtor.

4. The authority of an agent cannot be contested, more than 20 years having elapsed since the agency was alleged and the judgment obtained.

5. More than 10 years have elapsed since the property was purchased by plaintiff's author, in good faith, and a title acquired, which was legal and sufficient to transfer the property.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit by Mrs. Jennie Johnson, wife of William Johnson, against E. A. Carrere, to compel defendant to accept title to certain property. Judgment for plaintiff. Defendant appeals. Affirmed.

Branch K. Miller, for appellant. B. Armbruster, A. J. Murphy, and C. H. Osterberger, for appellee.

BREAUX, J. The plaintiff sues to compel the defendant to accept title to a certain piece of property on Canal street. The defendant agreed with plaintiff to purchase it from her for the sum of \$6,500. The defendant, after examination of the title, refused to accept it, on the ground that the judgment pronounced in the year 1866, in the suit of the Bank of New Orleans against C. Toledano, No. 21,799, of the late third district court, was null and void. The judgment was rendered for the sum of \$51,477.63 upon confirmation of a default. Under the execution of the judgment the property was acquired by Royal A. Porter on 5th February, 1867. Upon certain of the notes merged in the judgment the indorsement of C. Toledano, the debtor, was by his agent, John Taylor. His authority to indorse as agent is not questioned. The petition in that suit sets forth the authority of the agent to represent the defendant in the suit. In the act of procuration the principal, Toledano, gives full power to his agent to manage and transact all his business; to draw checks and drafts; to make promissory notes, bills of exchange, drafts, bonds, and all other obligations for the payment of money; to receive moneys and contract debts; to lease, sell, and mortgage his property. The power is general in terms, and the agent is specially authorized to ask, demand, sue for, recover, and receive all sums

of money due the principal; also to appear before all courts of law. There is in the suit a citation of Toledano by service upon the said agent. If it be conceded that the power was not as ample as it should have been, there was absolute acquiescence in the sale. The defendant, Toledano, departed this life three years after the judgment had been obtained, and nearly that time elapsed between the date of the sale of the property and that of his death. He must have known that he had been sued through his agent, and that the property had been sold. The agent's authority was never denied. The maxim, "semper qui non prohibet aliquid se intervenire mandare creditor," applies after these many years, during which the authority of the agent alleged judicially has remained unquestioned. At this time the heirs do not dispute his authority. After the death of the late C. Toledano they ratified the proceedings in which the judgment was pronounced and the sale made. The mortuary proceedings disclose that an inventory was duly made, and an administrator appointed. The administrator in due time presented a provisional account of his administration, from which we extract: "The above balance of \$24,450 has, under the before-recited order of the second district court, been applied in part payment of the judgment obtained by the Bank of New Orleans against the deceased in the third district court for this parish in the suit numbered 21,799 on the docket of said court for the sum of \$51,477.63." Some time after, a tableau of distribution was filed. The judgment for the same amount is carried on the tableau. It was duly homologated. Lastly, a final tableau of distribution was filed, also setting forth the indebtedness proven by the judgment now assailed, and referring in terms to that judgment. Three of the heirs opposed the homologation. Due advertisement was made and notice given of the filing. This judgment was taken account of throughout in casting the debit side of the succession accounts. It was partly paid with the proceeds distributed by the administrator, contradictorily with the heirs. The ratification was entire, and relates back to the suit in which judgment was pronounced. More than 26 years have elapsed since the homologation, and more than 10 since Mrs. Porter, a third person to the original transaction, became the owner by purchase from the succession. This period has cured all informalities, if any could remain not cured after the heirs have expressly ratified the title by consenting to the distribution made and the partial ratification of the judgment. The judgment appealed from in this case condemns the defendant to accept title. No reference is specially made in the judgment to rents, which, in accordance to the agreement, is to be turned over to the vendee; nor to the taxes due on the property. The deed tendered is not in

evidence. The defendant waived the tender. In his pleadings he does not complain that the deed was not drawn in accordance with the terms and conditions of the agreement to purchase. It will not be presumed that plaintiff has sought to evade any part of these terms and conditions. We therefore will not amend the judgment, as urged by defendant should be done. It covers all the rights of the parties.

The plaintiff and appellee prays for the infliction of damages for a frivolous appeal. The defendant, in earnestly submitting his grounds of defense in matter of title to realty, has not rendered himself liable to damages. Even if he had been overprudent in matter of a title to immovable property, the lack of seriousness and earnestness must be obvious to justify the infliction of damages.

Judgment affirmed, at appellant's costs.

(45 La. Ann. 948)

STATE ex rel. CAWLEY v. JUDGE OF FOURTH JUDICIAL DIST. COURT. (No. 11,279.)

(Supreme Court of Louisiana. May 15, 1893.)

IMPRISONMENT UNDER CRIMINAL SENTENCE—FAILURE TO PAY FINE—SURRENDER OF PROPERTY—RELEASE.

1. A party confined in jail under a decree of a competent court is not entitled to an absolute and immediate release from confinement on making a surrender of his property, and upon obtaining the judge's order of acceptance thereof. He must await the action of the meeting of his creditors.

2. Non constat, that his cession and discharge may not be successfully opposed.

(Syllabus by the Court.)

Application by John Cawley for writ of mandate to the judge of the fourth judicial district court, parish of Grant. Refused.

Edwin G. Hunter, for relator. Respondent, in pro. per.

WATKINS, J. It appears from the petition of the relator that at the March term of the district court of Grant parish for the present year (1893) he pleaded guilty to the charge of selling liquor without paying a license, and was sentenced to pay a fine of \$200 and costs, and, in default of payment, he was to suffer imprisonment in the parish jail for a period of four months, in keeping with the terms and conditions of Rev. St. § 910; and he was imprisoned in default of paying fine. That, availing himself of the provisions of the insolvent laws of the state, and particularly those relating to debtors in actual confinement, he applied for their benefit, for the purpose of regaining his liberty. That, notwithstanding the judge accepted his surrender, and granted him the stay of proceedings against his person and property that is usual in such cases, he has refused to release him from custody, and suffers him to be detained in prison. That the fine imposed must be placed upon the footing of any mere

contractual obligation to pay money, and from which he is legally relievable by means of a discharge under the insolvent law. His averment is "that, after the order accepting the surrender was signed, he was, by virtue of that order, entitled to be released from custody; and that he has suffered great injury, and a denial of justice at the hands of the said judge by his refusal to order his release from custody. The respondent returns that he declined to release the relator from imprisonment because his order accepting his surrender and granting him a stay of proceedings directed the convocation of a meeting of creditors on the fourth Monday of May, 1893, which will occur on the 22d day of the month, a date that is still in the future; and that the relator is not entitled to liberation from imprisonment until said meeting shall convene and take action in the premises. The Code declares that "the creditors cannot refuse the surrender made according to the forms ordained by law, unless in case of fraud on the part of the debtor. It operates the discharge of the restraint of the debtor's person, and delivers him from actual imprisonment." Rev. Civil Code, art. 2176. It is the creditors, and not the judge, who can discharge the insolvent. *Burdon v. His Creditors*, 20 La. Ann. 364. After the cession and acceptance of a surrender by the judge, all of the property of the insolvent vests in his creditors. Rev. St. § 1791. It is the duty of the judge, when granting an order staying all proceedings against the insolvent's person and property, to likewise grant an order convoking a meeting of creditors. Id. § 1790. At the meeting of creditors, their deliberations "in respect to the sale or disposal of the property surrendered, or for any other object relative to the interest of the mass of creditors, the opinion of the majority of the creditors in number and amount shall provide." Id. § 1799. Any creditor of an insolvent debtor is entitled "to oppose the appointment of a syndic, or to charge fraud against the debtor \* \* \* within ten days next following the meeting of creditors," etc. Id. § 1802. And in addition to these general provisions, clearly indicating that the insolvent cannot be discharged immediately upon the judge's order accepting his surrender, the further specific declaration of the statute is that "any debtor who may be imprisoned under a writ of arrest, and against whom no charge of fraud is pending, may be discharged by making a surrender of his property to his creditors." Id. § 1819; *Caldwell v. Bloomfield*, 2 La. 503. From the foregoing provisions of law, we take it to be clear that there is no possible efficacy in the stay order accompanying the judge's acceptance of a surrender, except to operate the future exemption of the debtor from arrest, and the molestation of his property by individual creditors. And, while the acceptance of his surrender operates the transfer of the insolvent's property to his



creditors, yet the creditors collectively can alone administer same, and make orders looking to his discharge. It is evident that the relator's application is premature, and must be refused. It is therefore ordered, adjudged, and decreed that the application of relator for a peremptory mandamus be refused, at his cost.

#### On Rehearing.

(May 22, 1893.)

FENNER, J. Relator, imprisoned under criminal sentence, cannot stand in better position than one under civil arrest; and even in the latter case, under section 1819, Rev. St., the debtor claiming release must show not only a surrender accepted by the judge, but also that no charge of fraud was pending against him. The latter can only be established after the expiration of the delay within which the law provides that charges of fraud may be made, viz. within 10 days after the meeting of creditors. Such seems to have been the view of the statute taken by this court. *Martin's Case*, 2 Mart. (La.) 78; *Caldwell v. Bloomfield*, 2 La. 503. We may add that relator's case is not, in our opinion, within the letter or meaning of section 981, Rev. St. He is not "sentenced to pay a fine and costs, and to stand committed until they are paid;" in which case his imprisonment would not discharge the fine. His sentence is, in effect, alternative, i. e. to pay the fine, or, in default of payment, to be imprisoned for four months. If he serves his term of imprisonment, the fine will be discharged. To such a case the statute does not apply. Rehearing refused.

(45 La. Ann. 932)

#### Succession of STEPHENS. (No. 11,284.)

(Supreme Court of Louisiana. May 15, 1893.)

WILLS — IMPOSSIBLE CONDITIONS — INTEREST ON LEGACIES — RECOGNITION OF LEGACY — PERSONS AND ESTATES OF MINORS.

1. A disposition by will, in which the property donated is to remain in the hands of the executor until a legatee who has arrived at the age of majority shall be 24 years of age, cannot be distinguished from one that seeks to prohibit the sale or other exercise of the right of ownership, and is therefore an impossible condition, illegal, and to be reputed as not written.

2. The persons and estates of minors are placed under the power of tutors and under-tutors.

3. Interest on particular legacies is due from the date of demand for their delivery.

#### On Rehearing.

The qualified recognition of the legacy by the executor will not carry with it the payment of interest prior to demand for its delivery.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

Succession of Thomas A. Stephens. Judgment, from which Mora, the executor, and Mrs. Brunet, tutrix, appeal. Affirmed.

Gus. A. Breaux, for appellant Mora. Ohrehen & Suthon, for appellant Mrs. Brunet. George O. Preot, for appellee Bertha Egloff. James D. Seguin, for appellee John F. Byrne, natural tutor.

BREAUX, J. The questions for decision are: (1) Whether an executor's authority, after having invested the amounts of the legacies as directed, continues under the terms of the will, and includes the duty of retaining possession and administering the interests for the protection and benefit of the legatees, or should he deliver the evidences of indebtedness and title of investment made by him to the legatees? (2) Whether the interest on a legacy of a certain amount runs from the date of the filing of the tableau recognizing the indebtedness of the succession. By the following excerpts from the testament of the decedent the pertinent facts of the case are set forth, viz.: "After all my just debts are paid, I give to Edna May Byrne, daughter of John P. Byrne and Ida Blackburn, the sum of \$1,000, to be put out at interest until she becomes of age, interest to be paid yearly for her education, clothing, and support. I give to Octavia, Felicity, and Jules Brunet, three children of Jules Brunet and Octavia Wolf, \$500 each, to be put out at interest until they become of age, interest to be paid yearly. I give and bequeath to Sophie Egloff, now living with Mrs. Alice Mora, \$500, to be put out at interest until she is twenty-four years of age, interest to be paid yearly. I give and bequeath to Bertha Egloff, now living in my house, \$3,500, whereof \$3,000 are to be put out at interest during her life, the interest to be paid yearly, and the remaining \$500 are to be paid in cash to her, in equal installments of \$250 each, one at my death and the other one year after my death. \* \* \* I give the remainder of my effects to Mrs. Alice Mora, wife of Thomas Mora. \* \* \* I charge my said executors to pay all my just debts, and then to distribute my estate as above provided, investing those legacies that are required to be put out at interest in such securities as they may deem best, in the name of the said legatees." Two of the plaintiffs in rule who apply to be placed in possession of certain legacies are the tutors of the minors who are legatees. The plaintiff, in another rule pending before us on appeal, is of the age of majority.

The possibility that the disposition is a *fidel commissum* is suggested in argument; also that it involves a substitution. It is also contended that an "impossible condition" attaches to the bequests. In reference to the first,—*fidel commissum*,—it being "a disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person," it does not include in its meaning any of the bequests of the will. It does not contain any

gift to the donees, through the agency of a third person, in confidence, that he will dispose of the amount for the benefit of the donees, i. e. no one "is charged to preserve for or to return a thing to a third person." The donations of the decedent are absolute. They are made without attempting to interpose any third person. The investment of the funds as directed in the will, and the manifest desire of the testator of protecting the interest of the donees, do not involve a *fidei commissum*. In reference to the prohibited substitution, tested by the discussion of the authorities and the decision in *Marshall v. Pearce*, 34 La. Ann. 557, there being no duty imposed upon the executor, and no condition attached to the direction to deliver the property ostensibly donated or really donated for a period to another, the real donee, at any time, it cannot in reason be held to fall within the definition given. In the opinion it is said: "The simplest test to the substitution prohibited by our law is that it vests the property in one person, \* \* \* and at the death of such person vests the same property in another person, who takes the same directly from the testator, but by a title which only springs into existence on the death of the first donee. Such a disposition destroys the power of alienation of the property by the first donee, because he is bound to hold it until his death, in order that the person then called to the title may take it. At the same time no power of alienation exists in the second donee during the life of the first, because this title only comes into being at the death of the latter." No such condition presents itself under the will in the case at bar. The legatees have absolute title, transferable and heritable. No others are named to have any interest. It is therefore not a prohibited substitution.

In reference to impossible conditions, defined as being those that are contrary to the laws or to morals, and as such reputed not written, the article, (900 of the Code Napoleon, and 1519 of our Code,) says Marcade, (volume 3, p. 553,) declares that in gratuitous dispositions all conditions physically or legally impossible are made nugatory by law to that extent that the disposition becomes one pure and simple, and had effect as if the impossible condition had not been written. If the condition is illegal, it is ignored and considered not written. The condition attached, relating to the administration of the property by the executor, has features denying to the donee the enjoyment to which she has a right as owner. The intention of the testator is the law of the will. "I give and bequeath" are the positive and disposing words intended to vest the donee with the right named. They are the absolute owners. Ownership is the right by which a thing belongs to some one in particular to the exclusion of all other persons. Civil Code, art. 488. "The ownership of a thing is vested in him

who has the immediate dominion of it, and not in him who has a mere beneficiary right in it." Civil Code, art. 489. "Ownership is perfect when it is perpetual, and the thing is unincumbered with any real right towards any other person than the owner." Civil Code, art. 490. The legatees are vested with these elements of ownership. The impossible conditions attached to the legacy are as if not written. By executing the condition maintaining the executor's possession and his right to administer, the property is practically taken out of commerce, and the authority to alienate is denied.

As to the denial of the right of alienation to the owner, we have the authority of Sirey, Codes Annotes, p. 387, § 47, and 18 Demolombe, § 290, in support of the statement that the condition not to alienate is an impossible one to impose upon a bequest of the ownership of property. From the former we translate: "That condition is impossible and to be expunged, prohibiting the legatee from selling or binding or incumbering the property before a certain epoch." From Demolombe: "The prohibition not to alienate is at most a precept, a *nudum praeceptum*." In *Partee v. Hill*, 12 La. Ann. 767, it was decided "that the appointment by will of trustees to receive a sum of money bequeathed by the testator, and to pay the interest on it annually to the legatee, will be disregarded if the legatee refuses to acquiesce in the creation of such an agency." From *Succession of Franklin*, 7 La. Ann. 395, we quote: "Any illegal or impossible condition the disposition may contain is presumed to have been inserted inadvertently, and not written." *Clague v. Clague*, 13 La. 1. The propositions are well supported by trustworthy authority that impossible conditions are to be considered not written, and that such condition as that attached to the legacy by the decedent is an impossible condition. In his elaborate opinion the learned judge of the court a qua says: "There appears to have been some confusion in the following opinion of the 'impossible condition' with the *fidei commissum*, but, as the judgment sustained the legacy, and merely held the condition to be void, its meaning, legally speaking, was that there was an impossible condition, and that there was not a *fidei commissum*, for, if the latter had existed, the whole bequest would have been null. *Succession of Steven*, 36 La. Ann. 754. I am aware that there may be some difficulty in reconciling the conclusion of the supreme court in the case cited with the ruling in the *Macias and Strauss Cases*, 31 La. Ann. 127, 38 La. Ann. 59, but, as the case cited has not been overruled in terms, and is supported by other decisions previously rendered, I feel authorized to rely on it in this case." We concur in the conclusion of the district judge, relative to the *Steven Case*, 36 La. Ann. 754, as authoritative when the legatee is *sui juris*. The two cases, *Macias' and Strauss'*, deflect

somewhat from the line of preceding decisions. We will not discuss the departure. They apply to the interests of minors. Whatever may be the appreciation of those decisions, when the necessity will arise for the consideration we are confident that the principles announced will not be extended as applying to legacies to persons not under legal disability. The legatee of age has the absolute right to the dominion of the property donated to her. These last decisions countenance the creating of a quasi tutorship *quoad* the legacy. They will have to undergo the test when a question arises involving the interests of minors. In the case at bar the minors' interests are not affected by such a condition as attached to the legacy of the legatee of age. It was not sought, under the terms of the will, to charge the executor with the duty of administering their interests until they are of age. After investing the amount of the legacies, it does not appear that it was the testator's intention that he should collect and account for the interest until the majority of the minors. There is nothing in the will attached as a condition with the view of precluding the tutor from administering. "The persons and estates of minors shall in all cases be placed under the power of tutors and undertutors." Code Pr. art. 958; Succession of Foucher, 30 La. Ann. 1017.

Interest is due from the day of the demand for delivery. Civil Code, art. 1626. Interest is only due on particular legacies from the date provided in the article of the Code. In the case to which our attention is directed, the issue, it appears, was as to whether the interest should run from 1857 or 1872. The court held that it should run from the last date. There was no question presented or decided as between the last date and that of demand. In *Ventress v. Brown*, 34 La. Ann. 461, there was a question of equity. "Equity, besides, entitles Isaac D. Brown to that allowance. Interest was allowed to his sister, Mrs. Feltus. There is no reason why he should not also receive it." We adhere to the article of the Code that interest is due from demand. "*Le légataire particulier n'a jamais droit aux fruits qu'à partir de sa demande.*" 4 Marcade, p. 69. The judgment of the court *a qua* is affirmed, at appellants' costs.

On Rehearing.

(May 27, 1893.)

Conceding, *argumenti gratia*, the law points presented for appellants in their application for a rehearing, there are obstacles in the way of granting the application. The executor acknowledged the legacies by carrying them in his account. But the conditions attached excluded them from the rank of legacies deliverable *instante*. The testator willed the payment of his debts, the investing of the amount of the legacies. In reference to the legatees who are minors, he did

not clearly direct by whom the funds should be managed after their investment, in accordance with the terms of the will. In so far as related to the legatee of age, the testator, after the investment, placed the management in the hands of the executor. This restriction was nugatory, and the amount will now be turned over to this legatee. The executor who files an account cannot be held to the payment of interest on particular legacies prior to the demand for their delivery, though he may recognize them as just and legal, if the admission is accompanied with conditions rendering it equitable and proper that interest be not allowed. The sale of the property, the payment of the debts, the interpretation of conditions of the will not clearly expressed involved delay which the judge of the court *a qua* did not consider unreasonable. With his views upon the subject ours coincide. The legatee of age, as to interest, claimed that the rule sued out by her should be made absolute in so far as to order the executor to invest the sum of \$3,000 in her name, with the legal interest thereon from June 6, 1891. Interest, by the judgment, is allowed from 30th January, 1893, the date that her demand was filed, the date of investment ordered. She acquiesces in the judgment, and does not apply for a rehearing. The appellant John F. Byrne, natural tutor, claimed interest on a thousand dollars from 6th June, 1891. By the judgment he is allowed interest from the date his demand was filed, *i. e.* November 28, 1892. The other petitioner for a rehearing, Mrs. Octavia M. Wolf, natural tutrix of minors who are particular legatees, did not, in the rule for delivery of the legacy after investment, claim interest from any time prior to the filing of her demand. She was allowed interest from the day her demand for delivery was filed, *i. e.* 30th January, 1893, to the date of investment. We think the judgment is correct, and does justice to the parties. Rehearing refused.

(45 La. Ann. 342)

STATE v. HARRIS. (No. 11,271.)

(Supreme Court of Louisiana. May 15, 1893.)

HOMICIDE—EVIDENCE—HOSTILE DEMONSTRATION OF DECEASED—RES GESTÆ.

1. The overt act or hostile demonstration of the deceased against the accused must be proved before the introduction in evidence of communicated threats.

2. The trial judge is clothed with discretion to determine whether a hostile demonstration had been made by deceased against accused.

3. The tendency of recent adjudications is to extend, rather than to narrow, the scope of the introduction of evidence as part of the *res gestæ*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence, as part of the *res gestæ*, for the purpose of showing its true character. The general rule is that the declaration sought to be proved must be contemporaneous with the event sought to be

proved as the principal fact; but, when there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gestae*.

4. An act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period.

5. On a difficulty which resulted in a homicide, and in the conflict the ear of the deceased was bitten or torn off by the accused, it is admissible evidence to prove the finding of the severed ear on the ground where the conflict took place, 15 or 20 minutes thereafter; and the acts and declarations of the accused, in relation thereto, when the severed ear was pointed out to him on the ground, are also admissible.

(Syllabus by the Court.)

Appeal from district court, parish of Grant; George Ware, Judge.

Ellas A. Harris, having been convicted of manslaughter, appeals. Affirmed.

Robert P. Hunter, for appellant. M. J. Cunningham, Atty. Gen., and R. E. Milling, Dist. Atty., for the State.

McENERY, J. The accused was indicted for murder, and convicted of manslaughter, and sentenced to hard labor. He appealed.

There are several bills of exceptions in the record. No. 1 contains a variance of statement of facts between counsel and trial judge. On the repeated rulings of this court, we accept the latter's statement. It completely destroys the effect of the bill. The statement also shows that the district attorney withdrew his objection to the introduction of proof—without first showing an overt act on part of deceased—of threats communicated to the accused.

The second bill is as follows: "When the state had offered the testimony of the witnesses Walter Neal and Fleet Tillman to show that after the difficulty between accused and deceased had occurred, and after the deceased had gone home, some two hundred yards, Fleet Tillman, the son of deceased, returned to the house of accused to get his father's cap, and a piece of the ear of said Tillman, deceased, which in the scuffle subsequent to the firing of the shot had been bitten or torn off by the accused, and that the accused had kicked the cap towards the boy, and told him to get out of his yard, and that on the discovery by the boy of the piece of ear, lying on the ground, the accused had put his foot on it, and stamped it, counsel for accused objected to the introduction of said evidence as not constituting a part of the *res gestae*; that the subsequent acts of the accused, away from, and out of the presence of, the deceased, and fifteen or twenty minutes after the difficulty was over, could not be connected with the difficulty itself in any way; and that such proof could only be offered to prejudice the minds of the jury against the accused, and draw their minds away from the facts of the homicide,—which objections were overruled by the court, and

the testimony admitted, for the following reasons, viz.: 'The evidence shows that the only means Tillman had to prevent accused from shooting him again was to close with him, and in the scuffle that ensued the ear, or a portion of the ear, of the deceased, was bitten off. The facts detailed in defendant's bill occurred so shortly after the shooting by accused as to constitute them a part of the *res gestae*, and are also admissible to show the feelings of the accused at the time of his attack upon the deceased.' The tendency of recent adjudications is to extend, rather than to narrow, the scope of the introduction of evidence as part of the *res gestae*. As a general rule, when it is necessary to inquire into the general nature of the act committed, or the intention of the party who did the act, proof of what the person said at the time of doing it is admissible evidence, as part of the *res gestae*, for the purpose of showing its true character. The general rule, also, is that the declaration sought to be proved must be contemporaneous with the event sought to be proved as the principal act; but, when there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gestae*. *Insurance Co. v. Mosley*, 8 Wall. 397; *Railroad Co. v. Coyle*, 55 Pa. St. 402; *Harriman v. Stowe*, 57 Mo. 93; *Field v. State*, 34 Amer. Rep. 479; *State v. Gonsoulin*, 38 La. Ann. 459; *State v. Corcoran*, Id. 949; *State v. Lewis*, 44 La. Ann. 958, 11 South. Rep. 572. Mr. Taylor, in the *Law of Evidence*, gives the fourth rule for the test of the admissibility of such evidence, as follows: "That an act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narration of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period." *Tayl. Ev. par. 523*. The trial judge's statement is that the ear had been severed in the fight, and that this fact had been proved. The finding of a piece of the ear on the ground, immediately after the difficulty, was a fact competent to be proved to show the facts of the severance of the ear, and the wounds inflicted upon the deceased. The act of stamping upon the ear, and the refusal to give it to the boy, was a fact contemporaneous with the discovery of the ear, and inseparable from the narration of its discovery by the boy. The refusal to let the boy have the piece of ear was also competent and admissible evidence to prove that the accused endeavored to suppress evidence as to the fact of its having been torn or bitten off during the fight. The incident of kicking the cap towards the boy, and ordering him to leave his premises, is so insignificant that it would be an absurdity, and a denial of justice, to disturb the verdict, because this fact had no reference to the principal one.

No. 3 was reserved to the ruling of the trial judge on the examination of a witness for the defense. This, also, is disposed of

by the statement of the trial judge, who says that he does not "agree with counsel as to his statement in the bill. The cross-examination by the district attorney of the witness Miss Arzela Harris was confined strictly to matters and things testified to by the witness in her examination in chief."

No. 4. The consideration of this bill will dispose of the others, as they depend upon the fact whether or not the deceased had made a hostile demonstration against the accused. The witness was offered to prove a general threat to kill a man before sundown, made by the deceased, which would corroborate the communicated threat testified to by Arzela Harris, and also the overt act testified to by her, of deceased against accused. The trial judge states that the ruling as to the general threat was in consequence of no overt act having been proved. His ruling is not, therefore, within the doctrine enunciated in case of *State v. Williams*, 40 La. Ann. 168, 3 South. Rep. 629. The statement of the reasons for his rulings is thus given by the trial judge: "While Miss Harris, the daughter of the accused, did swear that Tillman (deceased) came into the house of her father with an ox whip, she was fully contradicted by Neal and Baden, both of whom swore positively that Tillman did not come into the house that night, and made no threats whatever; that they were there at the time they say Tillman came in with the ox whip and made threats, and that he did not come into the house, and made no threat whatever. As to the evidence of Miss Arzela Harris as to the overt act at the time of the shooting, it was shown by the testimony of Teddlie and Neal that Teddlie shut the door when he went out on the gallery, and took Tillman by the arm; that Harris came out the back way, and from around the house; that there was no window in the front of the house; that Miss Harris, the witness, was in the house; that she was in the house during the whole difficulty, and could not have seen anything that took place; that they were positive she was not on the gallery, nor in the yard, at any time during the difficulty,—and whose statements are corroborated by the evidence of the witness Walker, sworn for the defense, and who was in the house himself at the time of the difficulty, and did not see any part of the difficulty, and says that Miss Harris was in the house during the difficulty outside. And, further, she contradicted herself in this: On being first placed on the stand, she stated she was on the gallery when the shooting took place, and, being recalled afterwards, stated she was in the yard, near her father, when the shooting took place." The trial judge's ruling is that he has the sole and exclusive right to determine, after the introduction of evidence, the extent of the overt act,—whether or not it was a hostile demonstration against

the accused. The counsel for the accused contends that the jury are the judges as to whether the testimony introduced as to the overt act of the deceased amounted to sufficient proof of that fact, and as to whether, at the time he fired the shot, the appearance of danger to the accused was such as to have justified him in firing upon the deceased. The witnesses for the state all say that the deceased, on hearing footsteps behind him, on nearing the gate of accused's premises, turned partially around, when he was fired upon by accused. The testimony of Miss Harris is that at the time the shot was fired the deceased was facing the accused, having broken away from the party escorting him to the gate, and was advancing in a threatening manner upon the accused, and exclaimed: "By God! I will go into that house or die." Since the case of *State v. Ford*, 37 La. Ann. 443, the rulings of this court have been uniform, adversely to the proposition submitted by the counsel for the accused. *State v. Labuzan*, 37 La. Ann. 489; *State v. Janvier*, Id. 644; *State v. Kervin*, Id. 782; *State v. Jackson*, Id. 896; *State v. Brooks*, 39 La. Ann. 817, 2 South. Rep. 498; *State v. Black*, 42 La. Ann. 861, 8 South. Rep. 594; *State v. Cosgrove*, 42 La. Ann. 753, 7 South. Rep. 714; *State v. Christian*, 44 La. Ann. 950, 11 South. Rep. 589. In that case (*State v. Ford*) this court said: "There is a wide difference between evidence of an act and proof of the same. The theory of defendant's counsel seems to be that there is no difference between the two, and that under the rule any testimony in favor of the commission of an overt act on the part of the deceased person is a proper and sufficient foundation for the introduction of such testimony, and that the trial judge is thus stripped of all discretion and of all power to consider the veracity or credibility of the witness making the statement. Such an interpretation of the rule is flagrantly erroneous. \* \* \* In passing on such a question the trial judge must, of necessity, be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore, and not consider, testimony which his reason refuses to believe." The ruling of the trial judge seems to have been based in strict conformity to the doctrine in this case. Judgment affirmed.

(45 La. Ann. 940)

RIGNEY v. MONETTE. (No. 11,239.)

(Supreme Court of Louisiana. May 15, 1893.)

ACTION FOR BREACH OF CONTRACT — RECONVENTION—FORUM.

1. Although plaintiff and defendant were both residents of the same parish at the inception of the suit, yet, if plaintiff subsequently removes to a different parish, the defendant having a cause of action against him is not compelled to follow him at his new domicile,

but, under article 375, Code Pr., may bring his demand by way of reconvention in the original suit, provided, at least, he does not thereby retard or delay the progress of plaintiff's action.

2. The object of the proviso to Code Pr. art. 375, is to secure a common forum for the settlement of controversies between the same parties, and to dispense a defendant who had been impleaded in the court of his domicile from the necessity of seeking his adversary in a different forum in order to propound an action against him.

3. The question as to the forum in which the reconventional demand may be urged depends on the conditions existing when it is filed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Theard, Judge.

Action by James Rigney against George A. Monette for breach of contract. Plaintiff had judgment, and defendant appeals. Reversed.

Merrick & Merrick, for appellant. W. S. Parkerson, for appellee.

FENNER, J. Plaintiff filed this suit, claiming damages for violation of a contract of sale of defendant's professional practice and good will in the city of New Orleans, on February 5, 1891. On February 27, 1891, defendant filed an answer of general and special denials. No further proceedings were taken until February 1, 1892, when defendant filed a supplemental answer, containing a reconventional demand. The latter set forth a claim for damages for malicious prosecution and arrest, and alleged that the plaintiff resided out of the parish of Orleans. So matters stood for nearly a year, when, on January 6, 1893, plaintiff filed a rule on defendant to show cause why the supplemental answer and reconvention should not be stricken from the record on the ground that it "changed the nature of the defense from an action ex contractu to an action ex delicto, and that the same is not permissible in law." No action was taken on this rule until February 2, 1893, when, the cause being set for trial before a jury which had been impaneled, the rule was argued and submitted to the judge, who made the same absolute, to which the defendant reserved his bill of exceptions. The case, thus shorn of the reconventional demand, went to trial before the jury, resulting in a verdict and judgment against defendant for \$500, from which the latter has appealed.

We think the judge erred in striking out the reconventional demand. Although both plaintiff and defendant resided, at the date of institution of the original suit, in the city of New Orleans, it is admitted that the plaintiff subsequently removed to the parish of Pointe Coupee, and was residing there at the time when the reconventional demand was filed, and so remained when the case was tried. Article 375 of the Code of Practice, after defining the nature of demands which may be pleaded in reconvention, and

declaring that they must be "necessarily connected with and incidental to the main action," proceeds to establish the following exception: "Provided, that when the plaintiff resides out of the state, or in the state but in a different parish from the defendant, said defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with or incidental to the main cause of action." The obvious purpose of the proviso is to establish a common forum for the settlement of legal controversies between the same parties, of whatever nature, and to dispense a defendant who has been impleaded in the court of his domicile from the necessity of seeking his adversary in a different forum, in order to propound a co-existent cause of action against him. Counsel for plaintiff contends that the right to file such a demand in reconvention must be determined according to conditions existing at the inception of the suit, and that, as both parties then resided in New Orleans, such an independent demand could never be filed in that suit. As we look at it, the question of the forum must depend on the conditions existing at the time when the demand is filed. That is certainly the ordinary rule. Defendant, desirous of bringing suit on a demand against the plaintiff, found that the latter, though still prosecuting his own suit against defendant at the latter's domicile, had himself withdrawn to a different jurisdiction, and the question presented was whether he was bound to follow him there, or whether, under article 375, Code Pr., he could compel him to answer in the forum which he had himself invoked. Defendant then found himself sued by a plaintiff who resided "in a different parish from defendant," and in that case the law expressly authorized him "to institute a demand in reconvention against him for any cause," and to have their differences settled at one time, and by the same court. The parties stood in the precise case for which the law provided, and all the reasons underlying its precept were fully applicable. Suppose the plaintiff had removed to a different state, would the defendant have been bound to follow him there because, at the inception of his suit, he resided here? We think not; and, the law making no difference between residence in a different state and residence in a different parish, we can make none. The mere fact that defendant's cause of action arose after the institution of plaintiff's suit seems to us of no moment. His right existed at the time when he filed his reconventional demand, and the only question was as to his right to prosecute it in the forum in which plaintiff was suing him. There is no complaint of the tardiness of his demand, or that it delayed or interfered with the progress of plaintiff's suit. On the contrary, the reconventional demand rested in court for 11 months

before the trial of the case, and before even the motion to strike it out was made. We can see no possible reason, under such circumstances, why the counterclaims between the parties should not have been tried and decided together. The defendant had the right to such a trial, and, without considering the merits of the verdict and judgment, we think justice requires that the case should be restored to the status quo before trial, and that all the issues should be heard and determined together. It is therefore adjudged and decreed that the verdict and judgment appealed from be avoided and reversed, that the defendant's supplemental answer and reconventional demand be reinstated, and the case be remanded to the lower court for further proceedings according to law, appellee to pay cost of appeal.

(45 La. Ann. 919)

**SAUTON v. SAUTON.** (No. 11,802.)

(Supreme Court of Louisiana. May 22, 1893.)  
PARTITION—DEATH OF ABSENT PARTY—EVIDENCE.

A question of fact, whether or not the defendant is living, is only involved in this case. The testimony satisfies the court that the defendant is living; and judgment affirmed.

(Syllabus by the Court.)

Appeal from district court, parish of Rapides; James Andrews, Judge.

Suit for partition by Clara Marie Sauton against Louise Amella Sauton. On a sale pursuant to decree, Benjamin Cooper bid in the premises, but afterwards refused to complete the purchase, and, from the judgment making the rule to show cause absolute, he appeals. Affirmed.

Robert P. Hunter, for appellant. Henry P. Dart and White & Thornton, for appellee.

**McENERY, J.** The plaintiff and defendant are sisters, and owned in indivision a cotton plantation in the parish of Rapides, containing 1,000 acres. They inherited this property from their mother. The defendant, when she was some seven years of age, was taken to the republic of Mexico by her uncle Edward Sauton, and his wife. She has been absent some 18 years. The plaintiff, alleging that her sister, the defendant, was an absentee, brought suit for a partition of the property. A curator ad hoc was appointed by the court to represent the absent defendant, who had no agent in the state. Experts were appointed to ascertain whether the property could be partitioned in kind. They reported that a division in kind could not be made. The curator ad hoc opposed this report. Testimony was then taken on the issue thus presented by the report of the experts appointed by the judge, and a decree rendered, ordering the sale of the property. The property was advertised and sold in accordance with the decree, and Benjamin Cooper purchased the same for the sum of

\$10,000. The proceedings were all regular, and in conformity to law. No complaint is made by the adjudicatee as to any irregularity, thus far. But when title was tendered to him, and the price of the adjudication demanded, he refused to comply with his bid, whereupon the plaintiff took a rule upon him to compel him to comply with the adjudication. His answer to the rule is that he cannot accept the title, and pay the price, because the coheir and defendant, Louise Amella Sauton, is and was dead at the time the partition proceedings were instituted, and that she had married, and died leaving issue. To sustain the allegations in his answer to the rule he took, by commission, the testimony of a number of witnesses, relatives and connections of the defendant. He failed to prove by them that the defendant had ever married, or that she was dead. On the contrary, the testimony taken by commission satisfies us that the defendant is still living in the city of Guanajuato, Mexico, and that she is unmarried. Being an absentee, without an agent or representative, owning property in this state, against which a right is asserted, the appointment of a curator ad hoc was the proper mode of proceeding to procure service on the absentee. *Butler v. Washington*, 45 La. Ann. —, 12 South. Rep. 356. The district judge made the rule absolute. We can find no error in the decree.

Judgment affirmed.

(45 La. Ann. 863)

**WARNER v. CLARK et al.** (No. 11,167.)

(Supreme Court of Louisiana. May 22, 1893.)  
LIBEL AND SLANDER—WHAT ACTIONABLE—WORDS AFFECTING PROFESSIONAL STANDING—EVIDENCE—APPEAL—RECORD.

1. Under the laws of Louisiana, libel is a quasi offense, actionable under the broad provision of the Code: "Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it." *Spotorno v. Fourichon*, 4 South. Rep. 71, 40 La. Ann. 424.

2. Our courts are not bound by the technical distinctions of the common law as to words actionable per se and not actionable per se. *Miller v. Holstein*, 16 La. 389; *Feray v. Foote*, 12 La. Ann. 894; *Spotorno v. Fourichon*, 4 South. Rep. 71, 40 La. Ann. 424.

3. The extent of damage to credit is an inferential fact arrived at only by an examination of all the circumstances in a case, and cannot be subject to direct proof. Damages or injury may be inferred from the nature of the words written, and from the circumstances under which they were written, without the necessity of special proof. *Miller v. Holstein*, 16 La. 389; *Daly v. Van Benthuyssen*, 3 La. Ann. 69; *Tresca v. Maddox*, 11 La. Ann. 206; *Cass v. New Orleans Times*, 27 La. Ann. 214; *Spotorno v. Fourichon*, 4 South. Rep. 71, 40 La. Ann. 424.

4. The rule that parties raising objections in the lower court must at the trial state their particular grounds of objections, the materiality of the action complained of, and the reasons of the judge for his rulings, has not been superseded by the statute authorizing objection to be noted in lieu of a bill of exceptions. Parties must still disclose everything

necessary to enable the appellate court to say that the court below erred.

5. A plaintiff may, for the purpose of proving the allegations of his petition that he has suffered special and general damage, as the result of certain letters written and sent out by the defendants, question the parties who receive the letters, or heard their contents discussed, as to the effect produced upon them by the letters; such evidence not being offered to prove the meaning of the words used, nor the innuendo charged, but the substantive fact of damage sustained.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action for libel by Harry J. Warner against James G. Clark and others. Plaintiff had judgment, and defendants appeal. Modified and affirmed.

Gurley & Mellen, for appellants. B. B. Howard and Merrick & Merrick, for appellee.

NICHOLLS, O. J. Plaintiff's petition is to the effect that his occupation is that of a clerk and solicitor, in which he has been engaged for years, and entirely dependent thereon for his living, and that, in the said pursuit, he always had the esteem and good will of his fellow citizens. That petitioner was in the employ of defendants, and served them honestly and faithfully as a solicitor, and about the 16th September, 1891, he was discharged by them, giving as the reason for the discharge that he was not as successful in soliciting business as they had anticipated, and for this reason only they would require his services no longer. That subsequently he was employed as a clerk in the office of the Cromwell Line Steamship Company, and remained in its employ for some time in New Orleans, and again returned to the business of soliciting for the house of Richard M. Ong, dealer in paints, oils, etc., and doing identically the same business and dealing in the same merchandise as defendants. That petitioner was doing a successful business for the said R. M. Ong. That the house of R. M. Ong was in opposition to James G. Clark & Co., the defendants. That petitioner suddenly ceased procuring orders, and his customers refused to patronize him, and refused to have any business relations with him whatever, and he was notified by them, and verily believes and charges, that the reason of said refusal, and for no other reason than that his said customers did receive from James G. Clark & Co. a circular letter prepared and published by said James G. Clark & Co., in the following language, to wit: "James G. Clark. (Signed) Charles W. Holland. James G. Clark & Co. Warehouses: 203, 205, 207 Magazine St., 17, 19, 21 Natchez St. Storage Yard: Erato, near Magazine St. Oils, Sugar-House Supplies, Naval Stores, Building Materials, Painters' Supplies. Office, 62 Magazine Street, New Orleans, October 17th, 1891. (City.) Gentlemen: Mr. Harry J. Warner, formerly in our employ, is no longer so. Our friends and customers will

kindly note the above, and give Mr. Warner no recognition on our account. Thankful for all past favors, we ask at your hands a further continuance of same. We remain, yours, very truly, [Signed] James G. Clark & Co. J. G. C.,"—by the above letter meaning to imply and implying, and meaning to insinuate and insinuating, that petitioner was dishonest and unreliable, and otherwise casting reflection on the integrity of petitioner, and intending to injure petitioner in his good name, fame, and credit, and to bring him into public scandal and contempt. Petitioner further averred that James G. Clark, or some member of the said firm, maliciously and falsely and without cause libeled and slandered petitioner in said letter and its meaning therein conveyed; and he specially charged that said letter was written and delivered to petitioner's customers, and to no other persons except those whose business was solicited for orders in the line of goods which petitioner's house, R. M. Ong, and also James G. Clark & Co., dealt in; that it was written maliciously and without any probable cause, for the express purpose of injuring petitioner in the estimation of his customers, and to completely ruin and destroy the confidence of the public in petitioner, which purpose has been accomplished by said letter and false and malicious accusation and insinuations. Petitioner further represented that his character has always been of the best, and his integrity unquestioned; that he has always conducted himself in an honest and straightforward manner in all business transactions, and has always earned a living in the community and city where he has lived; and that now he is unable to get employment at his business, or any other business of responsibility, on account of said malicious libel and misrepresentation by said James G. Clark & Co.; that he has been grievously injured in character and reputation and financial and business relations to the amount of \$10,000. All of which acts of said James G. Clark & Co. were done with malice aforethought and malicious intent to injure petitioner, and to secure for themselves any trade which petitioner might divert as solicitor for the house of Richard M. Ong. Petitioner prayed for judgment against defendant for \$10,000, and for trial by jury.

Defendants filed—First, an exception "that the petition disclosed no cause of action against defendants, or either of them; that the letter complained of does not libel or slander petitioner; and, second, an exception that said petition was too vague and indefinite to enable them to safely answer thereto." "It does not set forth what customers or who refused to patronize petitioner, and refused to have any business relations with him, nor when or at what dates; nor does it show or set forth of what items his claim for ten thousand dollars is composed, or what, if any, actual loss he has sustained;" and they prayed that the petition



be dismissed. The court overruled the first exception, but partially sustained the second, reserving to plaintiff "to amend and state the names of what customers of plaintiff or who refused to patronize plaintiff, or to have business relations with him, and where and at what dates on account of said letter." Plaintiff, under this ruling, filed a supplemental petition, in which he averred that he had, immediately after the publication of said libel, had a great falling off in his business, and had reason to believe and alleged that said falling off was due to said malicious and libelous publication by defendants as set out in the original petition. That he cannot say with exactness which of the customers refused him business on account of said libel, but he appended and made part of his amended petition a list of such of his customers who formerly dealt with him, and who have ceased to give him orders of any magnitude since its publication, and who, with others petitioner does not now remember, as petitioner believes and charges, have been influenced by the said malicious and wrongful act of defendants; that by reason of said libel he has been unable to get a salary of \$75 a month, promised him by Richard M. Ong, provided he should do a successful business, besides taking large receipts for commissions; that petitioner estimates his damages at \$1,000, and the damages to his injured feelings and character and reputation, \$9,000. To this petition was appended a list containing the names of a number of business firms. Defendants pleaded the general issue. They admitted that their firm wrote and sent to some of their customers the letter referred to in plaintiff's petition, but averred that said letter did not contain, and was not intended as, a libel or slander upon plaintiff; that all the statements made in said letter are true, and that they were justified in writing and issuing the same; that after his discharge by defendants, and before the writing and issuance of said letter, said Warner frequently called at defendants' place of business, saying that he was expecting letters containing orders for the defendants, which he wished to turn over to them, was admitted into their private office, there obtained information as to their business; that no letters containing orders for defendants ever came to their office for said Warner, or, if they did, he did not turn the orders over to them. Defendants subsequently learned that at the time of his visits to their private office said Warner was soliciting business for Richard M. Ong, of this city, a rival of theirs, and thereupon they charged him with being in said Ong's employ, which he at first denied, but, upon being pressed, admitted it to be true; that, after having obtained information as to defendants' business by access to their private office, said Warner called upon customers of defendants, whom they were about to supply with goods, or with whom they were ne-

gotiating for the sale of goods, and endeavored to prevent the sale of defendants' goods, and to effect a sale of said Ong's goods to said customers; that they would not have permitted said Warner to enter their private office and obtain information as to their business if they had known that he was soliciting business for said Ong; that while in their employ said Warner attempted to borrow a sum of money from Mr. Robert Beltran upon his statement to him that he, said Warner, had on deposit with defendants, or that defendants owed him, the sum of \$90; that at that time said Warner had no sum on deposit with defendants, nor did they owe him any sum whatever; that they issued said circular letter because they believed it was necessary for their protection by reason of the above-named facts and other acts of said Warner, and they were actuated by no other motive or purpose. On the trial of the case the jury rendered a unanimous verdict in favor of plaintiff for the sum of \$3,000.

Defendants moved for a new trial on the grounds that—First, the court erred in permitting plaintiff to offer before the jury testimony tending to show that the letter written by defendants was discussed by other persons than those to whom defendants sent it, and upon information not derived from defendants; second, because the court erred in permitting plaintiff to offer evidence before the jury tending to show merely the impressions or conclusions of third persons, and to prove the innuendoes charged by plaintiff, when the letter complained of is in plain and unambiguous terms; third, because the jury disregarded the law requiring express malice to be proved in cases of privileged communications, such as the letter complained of in this case, and, no malice having been proved, defendants were and are entitled to have plaintiff's suit dismissed; fourth, because the jury was prejudiced against defendants by efforts made by plaintiff's attorneys to introduce matters which were held by the court to be entirely irrelevant and improper; fifth, because the jury was prejudiced against defendants by an improper inspection during the trial of documents constituting only a portion of the evidence in the case; sixth, because no actual damage was proved, and no evidence offered by him upon which it is possible to estimate any damage, as is attempted to be done by the verdict; seventh, because the verdict is contrary to the law and the evidence. The court overruled the motion, and rendered judgment against defendants for \$3,000, in conformity to the verdict of the jury. The defendants have appealed.

The first contention of the defendants in this court is that there was error to their prejudice in not maintaining their exception of no cause of action. They say there is "nothing of a libelous nature in the letter; nothing from which it could be reasonably

inferred that Mr. Warner had been discharged for dishonesty, as charged in the innuendo; that the language used was not capable of such meaning." In support of their position they quote *Mulligan v. Cole*, L. R. 10 Q. B. 549; *Newell, Defam.* pp. 287, 288, § 25; *Dunsee v. Norden*, 36 La. Ann. 79. Article 2315 of our Civil Code declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." In *Spotorno v. Fourichon*, 40 La. Ann. 424, 4 South. Rep. 71, we said: "Our courts are not bound by the technical distinctions of the common law as to words actionable per se and not actionable per se, and allowing for the latter only actual pecuniary damage specially proved. *Miller v. Holstein*, 10 La. 389; *Feray v. Foote*, 12 La. Ann. 894. If the charges are false, injurious, and made maliciously or *malo animo*, they combine all the elements essential to support the action." These remarks apply fully to the case at bar. Plaintiff's allegations cover each of these essential requirements, and, if proved, would certainly entitle him to a judgment for damages for some amount. The case of *Dunsee v. Norden*, referred to, was not decided on an exception of no cause of action, but after a trial on the merits, and evidence heard. We think the ruling of the court on the exception was correct.

Defendants, denying that the language of the letter was "capable of the meaning charged in the innuendo," complain that the court permitted witnesses to testify as to the impression made upon them by reading the letter, to their understanding of its meaning, and to prove it had the meaning plaintiff attributed to it." When plaintiff's counsel asked of the first witness whom he placed on the stand and examined "what impression the letter conveyed to his mind," we find a statement made in the note of evidence that "defendants' counsel objected," but neither the grounds of objection, the ruling of the court, nor its reasons, are stated, nor is there any mention of an exception having been taken or any bill reserved. The action of the court seems to have been first specially objected to on an application for a new trial. We take occasion to say that the law authorizing a note of objections to be substituted in lieu of a bill never contemplated doing away with the recitals which we have always held necessary to a proper bill of exceptions, and that it is essential that the court should be fully advised of everything requisite to enable it to act advisedly upon all proceedings and rulings in the lower court. In the reasons assigned by the district judge for overruling motion for a new trial, he thus alludes to defendants' objections on this particular point: "The second ground of the defendants' motion is that witnesses were permitted to tell their impressions produced by the letter, and to prove the innuendo

charged. In no instance was any witness permitted to explain the meaning of the letter to prove the innuendo alleged by plaintiff. So far as I can find, testimony was received to show injury to plaintiff's name and reputation by reason of, or as the result of, the letter, and the comments it set in motion, and thereby to prove actual damage as alleged and general damage as alleged. The assumption of facts having this ground is not well founded. Every ruling that I made was based on the view that, having alleged actual and general damages, plaintiff should be permitted to prove that the effect of the letter on the minds of those who saw or heard of it was to injure his character, and to excite suspicions of wrongdoing. How else could he prove this than by hearing what effect or result the letter produced on the minds of third persons I cannot conceive. Such evidence was not offered to explain the letter, or to prove the innuendo." The reasons assigned by the judge fully justify, we think, his ruling on this particular point. Later on in the trial, another witness being on the stand, he was asked by plaintiff, "what was the impression received by you from what you heard?" To this question defendants objected "because, the letter complained of being a privileged communication, and not having been circulated or published by the defendants, they are not responsible for the publication or circulation made by others, not authorized or intended by themselves." Following this entry on the note of evidence we find the words: "Objection overruled. Bill reserved." We find no bill in the transcript. Before considering the objection, we wish to direct the attention of the district judges to the necessity of their supervising the objections as stated in the note of evidence, and of their seeing to the reasons for their rulings being simultaneously noted, so as to bring matters to the situation they would have been had the statute we have referred to not been passed, modified, of course, to the extent of doing away with mere formal and nonessential particulars. We come to a knowledge of the reasons for the judge's action by the statement already given as to his rulings on objections to testimony. That statement covers the complaint we are now considering, as well as that we have before mentioned. We think the judge decided correctly. Plaintiff, having found that his name and reputation were being injuriously criticised, had the right to trace this fact, as a fact, to its cause, and, if he could, to the circular letter. Having alleged that by and through the act and fault of the defendants in writing and delivering this letter, he had suffered general and special injury, he was entitled to prove that allegation as a fact, independently of the particular persons who, having received the letter, may have spoken of the same and its contents, and thereby increased the circulation of the statements

therein. The question is, did the act of the defendants in writing and sending out this circular have as its general effect to injure the plaintiff? The testimony objected to legally tended to prove that fact, in our opinion, and was admissible. It may be well to say in this connection that we do not regard the circular letter sent out by the defendants as a privileged communication.

The evidence shows that the plaintiff, who had been several months in defendants' employ, was discharged by them on the 30th September, 1891, and that the separation took place without friction. Amicable and cordial relations continued to exist between the parties, so much so that the plaintiff (who, on leaving the defendants, had gone into the employ of the Cromwell Line of steamers) was in the habit of stopping at defendants' store, and, with defendants' consent, making himself, it would seem, very much at home. Suddenly he was informed by the junior partner that his presence was offensive to them, and that they did not wish him to return. This notification was followed up by the writing and sending out of the circular letter which has given rise to this litigation. We are relieved from any great trouble in ascertaining the cause and motive of this act by the testimony of the two partners given on the trial. This testimony causes us to eliminate in that connection from the case that portion of the answer which refers to certain small purchases made by the plaintiff of Bernhardt and others, and his attempted loan of money from a friend of his. We are satisfied the first matter was known at the time, and not considered at all reprehensible, and that knowledge of the second did not reach them until after they had taken the steps they did, and it has no bearing in the case. In *Alba v. Moriarty*, 36 La. Ann. 681, a case where the plaintiff was suing his employer for his salary for having prematurely discharged him without cause, the court, in speaking of the discharge, said: "It is also shown by Moriarty's own testimony that at the time he dismissed the plaintiff he had not been informed about the alleged irregularities charged in the answer, and therefore they could not have entered into the reasons for his discharge. They were really an afterthought, and an evident pretext." These words are applicable to the case at bar. The real ground upon which the defendants acted, and on the sufficiency and correctness of which this case will have to turn as justifying their course, was that they had reached the conclusion that the plaintiff (as the senior partner said) had been dealing falsely with them,—not doing the square thing; that Mr. Warner was going to their office regularly, and at the same time he was going there he was in the service of R. M. Ong & Co., a rival house; (that is, a portion of the time;) and because (as the junior partner said) "they were very indig-

nant, because they thought he (plaintiff) was playing the dirtiest and shabbiest trick a man could play,—representing another firm, and still going to their office." We must inquire whether the plaintiff was in point of fact guilty of any double dealing with the defendants, and, if he was so guilty, whether the defendants were justified in resorting to the action they did as a corrective. We may say at once that there is no evidence that the plaintiff either obtained any advantages by his visits to the defendants' store, or, if he did, that he ever utilized them. There is not a scintilla of testimony going to show that he ever represented to any one after his discharge from defendants' service that he was still continuing therein, or that in soliciting for orders he concealed the fact that he was doing so for the house of Ong & Co. It would have been an act of folly for him to have attempted to do so, for the deception or misrepresentation would have inevitably been immediately discovered. If the plaintiff was guilty of wrong it would have been at most of continuing to visit in a friendly, intimate manner at defendants' store, when, at the time of doing so, he was in the employ of a rival establishment. When the defendants (as they had the right to do) discharged the plaintiff, their business relations were completely severed, and the latter was at liberty to seek employment elsewhere, and obtain it wherever he could. The fact of his prior service with the defendants in no manner interfered with his seeking service with a rival establishment, and, if employed by a rival house, he was fully authorized in doing his utmost for it, (as unquestionably it was his duty to have done prior to discharge for the defendants,) even though in doing so he might work to the prejudice of his former employer, provided, of course, in so doing he was guilty of no misrepresentations or legal wrongdoing. We know of nothing which would cut the plaintiff off from his absolute right of soliciting any one he might choose to solicit for orders, among others, the customers of the house with which he had been connected, and with whom he may have become acquainted through such connection. We know of no reason why friendly relations should cease to exist between a commercial firm and one of its employees ipso facto by his going into the service of another house in the same branch of business. We see no good reason why Mr. Ong himself, the head of the other house, could not with full propriety have visited defendants precisely on the same footing that plaintiff did. If the action of either the one or the other in doing so were to meet with the disapproval of the defendants, it would be a pure matter of feeling and taste, and not of right or wrong. As a matter of fact, however, it is exceedingly questionable whether the plaintiff, after he became employed by Ong & Co., ever went

to defendants' store more than on one occasion. Whether he would have done so or not had not the defendants objected is pure speculation. Plaintiff's visits to defendants' store seem to have been when he was employed with the Cromwell Line of steamers. Assuming, however, that plaintiff was employed by Ong & Co. when so visiting the defendants' store, and was at that time soliciting for Ong & Co., and defendants should have thought such conduct reprehensible and inconsistent with their ideas of propriety and fair or square dealing, their plain, obvious remedy was the very one which they at first adopted, of requesting a discontinuance of such visits,—a remedy which proved fully efficacious.

We think the defendants were entirely unjustifiable in following up this action of theirs by sending out the circular letter which they did. There was no legal relation or connection between the conduct complained of and this letter which defendants circulated. Plaintiff had not sought to utilize in any improper way his connection with them, and there was no reason, when they distributed the letter, for them to apprehend that he would do so. The defendants were, as they say, "indignant," and the letter was obviously sent in anger, and intended as a punishment, and to injure plaintiff, and not as a protection either to their customers or to themselves. They say themselves that as a solicitor he was a failure. They assign this as a reason for discharging him, and, if this was true, they had no reason to fear that he would (even had he resorted to illegitimate means, which he did not) have diverted any large amount of trade from them. We see no ground for any claim that this particular letter, written and sent to every one whose name happened to be on the address book in their store, was a privileged communication. They were bound to suppose that the parties to whom it was addressed, or, at all events, a large portion of them, would not consider it in that light, and would naturally speak of its contents to others, and that its contents would be publicly discussed. The whole matter was referred to a jury. They heard the evidence, and saw the witnesses, and, after full hearing, they have found by returning a verdict in favor of the plaintiff that the allegations in his petition are true, and his prayer just and well founded. The district judge, on application for a new trial, has given his views on the questions and issues raised, and, save as to the amount of the damages found, he concurs in opinion with the conclusions reached by the jury. On this last point, though refusing to set aside the verdict, he obviously was of opinion that it was far too large an amount.

In the case of *Spotorno v. Fourichon*, already mentioned, this court said: "Both the damages or injury and the malice may be inferred from the nature and falsity of the words, and from the circumstances under which they were uttered without the necessity of special proof." In the case at bar we are perfectly satisfied that the plaintiff has been injured and damaged, but it certainly cannot be said that he has proved the amount with certainty. Plaintiff has been pretty generally employed for the last 11 or 12 years at a salary or on commissions which brought him from \$30 to \$75 a month. He was in defendants' employ at \$60 a month, but before this difficulty arose they had reached the conclusion his services in their line as solicitor were not worth that much. He was paid \$75 a month by the Cromwell Line, but, after a week's employment, he voluntarily left them, to take service with R. M. Ong & Co., who were to pay him at the rate of \$60 a month should he establish to their satisfaction after a trial—at first on commissions—that he would make a successful solicitor. This he was unable to do for the assigned reason that defendants' circular letter had caused him to be thrown under a cloud, which has forced him to leave his home, and seek service at St. Louis, at which place, at the time his testimony was taken in the lower court, (June 15, 1892,) he was about obtaining employment. From the date of the letter he does not appear to have been employed elsewhere than at Ong's as a solicitor, where his commissions for seven months were almost nominal, \$75 or \$100. In the very nature of things, it would be impossible for a solicitor to establish to what precise extent failure to obtain orders would be attributable to the circulation of a letter of a character injurious to him. That kind of business is to a very great degree dependent upon the favor of the solicitor in the community in which he lives, and his good name and credit, and these are not readily measured; indeed, it has been frequently decided that extent of damage to credit is an inferential fact, which can be arrived at only by an examination, a weighing of all the facts and circumstances, and cannot be the subject of direct proof. *Trammell v. Ramage*, 95 Ala. —, 11 South. Rep. 916. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the lower court be, and the same is hereby, amended so as to reduce the judgment of the plaintiff against the defendants from \$3,000 to \$600, and, as so amended, the said judgment is hereby affirmed, costs of appeal to be paid by the plaintiff and appellee, those of the lower court by the defendants and appellants.

(97 Ala. 187)

**RICHMOND & D. R. CO. v. HISSONG.<sup>1</sup>**

(Supreme Court of Alabama. June 10, 1893.)

**INJURIES TO RAILROAD EMPLOYE — EVIDENCE — CUSTOM AND USAGE — PLEADING — INSTRUCTIONS.**

1. The sustaining of a demurrer to a special plea, if error, is harmless, where defendant has the full benefit of the same defense under his other pleas.

2. Where, in an action by a brakeman against a railroad company for injuries received while coupling cars, defendant has asked questions tending to show that a piece of board, used by plaintiff in an unsuccessful attempt to make the coupling, was not a suitable one, plaintiff may ask a witness on cross-examination what kind of sticks defendant furnished its employees, for the purpose of showing that the one attempted to be used was as good.

3. Where, in an action by a brakeman against a railroad company for injuries received in going between cars to couple them, it appears that a rule of defendant's road prohibited its employees to go between cars to couple, and that plaintiff entered into an express stipulation with defendant to abide by such rule, evidence is inadmissible to show that there was a custom on defendant's road for brakemen, when they found it impossible to make a coupling with a stick from the outside, to go in between the cars for that purpose, after having first signaled the engineer to stop the train. *Hissong v. Railroad Co.*, 8 South. Rep. 776, 91 Ala. 514, modified.

4. It is not error for the court, as part of its charge, to read from the reports the law announced by the supreme court, on appeal from a previous judgment in the case.

5. Two sentences in a charge, connected by the conjunction "but," must be construed together in determining whether either was erroneous.

6. A charge assuming a fact is properly refused.

7. In an action by an employe of a railroad company for personal injuries, the American Tables of Mortality, when identified, are properly admitted.

Appeal from circuit court, Jefferson county; S. H. Spratt, Judge.

Action by J. S. Hissong against the Richmond & Danville Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed. Application for rehearing denied.

For former appeal, see 8 South. Rep. 776.

The evidence for plaintiff tended to show that, when he entered the service of defendant as a switchman, he signed one of its regular applications for service, a part of which was a rule providing that "cars must not be coupled by hand. Sticks for the purpose, long enough to prevent going between the cars, will be furnished on application to yard master's office." The next day after plaintiff's employment, it became his duty to make a coupling, under the following circumstances: There were 12 or 14 cars being taken from the main line onto the side track to be coupled to some cars standing on the side track. For the purpose of making the coupling, having left his coupling stick on the engine, plaintiff picked up a piece of board, and, after guiding the link into the

drawhead of the other car, and thereby attempting to make the coupling, he saw that the pin would not go down. The plaintiff then struck and hammered the pin, and after discovering that he could not make the coupling with the stick, he stood out on the main track, and signaled to the engineer to stop. The engineer observed the signal, and stopped the train, and the plaintiff went in between the cars, and while working with the pin, a few seconds afterwards, the engineer, without any signal, moved his train back, and the plaintiff, in trying to escape, got his foot caught, and was run over, and so injured that it was necessary to have his leg amputated. The defendant's testimony tended to contradict that portion of the plaintiff's evidence which went to prove that the engineer had stopped the train when the plaintiff went in between the cars, and there was some conflict as to whether the plaintiff used the stick when attempting to make the coupling. The court, in its oral charge to the jury, read as a part thereof the portion of this court's opinion in the case of *Hissong v. Railroad Co.*, 8 South. Rep. 776, and to the reading of this portion of the opinion the defendant duly excepted. In his oral charge to the jury, the court, after instructing them as to the effect of the engineer's knowledge of the plaintiff's position after he had stopped the train, continued: "Now, do you believe the facts are as stated by the plaintiff,—that he made the signal to the engineer, which was observed and obeyed by him, and that, when the engine was brought to a stop, he thereupon went in between the cars, and attempted to couple the cars with his hands, (being unable to couple them with a stick,) and while in that dangerous position the engineer moved his train, and thereby caused the injury? If you believe this, then the plaintiff would be entitled to recover. But if he went in there while the train was in motion, and went in to couple, with his hands, not attempting to use a stick, and the engineer knew nothing about it, then there can be no recovery in this case. You will, of course, try this case just as you would try any other. You will not apply a rule to a corporation that you would not to an individual. The plaintiff may have been injured, and very greatly so, yet if he maimed himself, there can be no recovery." Upon the introduction of all the evidence the defendant, among other written charges, requested the court to give the following: "(1) If the jury believe the evidence, they must find for the defendant. (2) If the jury believe the evidence, they are bound to find that Barton, the foreman of the engine, who was directing the movements of the engine and train, was not guilty of any negligence." "(10) There is no evidence in this case that any custom and practice among switchmen on the defendant's road, of going in between the cars to couple, without using coupling sticks, was known to, and acquiesced in by,

<sup>1</sup>Modification of opinion in 12 South. Rep. 393.

defendant. (11) With regard to the custom which has been testified about, as to going in between cars, in certain contingencies, to make couplings, unless you believe from the evidence that such custom was known to the defendant, and acquiesced in by it, or had prevailed for so long a time as that defendant was bound to know, and would be presumed to have acquiesced in, it, then you should not consider such custom, in arriving at your verdict."

James Weatherly, for appellant. Bowman & Harsh, for appellee.

**HARALSON, J.** The defendant interposed the defense of contributory negligence by a special plea, to which the plaintiff demurred, on the ground that this defense was available under the general issue which had been pleaded. The court sustained the demurrer. This ruling was erroneous. *Railroad Co. v. Crocker*, (Ala.) 11 South. Rep. 262. But in this case that was error without injury, since the parties tried the question of contributory negligence on the part of the plaintiff, and of wanton, reckless, or intentional negligence on the part of defendant, as though appropriate pleadings for the trial of such issues had been made in the cause. We have many times held that the sustaining of a demurrer to a special plea, if erroneous, is not ground of reversal, when the record shows that the defendant had the full benefit of the same defense under his other pleas. *Railroad Co. v. Davis*, 91 Ala. 487, 8 South. Rep. 552; *Oliver v. Insurance Co.*, 82 Ala. 417, 2 South. Rep. 445; *Owings v. Binford*, 80 Ala. 421.

On the cross-examination of defendant's witness Barton, plaintiff's counsel asked, and the court allowed, against the objection of defendant, the question and its answer: "What kind of coupling stick did the R. & D. R. Co., at that time, furnish its employees?" There was no error here, since the defendant had made inquiries of the witnesses, the tendency of which was to prove that the stick the plaintiff used on the occasion of the injury was not a suitable one. It was therefore competent for plaintiff to show what kind of sticks the defendant provided for its employees, and that this one was as good. "Sticks long enough to prevent going between the cars," was the requirement of the company of its switchmen. It was competent for plaintiff to show that he had on the occasion a stick that answered this requirement, and one of the ways of showing it was by proof comparing it with the sticks the company proffered to, but did not make it obligatory on, switchmen to use.

The court allowed the witness Barton to testify, against the objection of the defendant, that it was the custom and practice of the railroad company, at the time of the injury to plaintiff, "where switchmen had tried to make the coupling, and had stood on the outside and hammered with the stick, and

the pin failed to go down, to signal the engineer to stop, and, after the engine had stopped still, for him to go in and see what was the matter." The question propounded to this witness on the former trial, and which was passed on when the case was here on appeal, (91 Ala. 514, 8 South. Rep. 776,) was: "Was it not the custom and practice on defendant's road, and on all well-regulated railroads, for switchmen, when they find it impossible to make a coupling with a stick from the outside, to go in between the cars for that purpose, after having first signaled the engineer to stop the train, and the train has been stopped in response to the signal?" This court said in reference to the proof of this custom that it "was, in view of some of the tendencies of the evidence, relevant and admissible. Such custom and practice, if they existed, tended to show that in such case defendant waived the rule requiring coupling to be done with a stick, and forbidding going in between the cars for that purpose, or, at least, did not regard its observance necessary." 91 Ala. 519, 8 South. Rep. 777. The rule to which the court was referring as one that might be waived, and which the plaintiff, in his contract of employment with the defendant, agreed he would observe, and not violate, reads: "Cars must not be coupled by hand. Sticks for the purpose, long enough to prevent going between the cars, will be furnished on application to yard master's office at end of each division. Any employee going in between cars while in motion, to uncouple them, does so at his own risk, and against the rule of the company." It will be observed that this rule applied to coupling and uncoupling. Coupling with the hand is absolutely forbidden, and requiring it to be done with sticks provided by the company for the purpose is enjoined; and uncoupling cars by going in between them, when in motion, is also prohibited. On the first trial the proof of custom sought to be established was that a switchman might go in between the cars, to couple them, when he found it impracticable to do so with a stick, having first signaled the engineer to stop. On this trial the proof of custom sought to be proved for the same purpose is that, under the same circumstances as before hypothesized, the switchman might go in between the cars to "see what was the matter." The purpose had in seeking to prove this custom is the same now as the attempt to prove a custom on the other trial, viz. that "defendant had waived the rule requiring coupling to be done with a stick, and forbidding going in between the cars for that purpose," although the question propounded to show the custom is different now from what it was before. Neither the rule nor the contract of plaintiff with defendant contained anything in respect to plaintiff's going between the cars under any circumstances to make a coupling with his hand, or to see what was the

matter; and to allow him to do so, for either purpose, is a violation of the rule and his contract, binding him to it. It is not to be disputed that a rule may be shown by parol evidence to be of no force and effect, by its general nonobservance, and by the continuous and well-known acquiescence of a company in its nonobservance. If rules are promulgated as shams, with no intention on the part of the company making them to have them complied with, but are gotten up as a basis of a convenient and simulated defense, when sued by some one injured from a failure to observe them, they ought to be treated, as they deserve, as if never made, and of no force or effect. It is the duty of a railroad company, out of suggestions of its own best interests, and in obedience to a humane and beneficent policy, to save human life, and prevent irreparable misfortune to its employes, to promulgate rules which admit of employment in its service with safety to life and limb; but its duty does not end with prescribing such rules. It is equally binding on them to honestly and faithfully require their observance. *Whittaker v. President, etc.*, 126 N. Y. 544, 27 N. E. Rep. 1042; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932. Such a rule as No. 20, which we are considering, has been held to be reasonable and just, and its violation, where the company has provided a safe method for performing the service, is contributory negligence. This rule is explicit in its terms and reasonable in its requirements. The plaintiff entered into an express stipulation to abide by it. Its "conditions [were] distinctly understood and agreed to" by him when he entered the defendant's service as switchman, the day before he was injured. There is no indefiniteness or ambiguity about the rule or contract, and none is suggested. The principle of law in such cases, as we have heretofore said, is "that parol evidence of usage is admissible to explain terms ambiguous or doubtful in significance, or from which to infer the intention, understanding, and agreement of the parties, and to incorporate a stipulation or element wherein the contract is silent." Custom never assumes "a character so binding as that parties cannot by agreement place their contracts without their influence. So, when custom and contract come in conflict, the latter prevails over the former. \* \* \* Custom cannot overturn the positive requirements of the law or the express contracts of the parties, whether the contracts be evidenced by writing or not." *Barlow v. Lambert*, 28 Ala. 709. Speaking of this same rule, we said of it, in another connection: "It was adopted for the protection of the company, and for the safety of its employes. Evidence of usage and custom of its violation by those it was intended to protect, either to exempt them from its own obligations, or to subject the company to damage because of its repeated violation, does not come within the

exception, [that of the variation of contracts by proof of custom,] and such evidence is inadmissible." *Railroad Co. v. Graham*, 94 Ala. 555, 10 South. Rep. 283; *Railroad Co. v. Johnston*, 75 Ala. 604; *Boon v. The Belfast*, 40 Ala. 184. The question propounded simply asked the witness if such a custom as that inquired about existed, and, if admissible under any phase of the evidence, from aught that appears, it may not have existed a week, or for any such length of time as that the defendant will be presumed to have acquiesced in it, and had impliedly consented that plaintiff should not be bound by his contract. *Herring v. Skaggs*, 73 Ala. 454. If rule 20, by long nonobservance, had gone into disuse, and was a regulation of the company by name only, and no longer binding, we know of no law which, notwithstanding, prevented the parties from making it the basis of their contract for plaintiff's service, and, if bona fide entered into, how proof of any custom theretofore existing to the contrary might set aside and annul the deliberate engagements of the parties. Surely, this would be making their contract for them, and denying them the privilege. We must hold, therefore, that when a contract of the kind we are construing has been entered into between the parties, no proof of custom can be made to the contrary of its stipulations to vary its binding force, and that it must be held binding between the parties, unless it be shown, by their acts and conduct, they have mutually altered or rescinded it. 3 Brick. Dig. p. 152, § 146; 1 Brick. Dig. p. 394; *Warden v. Railroad Co.*, 94 Ala. 285, 10 South. Rep. 276. Our ruling in this case, on the former appeal, on the admissibility of evidence of custom theretofore between the defendant and other employes, to show a waiver by the defendant of its contract with the plaintiff, must be modified in accordance with the principle herein announced. The court erred in allowing the witness to testify as to such custom and practice.

The defendant's objection and his exceptions to the admission in evidence of the American Tables of Mortality, and to McNeely's testimony in identification thereof, were without merit. *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. Rep. 120; *Gordon v. Tweedy*, 74 Ala. 232.

There was no error in the court's reading, as a part of his charge to the jury, the law as announced by us in this case when it was here before. The passages read seem to be the law, and there could be no objection to them for being read out of the book.

The eighteenth assignment of error cannot be sustained, because the sentence excepted to, together with the one following, are necessary to be taken together, as constituting the hypothesis upon which the court predicated its instructions to find for or against the plaintiff. The two sentences are connected by the conjunction "but," and may not be construed separately without doing

violence to the first, and must be held to be one, the last modifying or explaining what went before.

The general charge asked by defendant was properly refused. There was evidence tending to show that the engineer knew, or had good reasons to believe, that the plaintiff was between the cars. Charge No. 2 was properly refused, since it assumed as a fact that Barton was directing the movements of the engine and train. Charges 10 and 11, refused, from what has already been said, will appear to have been proper charges, and applicable to the particular conditions of this case, and should have been given.

A motion was made in the case for a new trial, on the ground, among others, that the verdict of the jury was contrary to the evidence. The court overruled it. As the cause must be reversed, we refrain from passing on this motion. We simply declare the rule, as heretofore announced, to be that if, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust, it ought to be set aside. *Cobb v. Malone*, 92 Ala. 631, 9 South. Rep. 738. For the errors pointed out, the case must be reversed and remanded. On the application for a rehearing, the opinion, as at first prepared, is corrected, and the application is denied. Reversed and remanded.

(98 Ala. 219)

**ROMAN et al. v. WOOLFOLK et al.**

(Supreme Court of Alabama. May 16, 1893.)  
MINORITY STOCKHOLDERS — SUIT IN BEHALF OF CORPORATION.

1. A minority of stockholders will not be permitted to displace corporate authority and control by substituting therefor the policy, management, and control of the courts, except in plain cases of such fraud and maladministration as work manifest oppression and wrong to them; and, before calling on the court to take into its hands the management of corporate affairs, it must be made clearly to appear, not only that such oppression and wrong is being done, but that every reasonable effort has been made to secure redress, and prevention of further mischief, within the corporation itself.

2. A bill by the minority stockholders of a terminal corporation, organized to build and equip railroads, charged the president with having wrongfully used all the available assets in the construction of an insolvent railroad, organized by himself, and that he, and others acting with him in misappropriating the assets of the terminal company, controlled a majority of its directors, and also of its stock, and could not be relied on to bring any suit for the recovery of the assets so misappropriated. *Held*, that an application for an injunction and the appointment of a receiver for the terminal company pending the action would be denied, where not a member of the board of directors of the terminal company, except the president, and not a stockholder, with two or three exceptions, has any interest in the railroad company, since an appeal should first have been made by the minority stockholders to the terminal company itself to redress the alleged grievance, or for authority to use its name in the prosecution of the suit.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Bill by S. Roman and six others, who are a minority in number and value of the shareholders of the Alabama Terminal & Improvement Company, (a body corporate,) against J. W. Woolfolk, W. E. Woolfolk, George B. Shellhorn, S. B. Stern, A. C. Saportas, F. W. Hoodley, Charles Henderson, the Farley National Bank, L. B. Farley, J. L. Hall, the Montgomery, Tuscaloosa & Memphis Railroad Company, (a body corporate,) and the said Alabama Terminal & Improvement Company, hereinafter styled the "Terminal Company." The interests of the Terminal Company are sought to be protected by the suit. On account of alleged grievances, hereinafter referred to, the bill prays for the appointment of a receiver of its assets, for an accounting by defendants, and a dissolution and final winding up and settlement of the affairs of the corporation. The chancellor overruled defendants' motion to dismiss the bill for want of equity, but granted the motion to dissolve the injunction, and refused the application for a receiver. Complainants appeal. Affirmed.

Two of the complainants, viz. S. Roman and A. St. C. Tennille, and six of the respondents, viz. J. W. Woolfolk, W. E. Woolfolk, S. B. Stern, Charles Henderson, George B. Shellhorn and A. C. Saportas, constitute the board of directors of that company. J. W. Woolfolk is, and has been since the organization, president and general manager. J. B. Knox, one of the complainants, is secretary. The connection with the case of the Farley National Bank (with whom, in interest, are said L. B. Farley and J. L. Hall) and the Montgomery, Tuscaloosa & Memphis Railroad Company will be shown hereafter. The Terminal Company was organized in 1887 under the general laws of this state then in force, and among its charter powers is the power to build and equip railroads. In fact, the moving purpose of its organization was to build the Alabama Midland Railroad, under contract with the Alabama Midland Railroad Company, organized for the construction of a railroad from Montgomery, Ala., to Bainbridge, Ga.,—a distance of 175 miles. It secured the contract for the building and equipment of that road, and was to receive, and did receive, for the work, the mortgage bonds of the Midland Company, at the rate of \$15,000 per mile, and all its capital stock, except the stock subscribed for by cash subscribers; also, all other subscriptions to capital stock, obtained or to be obtained, and all its property real, personal, and mixed, except rights of way, and certain other excepted properties. The Terminal Company then sublet the construction of the road to J. M. Brown & Co., railroad builders, who completed and delivered it in May, 1890. When the Terminal Company was organized it received from a large number of persons, subscribers to its capital stock, their



notes for their subscriptions, amounting in the aggregate to about \$300,000. The complainants are among these subscribers, and their notes are yet unpaid. These subscription notes, and the assets and properties received from the Midland Company as the consideration of the construction of the Midland road, constituted, in the main, the assets of the Terminal Company, with which it was enabled to engage the services of Brown & Co. to build the road. These assets had to be utilized to that end. It seems from the history given by this record that from the beginning the enterprise was almost entirely confided to the direction, control, and management of J. W. Woolfolk, the president and general manager. The directors resided in different states, and there appears to have been difficulty in securing meetings of that body, so that the financial policies and plans of operation were left very largely to be designed and executed by Woolfolk, without much aid from them; and there seems to have been a general disposition on the part of directors and shareholders to acquiesce in and ratify whatever he did while the Midland road was being constructed. It is unnecessary to state in detail the various transactions had by Mr. Woolfolk in New York, by which funds were realized upon the Terminal Company's holdings. To state generally, he floated the Midland bonds by guaranteeing the payment of the interest for a certain number of years, securing the guaranty by pledge of the subscription notes and other assets, which were deposited with the Metropolitan Trust Company of New York, and afterwards, in 1890, sold to the Plant Investment Company, in New York, the Terminal's stock, etc., and other property in the Midland road, and in a belt-line street road in Montgomery, for \$500,000, and in the transaction secured release from the guaranty of interest on the Midland bonds, and return of the securities held by the Metropolitan Trust Company; the subscription notes then unpaid, and so returned, amounting to about \$265,000. These transactions were all authorized or ratified by the company, and there seems to have been no real complaint of Woolfolk's management in reference to them, except that, after the authorization of the sale to the Plant Investment Company, some of the complainants who had voted in its favor afterwards objected, and sought to prevent the sale, which action caused another meeting of the stockholders, which again authorized the sale. In fact the allegation of the bill is that on the completion of the Midland road great success in the Terminal's enterprise was developed, leaving the company in the possession of large assets, representing actual profits realized. About the time of the sale to the Plant Investment Company, Woolfolk rendered a statement to the Terminal Company of its assets and liabilities, showing estimated assets, \$1,544,705.92, and liabilities, \$847,263.-

72. It is shown, however, by Woolfolk, that these estimated values suffered an enormous decline in the general commercial depression, affecting peculiarly enterprises of this character, which followed the failure of Baring Bros. in the fall of 1890,—Woolfolk placing the decline at over \$400,000. He gives a detailed statement by which he reaches that result.

In November, 1887, Woolfolk procured to be organized a railway company known as the Alabama Great Northwestern Railway Company, for the purpose of building a road from Montgomery to Tuscaloosa, and on to a point on the Alabama & Mississippi line in Lamar county, Ala. Woolfolk's transactions in connection with this latter company form the principal subject-matter of complainants' complaint. The scheme of this organization, devised by Mr. Woolfolk, evidently, was to establish a connection with the Mobile & Ohio Railroad, or the Illinois Central, at some point in Mississippi, to penetrate the coal fields of Alabama, and supply a missing link between the Alabama Midland, then under his construction, and terminal facilities to the northwest, and it was believed the road, when constructed, would be very valuable, and early disposed of, to advantage, to some of its connecting lines. Upon organization the capital stock of this company was placed at \$50,000. The subscribers were W. F. Joseph, 5 shares; E. B. Joseph, 5 shares; R. P. Tallman, 50 shares; J. W. Woolfolk, 200 shares; James S. Negley, 150 shares; P. C. Smith, 5 shares; W. G. Hutcheson, 20 shares; and M. E. Pratt, 5 shares. These persons, except Negley, were elected directors. W. F. Joseph was elected president; J. W. Woolfolk, vice president and general manager; and W. G. Hutcheson, secretary and treasurer. In April, 1889, the name of the company was changed to the Montgomery, Tuscaloosa & Memphis Railway; and at an election under the new organization held in July, 1889, the two Josephs, Pratt and Woolfolk and W. S. Chisholm and Morris Jessup, were elected directors; W. F. Joseph, president; J. W. Woolfolk, vice president and general manager; J. C. Woolfolk, secretary and treasurer; and W. C. Giles, assistant secretary. On October 16, 1889, Jessup resigned as a director, and O. C. Munroe was elected in his stead; and on the same day Woolfolk resigned as vice president, and said Munroe was elected in his stead on October 24th. On November 11, 1889, W. F. Joseph resigned as president, and J. W. Woolfolk was elected. He continued in office until November 12, 1889, when he resigned, both as president and director. W. F. Northington was elected a director in his stead. Pratt and Chisholm having died, I. B. Newcombe and W. W. Van Voorhis were elected to succeed them on December 19, 1890, and, at an election held that day, O. C. Munroe was elected president; J. B. Newcombe,

first vice president; and E. B. Joseph, second vice president. The bill charges, on information and belief, in reference to this organization, that Woolfolk and his brother, W. E. Woolfolk, Shellhorn, Saportas, F. W. Hoadley, Chester C. Munroe, or some of them, and others unknown, formed some agreement, or entered into some combination, for the purpose of building a railroad called the Montgomery, Tuscaloosa & Memphis Railroad, extending from Montgomery northwest to Tuscaloosa, thence northwest in the direction of Memphis, and organized a corporation to own and operate said railroad, which company was and still is under the control of the above-named parties, and other associates and confederates acting with them and in their interest. That these parties, under some understanding and arrangement unknown to complainants, entered upon the construction of said railroad, and had prior to the 20th day of July, 1890, expended a large amount of money, and contracted heavy obligations, in the undertaking, and at that time, finding themselves cramped for means, and seeing that their contract and undertaking would be ruinous to them, formed a combination and conspiracy—some or all of them—with other associates unknown to complainants, to use the controlling influence which they held in the Terminal Company, by their ownership of a majority of its stock, which they then held and now hold, and by having a majority in number of the board of directors in their interest, to induce the Terminal Company to buy out their contract, and to assume all their obligations, amounting to \$494,330.77 or more, and to undertake the construction of said Montgomery, Tuscaloosa & Memphis Railroad. And accordingly, on the 20th July, 1890, Woolfolk, in furtherance of the scheme, at a meeting of the stockholders of the Terminal Company, proposed and passed, by the votes of himself and associates interested in said contract, a resolution reciting that a proposition had been made to the Terminal Company to build said road, and authorizing and directing the board of directors to enter into negotiations with said Montgomery, Tuscaloosa & Memphis Railway Company, with power to act if satisfactory terms could be made. That at a meeting of the board held thereafter, on November 12, 1890, said Munroe, as president of the Montgomery, Tuscaloosa & Memphis Company, submitted a written proposition to sell out the contract for building said road to the Terminal Company for \$100,000, if the Terminal would assume the debts, amounting to \$494,330.77, and engage to complete the road. A committee of three directors was appointed to investigate and report on this proposition, and on November 24, 1890, the committee reported adversely, showing in their report that the enterprise was dangerous, and likely to be ruinous, and their report was unanimously

adopted. Woolfolk was then present at the meeting. On the adoption of the report a motion was adopted, instructing Woolfolk, as president, to convert the assets of the Terminal Company into cash, and pay its debts; and he was also directed to call a meeting of the stockholders to take action looking to the liquidation and dissolution of the Terminal Company. That on the 20th December, 1890, the meeting of stockholders, as directed to be called, was held, and the previous proceedings of the directors' meeting were read, and thereupon the secretary read another written proposition of said Munroe, as president of the Montgomery, Tuscaloosa & Memphis Company, offering to sell out to the Terminal Company without any bonus, if the Terminal Company would assume all liabilities of his company; and thereupon Woolfolk introduced, and had passed, by a vote of stock, including his own, a resolution instructing the directors of the Terminal Company "to open negotiations and close the contract with the owners of said enterprise known as Montgomery, Tuscaloosa & Memphis Railway Company, aforesaid, represented by Chester C. Munroe, president of said company, with power to act, to build, complete, and equip said railroad, and do such other things in reference thereto as may be lawfully done under the charter of this company," meaning the Terminal Company. The said resolution was passed by an affirmative vote of 2,241½ shares against the negative vote of 642 33-100 shares; and complainants charge that the stock voting in the affirmative, or the great majority thereof, was controlled and voted by persons directly interested in the Montgomery, Tuscaloosa & Memphis Company, and that the stockholders, present at the meeting, and not interested in said enterprise, voted in the negative, and that a large number of them entered a protest on the minutes against the resolution, and giving notice that they would not be bound by said vote. It will be observed that this charge does not name the persons who voted in the affirmative, nor state how or in what manner they were interested in the Montgomery, Tuscaloosa & Memphis Railway Company, except the name of J. W. Woolfolk, and it does not state how many shares he held, nor how he induced others to vote for the proposition.

The bill further charges that the board of directors of the Terminal never took any further action in reference to the purchase of the contract for building said road, or in any manner complied with said resolution, nor was it afterwards discussed in any meeting of the board. But the bill alleges the said Woolfolk, and his associates in the enterprise, and others confederating with them, unknown to complainants, and without the knowledge of complainants, appropriated and used all the available assets of the Terminal Company, amounting in value to \$500,000, or

other large sum, for their own use, or the use and benefit of the other owners of the said enterprise represented by Chester C. Munroe, as president, without any authority or right whatever derived from the board of directors of the Terminal Company. That among the assets so used are all the said stock notes which had been deposited with the Metropolitan Trust Company, amounting to \$600,000, or other large sum, among which are the stock notes of complainants. That a large amount of said stock notes, with other securities of the Terminal Company, has been transferred, upon some agreement unknown to complainants, to, and are now held by, the Farley National Bank, located at Montgomery, Ala., of which said J. L. Hall is president, or held by said J. L. Hall and L. B. Farley. That some of said notes have been surrendered to the makers thereof by Woolfolk, by and through transactions amounting to donations to such stockholders of their liability on their notes. The character of these transactions is not stated, nor with whom had, nor the amount of the notes so disposed of, except that it is alleged that Woolfolk had in his hands large amounts of the Alabama Midland Bonds, belonging to the Terminal Company, which he sold to said parties, friends of his, liable on said stock notes, at their value in the market, and surrendered the stock notes of the purchasers as parts of the transactions, and that complainants are unable to state the number and amount of such transactions, but they aver, on information, that notes to a large amount have thus been used and disposed of by Woolfolk in fraud of the rights of the Terminal Company. The bill charges that all the acts and doings of Woolfolk and his associates in reference to the funds and assets of the Terminal Company, under and by which it is averred they have used, appropriated, or misapplied everything belonging to said Terminal Company available for use and conversion, are illegal, void, and fraudulent, and they, with all others receiving said assets, with knowledge of their ownership and misappropriation, including the Farley National Bank, J. L. Hall, L. B. Farley, and the Montgomery, Tuscaloosa & Memphis Railway Company, are liable and responsible to the Terminal Company for the funds so misapplied, which are averred to amount, in the aggregate, to \$500,000, or other large sum, in value. The bill further charges that, since the misapplication of said funds, Woolfolk has attempted to have the same ratified, so far as the transactions with the Farley National Bank are concerned, by the directors of the Terminal Company, and for that purpose prepared and sent round to the individual members of the board (not assembled and acting as a board, but separately as individuals) two resolutions, copies of which signed by J. W. Woolfolk, A. C. Saportas, W. E. Woolfolk, Charles Henderson, and George B. Shellhorn, dated Jan-

uary 26, 1892, and February 7, 1892, respectively, are appended to the bill, which documents, in terms, ratify and confirm the transfer of said securities to said bank. They were never considered by the board as such, but the directors whose names are signed thereto signed the same, as alleged by the bill, at the solicitation and request of Woolfolk; and it is charged that Woolfolk, and "some others signing said resolutions," (what others are not stated,) were and are directly interested in the said enterprise represented by C. C. Munroe, as president, and were and are interested, directly or indirectly, in the said use and misappropriation of the funds and assets of the Terminal Company, and so complainants aver that the said resolutions, if they had been passed at a regular meeting of the directors of the Terminal Company, by and through the votes of the said parties signing them, would be void, and that they are void for the further reason that they have never had the sanction of the directors, assembled as a board. It is further alleged that "J. W. Woolfolk and his brother, W. E. Woolfolk, A. C. Saportas, and others of said parties acting with said J. W. Woolfolk, and interested with him in misappropriating the assets of said Terminal Company, control a majority of the directors of said Terminal Company, and also of the capital stock of the corporation, and cannot, for that reason, be relied on to bring any suit for the recovery of the said assets so misapplied and misappropriated. And orators aver that unless the said assets can be recovered the said Terminal Company is wholly insolvent, and that if it is held to the engagements entered into in behalf of said company by said J. W. Woolfolk without the authority of said Terminal Company, relating to the construction of said Montgomery, Tuscaloosa & Memphis Railroad, it will be and is insolvent, in any event."

An amendment to the bill was afterwards filed, alleging that Woolfolk had contracted, in the name of the Terminal Company, debts to the amount of several hundred thousand dollars,—among them, a debt of \$150,000 to the Farley National Bank,—without the authority of the board of directors, and largely for the uses of Woolfolk and his associates, or for the building and construction of said Montgomery, Tuscaloosa & Memphis Railroad,—an enterprise in which the Terminal Company has no interest. That a suit at law is now pending on the debt of Farley National Bank. That said Shellhorn, an associate and confederate of said Woolfolk, and under his influence, and who acted with him in creating said debt, and otherwise disposing of the assets of the Terminal Company, without authority, and for improper purposes, accepted service of the writ in said suit, and said suit will not be defended by said Woolfolk and Shellhorn, nor will it be defended in the name of said company, since a majority of the directory,

consisting of J. W. Woolfolk, A. C. Saportas, W. E. Woolfolk, and Charles Henderson, are all interested with, or under the influence of, said J. W. Woolfolk, and cannot be relied on to defend said suit. That W. E. Woolfolk is a brother of said J. W. Woolfolk, and, with said Shellhorn, receives employment by or through said J. W. Woolfolk, as president of said Terminal Company. That said J. W. Woolfolk gave to each of them a small amount of the stock to qualify them to serve as directors. That otherwise they have no interest in said company, and are mere "figureheads" to do the bidding of said J. W. Woolfolk. That said Saportas is also under the influence of said J. W. Woolfolk, and has been privy to, and engaged with him in, the misappropriation of the funds and assets of the Terminal Company, and is willing to do anything asked by said Woolfolk in the way of ratification of his illegal actings and doings concerning said Terminal Company. That said Henderson is in combination with said Woolfolk, and all of the said parties are interested adversely to the said Terminal Company. It is alleged on information and belief that said Henderson has received from said Woolfolk assets of the Terminal Company to a large amount, without any consideration sufficient or proper, in law, being paid therefor, and said Woolfolk has undertaken to release and discharge said Henderson from large obligations to the company for the stock therein, in an irregular and improper manner, and without the authority of the Terminal Company, and that said Henderson, influenced by these matters, is subject to the manipulation of said Woolfolk in all matters of the Terminal Company. Sundry acts of misappropriation alleged in the original bill are reiterated in this amendment, viz. the transfer of assets to the Farley Bank, and the use of assets of the company in discharge of obligations of the Montgomery, Tuscaloosa & Memphis Railway Company; and it is alleged that these latter appropriations were made without taking any security for the repayment of the money so expended, and without even the form of a contract in reference thereto. It is further alleged that Woolfolk had called a meeting of the directors for August 10th, (the day of filing the amended bill.) That Saportas had come from New York, at his bidding, to be present and serve his purposes, and that Shellhorn, W. E. Woolfolk, and Charles Henderson were on hand for the same purpose, and these, with said J. W. Woolfolk, constitute a majority of the board of directors. That the object and purpose of this meeting was to ratify the acts of Woolfolk, Saportas, and Shellhorn, and others, in the said use of the assets of the Terminal Company, and in the creation of the said debt to the Farley National Bank, and the transfer of assets to secure the same, and to ratify other illegal and fraudulent acts of Woolfolk and asso-

ciates. It is further alleged that there has been no meeting of the directory of the Terminal Company for more than a year, and the company is engaged in no business. That Woolfolk failed to carry out the resolution of the board of directors requiring him to convert the assets into cash, and pay the debts, but, instead of doing so, has, with his associates, converted the assets to other unlawful uses, as herein stated, and that no steps will be taken by them to collect the large debts arising by reason of said misappropriation.

In September, 1892, a further lengthy amendment was filed, alleging the insolvency of Woolfolk and the Montgomery, Tuscaloosa & Memphis Railway Company. That the subscribers to the capital stock of the latter company were merely nominal, and only a nominal part of their subscriptions has been paid in. That the company had no means, and was a railroad merely on paper. That it had no means of raising money, except that raised upon the negotiation of its bonds as the work upon the railroad justified, and that the road is still incomplete, and its stock worthless, and its bonds not worth 25 cents on the dollar. That Woolfolk organized the said company while president of the Terminal Company, which latter had good credit, and large means in his hands, as president, and that the scheme was practically the personal scheme and property of Woolfolk. That Woolfolk and certain unknown associates took the contract to build and equip said Montgomery, Tuscaloosa & Memphis Railroad, for the stock thereof, at a given rate per mile; and the averments of his use of the Terminal assets in the construction of that road are repeated, charging him with buying equipments for that road and the Midland road jointly, using the credit of the Terminal Company for both, and mingling the accounts and business of the two roads. He is charged with taking money from the assets of the Terminal Company for his own use, and charging the same to the Montgomery, Tuscaloosa & Memphis Railway Company, upon a pretended sale to the latter company of stock issued to him in the Terminal Company, and the charge of buying in the stock of favored stockholders of the Terminal with the bonds of that company, to the amount of some \$100,000, or more, is repeated; and it is charged, generally, that all accounts which Woolfolk has kept since the organization of the Terminal Company are fraudulent, and that they have never been audited by any one competent to protect the interest of the company. It is further alleged that Woolfolk was personally interested with J. M. Brown & Co. in the contract for building the Midland road, whereby Brown & Co. have been paid large sums of money in excess of what they were justly entitled to, and that he discharged competent engineers on the Midland road, and replaced them with others, who could

be and were imposed upon by the contractors, or who allowed and passed, knowingly, improper items and charges for construction. It is charged that Woolfolk issued to said Brown & Co. \$50,000 or more of the Terminal stock, which has never been paid in, and for which they still owe, which stock is voted, used, and controlled by Woolfolk and Brown & Co. in furtherance of his schemes; that Woolfolk issued to Hoadley & Co., of New York, of which firm said Chester C. Munroe is a member, \$50,000 or more of said stock, for which they owe, and that this is also used by Woolfolk, and in his interest, whenever occasion demands; that Munroe and Hoadley & Co. have been actively operating with Woolfolk in all his schemes against the Terminal Company, and participating with him in the profits derived therefrom; that he had Munroe elected president of the Montgomery, Tuscaloosa & Memphis Company when he was not a stockholder therein, for the purpose of having him make the proposition to sell out the Montgomery, Tuscaloosa & Memphis road to the Terminal Company, and that the stock of Hoadley & Co. and J. M. Brown & Co., in the Terminal, was controlled and voted in favor of accepting that proposition, in the interest of Woolfolk. It is charged, also, that Woolfolk issued to Saportas \$45,000 or more Terminal stock, for which he still owes; that Saportas is a confederate of Woolfolk in his schemes for defrauding the company, and participates in the profits of such frauds, and his stock is also used by Woolfolk, or in his interest. It is alleged that the stock held by Woolfolk and these other persons, as well as other stock bought up with the means of the Terminal Company, amounting to some \$100,000, give him absolute control of the stock of the company at any stockholders' meeting. It is also charged that Woolfolk has undertaken to release solvent subscriptions to the stock of the Terminal Company, to the amount of \$20,000 or more, substituting therefor his own obligations, or of other insolvent persons. That he has control of the Montgomery, Tuscaloosa & Memphis Railway Company by virtue of his ownership of substantially all the stock therein, as well as control of a majority of the stock, and of the directory of the Terminal. It is alleged that the Terminal Company is out of business, and is now insolvent, and, generally, that the interests of the company cannot and will not be protected under the management of Woolfolk and his associates.

The original bill incorporates many minute and searching interrogatories to the defendants, calling for discovery upon oath of the facts touching all its material allegations. Woolfolk answered at great length, giving upon oath, in minute detail, his version of every act of maladministration charged against him, and a substantial history from his standpoint, of the Terminal Company, the Montgomery, Tuscaloosa & Memphis

Company, and his connection with, and acts of administration in, each, from their organization down. The other defendants also answered. Woolfolk sets forth his financial operations in the building of the Midland road, a general outline of which we have already given, and shows, in detail, what assets remained on the completion of that road, substantially, except as to value, as charged in the bill. He explains fully the organization of the Montgomery, Tuscaloosa & Memphis Railway Company by himself and others, and denies emphatically that any of the persons connected with or interested in that company, except himself and the two Josephs, ever had any interest whatever in, or connection with, the Terminal Company. He denies, with emphasis, each and every charge contained in the bill, of combination and conspiracy between himself and others to promote that enterprise, or to subserve purposes of his own, or otherwise, and he alleges that the persons charged to be in combination with him had and have no interests whatever to be subserved, except their interests as stockholders and directors in the Terminal Company, and that he had and exercised no influence or control whatever over them, except such as resulted from their confidence in his judgment and capacity to manage the affairs of the Terminal Company to its best advantage; and he denies that, in any of the transactions assailed, they, or either of them, ever did an act, under his influence, for the purpose of furthering his personal interests, or any other interests but those of the Terminal Company. He alleges that they are business men of high standing in the commercial world, and incapable of lending themselves to the purposes and ends charged against them. It is unnecessary to extend this statement by giving at length the form of these denials. They go, specifically and fully, to each and every charge of combination and fraud, and categorically answer and repel every imputation cast upon him, and the other directors and shareholders charged to be in collusion with him, and explain in detail each and every transaction assailed by the bill as fraudulent, in a way which, if true, is consistent with good faith, and an honest purpose to serve the best interests of the Terminal Company. In his history of the construction of the Midland road he shows that to enable the Terminal Company to pay the interest guaranteed by it on the Alabama Midland bonds, and upon which it would have defaulted in May, 1890, but for this loan, he, as president of the Montgomery, Tuscaloosa & Memphis Railway Company, from November 20, 1889, to July 3, 1890, loaned the Terminal Company, of money belonging to the Montgomery, Tuscaloosa & Memphis Railway Company, the sum of \$417,461.80, of which, during the same period, the Terminal Company paid back \$249,514.81, leaving a balance due July

3, 1890, of \$167,946.99; that at the time of his resignation as president of the Montgomery, Tuscaloosa & Memphis Company, on November 12, 1890, the Terminal Company had discharged its indebtedness to the Montgomery, Tuscaloosa & Memphis Company, and that company then owed the Terminal \$97,767.77. He admits the making of the proposition by Munroe, as president of the Montgomery, Tuscaloosa & Memphis Company, on November —, 1890, to the board of directors of the Terminal Company, and the action of the board thereon, as alleged in the bill, as well as the resolution of the board instructing him to convert the assets into cash, and pay the debts, and to call a meeting of the stockholders to take action looking to the liquidation of the corporation, and states that he did not carry out the resolution to convert the assets, and pay the debts, because of the action of the stockholders' meeting, called in pursuance of the resolution, by which the modified proposition of Munroe, as shown by the bill, was accepted by the stockholders, and the Terminal directors instructed to close the contract with the Montgomery, Tuscaloosa & Memphis Company. He admits that there was no formal action of the board, in meeting assembled, closing the contract, in pursuance of said proposition and instructions, but that he, and a majority of the board, with the knowledge and acquiescence of all the directors, did carry out said instructions, and accepted the proposition in the terms in which it was proposed, and thereupon entered upon the completion of the road; and it is shown by affidavit of Shelhorn that immediately thereafter the company had letter heads printed for use in the Terminal office, with which all its correspondence was thereafter conducted, some of which correspondence was with some of the complainants, on which were printed, in large type, the words, "The Alabama Terminal and Improvement Company, (Builders and Owners of) The Montgomery, Tuscaloosa, and Memphis Railway, and former owners of The Alabama Midland Railway;" and on February 23, 1891, at a meeting of the Terminal directors, at which complainants Roman and A. St. C. Tennille were present, a resolution, seconded by Roman, was passed, reciting that the Montgomery, Tuscaloosa & Memphis Railway Company was largely indebted to the Terminal Company, and authorizing the president, Woolfolk, to join the Montgomery, Tuscaloosa & Memphis Company in executing bond to the state of Alabama to enable the latter company to obtain from the state a grant of \$10,000 made by the state to it from the 2 and 3 per cent. fund. The answer of Woolfolk admits that the stockholders' meeting of December 20, 1890, by a vote of 2,241½ against 642½ shares, accepted the said proposition of Munroe, and ordered the directors to close the contract, and denies that any one

besides himself voted on the proposition who had any stock or any interest whatever in the Montgomery, Tuscaloosa & Memphis Company, and alleges that his stock in that company amounted to the sum of \$67,900, or only 687 shares, and he denies very emphatically that he had or exercised any influence or control whatever over the votes cast by any stockholder; and he insists that the acceptance of the proposition, and the undertaking of himself and other directors in taking charge of and constructing the Montgomery, Tuscaloosa & Memphis road, was in strict accord with the judgment and wishes of the majority of the Terminal stockholders and directors, having in view the welfare and success only of the Terminal Company. He admits that, acting under this authority, he expended up to April 1, 1892, of the Terminal moneys and acceptances, \$287,364.98 upon the Montgomery, Tuscaloosa & Memphis Railroad property, and alleges that the Terminal Company holds against this advance \$368,000 of the Montgomery, Tuscaloosa & Memphis Company bonds, and will own about three-fourths of all its stock, of both issues, preferred and common,—say \$1,725,000,—when the road is completed, at which time he believes the property would command a large sum of money. He admits that he contracted a debt of about \$150,000 with the Farley National Bank, a large part of which was to raise funds for the construction of the Montgomery, Tuscaloosa & Memphis road, and the balance for use in the construction of the Midland road, and that he transferred to the bank, as collateral security, large assets redeemed from the Metropolitan Trust Company. He alleges that he had authority to make this transfer, as president, under the by-laws of the company, and by established usage, in his administration of the Terminal affairs, having done so many hundred times before in similar transactions; and he states and insists that in January, 1892, six of the eight directors, with full knowledge of all the facts, expressly ratified and confirmed said transfer, by signing a resolution to that effect, a copy of which he appends to his answer. He admits that afterwards one of the directors, S. B. Stern, gave notice of the withdrawal of his ratification of said transfer. He states that this form of ratification of his acts had often been adopted by the directors when they could not be conveniently assembled,—they being residents of Troy and Montgomery, Ala., Columbus, Ga., and New York city,—and at the time of this ratification, in January, 1892, two of them were in New York, one in Columbus, Ga., one in Troy, and three in Montgomery, and no meeting could have been conveniently assembled. He gives previous instances of such form of ratification, in which some of the complainants joined as directors, one of which was the ratification of the sale to the Plant Investment Company in Au-

gust, 1891, and another the transfer in January, 1892, of notes amounting to \$16,000 to Hoadley & Co., as collateral security. He shows, also, that all his financial transactions in connection with the Montgomery, Tuscaloosa & Memphis Company were duly and regularly entered upon the books of the Terminal Company as they occurred, and he produces many exhibits from the books showing, in detail, these and other transactions assailed by the bill; and he states that no steps were taken by complainants to prevent any of these transactions, or disaffirm the same, until the filing of this bill, on May 31, 1892. He states, also, that the creditors of the Terminal Company, as well as the large majority of the stockholders and directors, approve his policy in reference to the Montgomery, Tuscaloosa & Memphis road, and are disposed to assist his efforts, and uphold him in his work; and he shows that he is a personal indorser of the Terminal Company's obligations to the amount of \$196,323.64, and personally liable for the same. The condition of the Montgomery, Tuscaloosa & Memphis Company on November 1, 1890, is stated to have been, assets, \$1,178,330.14, including the outlay to that date, and liabilities, \$494,330.77; and on April 1, 1892,—the date of the last statement made,—assets, \$1,885,566.65, of which amount \$989,566.65 had been expended upon the work, and bonds then held by the company, in value, \$396,000, and liabilities, exclusive of the amount invested in the work of the Terminal Company, \$416,104.14,—the expenditures of the Terminal Company being \$286,866.31,—and that these statements are based upon fair valuations. He states that the road has been graded to Tuscaloosa, within 5 per cent. of the whole, and that the company has steel rails delivered on its right of way, enough to lay 70 miles of track,—said steel costing \$260,000,—besides 200 cars, and a completed bridge for the Alabama river now ready for shipment and erection, besides other valuable assets; and he further states that negotiations for the complete rehabilitation of the company's finances are nearly completed; that Mr. Saportas is now in London to close negotiation for the sale of the bonds to responsible capitalists; and that, if let alone, the work of completing the road to a connection with the systems in Mississippi will soon be resumed, and carried to speedy completion, when all interests of the Terminal Company will be fully protected. As we have said, all other particular charges of fraud and collusion are denied or explained, circumstantially and in detail, and it is deemed unnecessary to set forth the denials at length. The answer of Woolfolk was sworn to, and considered as his affidavit on the hearing of the application for a receiver, and the motion to dissolve the injunction.

The defendants Saportas, Shellhorn, Henderson, and W. E. Woolfolk filed separate

answers, (the last three being under oath,) fully denying all charges against them, and explaining in detail the transactions with which they were connected. These sworn answers were also considered as the affidavits of the parties on the hearing. Separate affidavits of J. L. Hall, L. B. Farley, and G. B. Shellhorn were read by respondents, corroborative in some respects of Woolfolk; and affidavits of J. B. Knox, W. F. Joseph, E. B. Joseph, Stern, Roman, and Lorenzo Semple, corroborative of some of the allegations of the bill, were read by complainants.

Brickell, Semple & Gunter, for appellants. Roquemore, White & Dent and Tompkins & Troy, for appellees.

HEAD, J. As the case is presented to us, we cannot properly pass upon the equity of the bill, except as incidental to the motion to dissolve the injunction, and the application for a receiver. The bill fails to show that application was made by the complainants to the board of directors, or to the stockholders, to take steps for the redress of the wrongs complained of, or for authority to prosecute the suit in the name of the company, but the facts charged are relied upon as showing that such an application would have been fruitless. It is not denied that the policy of the law is to leave the affairs of corporate bodies to the management and control of their own chosen agencies, and that a minority of stockholders will not be permitted to displace corporate authority and control by substituting therefor the policy, management, and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them; and that, before calling upon the court to take into its hands the administration of the corporate affairs, it must be made clearly to appear, not only that such oppression or wrong to them depends, but that every reasonable effort has been made to secure redress, and prevention of further mischief, within the company itself. These requirements are the most salutary, and of the highest importance. We had occasion to speak on this subject in *Planters' Line v. Waganer*, 71 Ala. 581. We there said: "In government of corporations, much must be left to the judgment and discretion of the directory, and much must be credited to the fallibility of human judgment. If it be supposed an unwise course is being pursued, or that the interests of the corporation are suffering, or likely to suffer, through the inefficiency or faithlessness of an official, an appeal should first be made to the directory or governing body to redress the grievance. Failing there, in ordinary cases, the next redress will be found in the power of the ballot, which usually comes into exercise at short intervals." We quoted approvingly the cases

of *Greaves v. Gouge*, 69 N. Y. 154, and *Brewer v. Boston Theatre*, 104 Mass. 378. In *Hawes v. Oakland*, 104 U. S. 450, Justice Miller, in delivering the opinion of the court, stated that a stockholder could appeal to the courts for relief where the board of directors or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders. That is precisely what is averred in this case. "But," Justice Miller adds, "in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he had exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest—not a simulated—effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." Continuing, we said: "These principles commend themselves to our approval by the strongest of considerations. A corporation, to attain the highest success, should, like a family, dwell together in unity; and when disputes arise between members of this body corporate, or law-created household, they should, if possible, be adjusted among themselves. It should be a strong case to justify a resort to personal litigation, which almost invariably leads to personal alienation, if not open hostility." See, also, *Mack v. Iron Co.*, 90 Ala. 396, 8 South. Rep. 150.

We are not to consider, as the case is now presented to us, whether the averments of the bill, taken as true, make a case excusing effort on the part of the complainants to seek relief in and through the company itself, or not. The chancellor, in effect, held them sufficient when he refused the motion to dismiss the bill for want of equity, and it is not our purpose now to review that ruling, as it is not necessarily before us. The case comes before us, in the matter of the receivership and injunction, not only upon the averments of the bill, but upon the sworn answers and affidavits introduced upon the hearing, as well. Upon a careful consideration of the whole case, it is quite clear to our minds that no sufficient reason is made to appear why appeal should not have been made to the company itself to redress the alleged grievances, or for authority to use its name in the prosecution of the suit. It is shown, without doubt, that not

a member of the board of directors, except Woolfolk, and not a stockholder, except him and the two Josephs, have any interest whatever in the Montgomery, Tuscaloosa & Memphis Railway Company, adverse to the interests of the Terminal Company, and the charges in the bill of influence and control over them, for unlawful purposes, on the part of Woolfolk, are as emphatically and fully denied as they are alleged; and there is no sufficient corroborative evidence in support of the allegations of the bill upon this subject to justify the extremity of wresting from the hands of the corporation, where the law places them, all its assets, and restraining it from performing the functions of its creation. Upon the case now made, we are bound to hold that complainants should have presented their grievances, in a proper way, to the company, and invoked proper remedial action at its hands; and, having failed to do so, they are not in a position to ask relief of the court. The bill has been retained by the chancellor, and issues made up on the pleadings. What the aspect of the case will be when the proofs are regularly taken upon those issues, if the bill is further prosecuted, we, of course, cannot know. We rest our conclusion upon the case as it is now presented to us. The decree of the chancellor, dissolving the injunction and refusing to appoint a receiver, is affirmed.

(90 Ala. 457)

**RICH v. LOWENTHAL et al.**

(Supreme Court of Alabama. May 2, 1893.)

**REPLEVIN—BOND OF DEFENDANT.**

1. A bond executed by one of several defendants in replevin, who alone has possession of the property, in order that he may retain possession, as required by Code, § 2717, is sufficient, without the other defendants joining therein, since only the possession of the defendant who retained the possession can be disturbed by the execution of the process.

2. The fact that part of the property sued for and included in defendant's bond was omitted from the sheriff's return of seizure, and that certain articles of property not sued for were included in the bond, does not affect its validity, since defendant is required to deliver only the property sued for and replevied and recovered by plaintiff by virtue of the verdict and judgment.

3. The fact that the penalty of the bond is for a less sum than the value of the property, as assessed by the jury, does not prevent its enforcement by summary execution against the sureties in an amount not exceeding such penalty.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Petition by Herman Lowenthal and Moses Lowenthal, praying for the quashing of an execution issued against them as sureties on the replevin bond of defendant in the case of *Herman Rich* against *Verona Rich* and others. From an order overruling the demurrer of plaintiff, *Herman Rich*, to such petition, he appeals. Reversed.



The bond was given by Verona Rich, with Herman Lowenthal and Moses Lowenthal as her sureties, to retain possession of certain personal property for the recovery of which Herman Rich had instituted an action of detinue against the said Verona Rich and Louis Hecht and Robert Hecht. The plaintiff having made affidavit and given bond at the commencement of the suit, as provided by the statute, the clerk of the court made an indorsement on the summons, requiring the sheriff to take the property mentioned in the complaint into his possession unless the defendant gave bond therefor as required by law. The said Verona Rich, who had possession of the property, thereupon executed a bond, as above stated, and kept the property. The penalty of this bond was in the sum of \$500, and the condition was as follows: "Now, if the said Verona Rich shall well and truly within thirty days after the determination of said suit, if the said Verona Rich be cast in said suit, deliver the property replevied, and also pay all the costs and such damages as may accrue from said detention, then this obligation to be void; otherwise to remain in full force and effect." On the trial of the detinue suit a judgment was rendered in favor of the plaintiff against the said Verona Rich for the greater portion of the property sued for and replevied, the suit having been dismissed as to the other two defendants. The alternate value of the property for which such judgment was rendered was assessed at \$714, and the damages for the detention was found to be \$1,456.05. None of the property having been returned, and no part of the damages having been paid, at the expiration of 30 days from the rendition of the judgment, the sheriff made return of the facts, and the clerk thereupon issued an execution against the sureties on the bond for the sum of \$500. The proceedings in this case were begun by said sureties by petition setting forth the facts which are briefly stated above, and praying that the execution be quashed. A copy of the bond, and also of the execution, are annexed as exhibits to the petition. The objections made in the court below to the validity of the bond as a statutory bond were as follows, as set out in the petition: First, that the bond was not the bond of all the defendants in the suit, but of only one of them; second, that certain property was mentioned as having been replevied which had not been levied upon and seized by the sheriff, and that two willow rockers were included in the bond, when the same had not been sued for; third, that the penalty of the bond was less than the alternate value of the property, as assessed by the court trying the case, and that the statute only authorized the issue of an execution for such alternate value, and for the damages assessed for its detention; fourth, that the bond should have been conditioned for the return of the property if the defendants, or any of them, were cast in the

suit, and not if Verona Rich merely was cast in the suit. It was also alleged that plaintiff failed to recover some of the property replevied. The plaintiff in the detinue suit, and respondent to this petition, Herman Rich, demurred to the petition on the grounds—First, that it was a statutory bond; second, that the defendant, Verona Rich, had the right to execute the bond and replevy the property sued for if the same was in her possession, without requiring the other two defendants to unite in the execution of said bond; and, third, that there is no provision of law that all of the defendants must unite in the execution of the bond when only one is in the wrongful possession of the property sued for; fourth, because by the execution of the bond the defendants are estopped from denying that any of the property was seized by the sheriff; and, fifth, that the fact that some of the property contained in the bond as being replevied, when it was not sued for, is immaterial, and does not affect the validity of the bond.

Cabaniss & Weakley, for appellant. Jas. E. Webb, for appellees.

HEAD, J. Our statutory action for the recovery of personal chattels in specie (Code, § 2717 et seq.) combines the qualities of detinue and replevin, as those remedies were understood at the common law. But one form and method of procedure are prescribed for any recovery of a chattel, whether the grievance be the mere wrongful detention resulting from a possession originating in contract or an unlawful taking and detention; and to this procedure is adapted the machinery of the action of replevin for seizing the property, at the institution of the suit, and its custody, under bonds, to abide judgment upon the rights of the parties. Detinue and replevin, as they are distinguished from each other, are practically superseded by this statutory substitute, designed to answer the aims and ends of both. So combined, the beneficial incidents of either of the old remedies will be held to attach to the new system. If the goods were unlawfully and tortiously taken and detained, for the redress of which, according to the early notions of detinue and replevin, the latter was the appropriate remedy, a plaintiff suing several in one action might recover against one or more defendants, and fail as to the others, as in other actions of tort. This incident must be now held to attach to any action under our statute for the recovery of chattels. From this standpoint there can be no doubt that when suit is brought against several, and the appropriate mandate obtained for the seizure of the goods, it is the duty of the sheriff to execute the mandate, though the goods be found in the possession of, and exclusively detained by, one of the defendants only; and, this being true, it follows as a necessary conse-

quence that the defendant in possession may retain possession by the execution of the replevy bond authorized by the statute, for in such case the other defendants, who may be improperly sued, and who may successfully defend upon the mere denial of the detention, have no concern with the seizure, and no interest to prompt them to join in the execution of the bond. It is no strained, but a fair, construction of the words of the statute to hold, as we do, that the defendant authorized to execute bond and retain possession is he who is in possession and detaining the property; he whose possession would be disturbed by the execution of the process of the court. Indeed, it may be open to serious inquiry whether the other defendants who are not in possession are clothed with a legal right to join in the replevy, since its effect would be to convert into the common custody and possession of them all that which was exclusively in the defendant found in possession. It may be readily perceived how the rights of a real owner in possession might be subverted by such enforced transfer of custody, without any provision of means of indemnity. That question does not arise, however, and we pronounce no decision upon it. Manifestly, the fact that a part of the property sued for and included in the replevy bond was omitted from the sheriff's return of seizure can exert no influence upon the statutory character of the bond. Nor does the fact that certain articles of property not sued for were included in the bond affect it. Such inclusion could not possibly prejudice any right or work any conceivable harm. It is a mistake to suppose, as argued by counsel, that the bond requires the obligors necessarily and at all events to deliver all the property mentioned in it after judgment. Interpreted in the light of the several provisions of the statute under which it is given, the obligation is to deliver the property sued for and replevied, and which the plaintiff shall recover by verdict and judgment. It is not denied that a plaintiff in this action may recover a part of the property sued for and replevied, and fall as to the residue. As well might it be argued in that case that the bond requires the delivery of all the property mentioned in it, yet unquestionably it does not. When the penalties of the bond come to be enforced by return of forfeiture and execution prescribed by the statute, the officers must read it in connection with the record, and thereby ascertain what property was condemned to delivery, and ought to have been delivered. If the willow chair was not sued for, it could not have been recovered, and no obligation could rest upon the obligors to deliver it.

It is next insisted that the execution should be quashed because the statute requires that

it shall issue for the alternate value of the property, as assessed by the jury, whereas this execution issued for a sum less than that value, being the amount of the penalty of the bond. The proposition is that, where the penalty is less than the assessed value, the bond cannot be enforced by summary execution. We think this construction of the statute too narrow. We can see no possible detriment or inconvenience to result to any one from a summary enforcement of the bond to the extent of the penalty when the assessed value is greater, which would not be suffered if enforced for the assessed value when the penalty is greater. The purpose of the statute in requiring the bond and providing the processes for its enforcement was to furnish, upon the obligation of sureties, a speedy, efficacious, and inexpensive remedy for compelling delivery of the property on its recovery by judgment, or payment of its alternate value, so far as the obligation of the sureties may be the means of effecting that result. The statute must be given a liberal interpretation, so as to accomplish the remedial objects intended. It is a fair construction, therefore, of the provision requiring the execution to issue for the assessed value, to impose upon it the implied limitation that the execution shall not exceed the penalty of the bond, that being the measure of the obligor's liability. It has been the practice in this state to pursue the course here pursued in analogous cases, and we are not aware that any objection has ever been raised to it. For instance, by statute, in cases of appeals to the circuit court from judgments of justices of the peace, it is required that, on affirmance of the judgment in the appellate court, judgment shall be rendered against the sureties on the appeal bond, as well as the principal, for the amount recovered and all costs. This judgment, as to the sureties, is purely summary, and yet it has for many years, and frequently, been held by this court that, if the sum recovered and costs exceed the penalty of the bond, judgment should properly be rendered against the sureties for the amount of the penalty only. *McBarnett v. Breed*, 6 Ala. 476; *Witherington v. Brantley*, 18 Ala. 197; *McKeen v. Nelms*, 9 Ala. 507; *Sherry v. Priest*, 57 Ala. 410; *Walte v. Ward*, 93 Ala. 271, 9 South. Rep. 227. A literal construction of the statute, such as appellees' counsel contends for, would, in such a case, deny to the circuit court the power to render any judgment at all against the sureties on the appeal bond. We are of opinion that none of the grounds of the motion to quash the execution were well taken. The judgment of the city court is reversed, and a judgment will be here rendered overruling the petition and motion to quash.

(39 Ala. 465)

COOK et al. v. BOLLING et al.

(Supreme Court of Alabama. May 16, 1893.)

EQUITY—PARTIES—PLEADING—DECREE.

R. sued R., W., J., and others to enforce collection of a debt secured by note, mortgage, and other collaterals given by W. and J. The bill alleged that a firm composed of R. and W. was indebted to B.; that the mortgage was given to obtain money to pay such indebtedness, and the loan, also, of a further sum to J.; and that on delivery of such mortgage the indebtedness of the firm to B. had been canceled. No other reference was made to any debt of the firm, nor was the firm made a party in its firm name. *Held*, that there could be no decree against the firm.

Appeal from chancery court, Crenshaw county; John A. Foster, Chancellor.

Bill by Rufus Cook and others against R. E. Bolling & Son to have reviewed and set aside a decree rendered by the chancellor in a suit brought by said Bolling & Son against W. H. Cook and others. The chancellor sustained defendants' demurrer interposed to the bill, and plaintiffs appeal. Reversed and remanded.

In his bill of complaint, complainant averred that on April 27, 1887, R. E. Bolling & Son filed their bill of complaint against complainant W. H. Cook, Jefferson Cook, Martha Cook, and W. T. Trantum "for the purpose of foreclosing a mortgage made by Jefferson Cook and Martha Cook, and to have the deed made by said Jefferson Cook and Martha Cook declared fraudulent and void as to said creditors;" that the firm of Cook Bros., which was composed of the complainant and W. H. Cook, was not made party defendant to the said bill of complaint; that it was alleged in said bill of complaint that the said firm of Cook Bros. was indebted to R. E. Bolling & Son at the time of the making of the mortgage by W. H. Cook and Jefferson Cook, (which was ought to be foreclosed,) and that it was also alleged and shown in said bill of complaint that the mortgage was given to secure the payment of money which was borrowed by Jefferson Cook for the purpose of paying up the said sum due from Cook Bros. to R. E. Bolling & Son, and also to secure an additional sum borrowed by Jefferson Cook; that upon the execution of said mortgage by W. H. Cook and Jefferson Cook the firm of R. E. Bolling & Son delivered to W. H. Cook the notes which evidenced the indebtedness due to them by Cook Bros.; and that these notes were marked "Paid," on the face of them. The bill then avers that on July 20, 1888, the chancellor rendered a decree dismissing the bill "for all purposes except the Pace lands, and to foreclose the mortgage executed by W. H. Cook to R. E. Bolling & Son;" that on January 24, 1890, the chancellor rendered a final decree in said cause; and setting out that part which has special reference to the firm of Cook Bros., and which is copied in the opinion of this court. Complainant then prays for a decree declaring that said final decree in the

original cause of R. E. Bolling & Son against W. H. Cook et al. be reviewed, reversed, and held for naught. By amendment, W. H. Cook was made a party complainant. The defendants demurred to the bill on the following grounds: (1) That there was no equity in the bill because the error of law, if there be any, as averred by the bill, could have been reached by demurrer, and cured by amendment; (2) because, if the proceedings were irregular, in not making Cook Bros., as a firm, parties defendant to the complaint, complainant should have demurred to the bill, or have made a motion to dismiss; (3) that there is no error of law appearing on the face of the decree, as shown by the bill; (4) that the complainant had a clear right of appeal, and cannot now be benefited by his laches; (5) that the bill makes the individual members of the firm parties, and the court could properly render a decree against the partnership firm either on the pleadings, or the testimony of the case; and (6) that there is no equity in the bill, because, if there had been an amendable defect in the original bill, no demurrer was interposed, and no objection made, and that, therefore, the court very properly considered such an amendment defective, according to the alleged defect, without objection. Upon the submission of the cause upon the demurrers the chancellor sustained them, as interposed.

J. H. Parks and Gardner & Wiley, for appellants. Gamble & Bricken and D. M. Powell, for appellees.

STONE, C. J. The transcript in this case is, of itself, very incomplete. It fails to fully explain the point presented for our consideration. There is an agreement, however, that the transcript in another case pending in this court may be consulted in connection with the present one. That transcript contains the entire record of the suit which the case in hand seeks to have reviewed on an allegation of error apparent. This agreement is signed by counsel, and is certified as part of the record in this case. There is a grave objection to this practice. It imposes on the court additional labor, and may lead to great confusion. But we will make no specific ruling on this question at this time. We have consulted the record in the case referred to. It was a bill by R. E. Bolling & Son against W. H. Cook, Rufus Cook, Jefferson Cook, and other defendants. Its purpose was to enforce the collection of a debt secured by a mortgage, and by certain other securities and collaterals. The claim sought to be enforced was a debt secured by note, dated January 8, 1885, and due January 1, 1886, for \$934, with waiver of exemptions. The averment of the bill in reference to the execution of that note is as follows: "That orators \* \* \* agreed to loan and did actually loan, them the sum of nine hundred and thirty-four dollars, and to secure the same took the

note and mortgage and transfer of accounts from William H. Cook and Jefferson Cook." The note was signed, "W. H. Cook and Jefferson Cook," but the mortgage was executed by W. H. Cook alone. They are made exhibits to the bill. The first section of the said bill is in the following language: "That on the 8th day of January, 1885, Cook Bros., a firm composed of William H. Cook and Rufus Cook, was indebted to your orators for goods sold them before that time, and that they and their father, Jefferson Cook, applied to your orators for a loan of an amount of money for the purpose of paying up said sum by Cook Bros., and also about six hundred dollars to aid Jefferson Cook in defense of a charge of pension fraud before the United States court, as orators believe and so charge." This is the only reference in the bill to any debt due from Cook Bros., or the amount of it. To ascertain the amount would, at least, involve a calculation of interest accruing between the date and maturity of the note; for the sum of the debt due from Cook Bros. must have been the balance left of the \$934 after discounting—First, the sum advanced for Jefferson Cook's defense; and second, the interest to accrue between the making and maturity of the note. Taking the averments of the bill to be true, as we must treat them on this inquiry, the sum must have been much less than \$300. As we have said, this is the only averment of a debt due from Cook Bros., and it is nowhere charged that the mortgage executed, or the collaterals placed, were intended to secure that indebtedness. From aught that appears in the bill, that former indebtedness, whatever its form or amount may have been, was a simple contract liability, accompanied by no equitable rights or liens for its enforcement. Particularly was that the case so far as Rufus Cook is shown to have been concerned. And the bill, nowhere in its averments or prayer, seeks to enforce the collection of that original indebtedness of Cook Bros., nor are they made parties, in their partnership name. The entire scope, purpose, and prayer of the bill are to recover on the alleged negotiation and contract of W. H. Cook and Jefferson Cook, of date January 8, 1885; and in maintenance of their equity they set forth, not only the written evidences of the contract, but their representations and other acts leading up to it.

Part of the decree of the chancellor, rendered in that cause, is in the following language: "And it appearing from the report of the register that Cook Bros., a firm lately composed of William H. Cook and Rufus Cook, is due and owing to complainants the sum of five hundred and seventy-three and 60-100 dollars, it is therefore ordered, adjudged, and decreed that the complainants do have and recover of the said Cook Bros., a late firm composed of William H. Cook and Rufus Cook, the said sum of five hundred and seventy-three and 60-100 dollars, for which

let execution issue." Under an execution issued on this decree it is manifest the sheriff would be commanded to levy, not only on the property of each of the defendants William H. and Rufus Cook, but on any property of the late firm of Cook Bros. If the chancellor could under any circumstances pronounce such decree for the enforcement of a simple, nonsecured, money liability, it is manifest there were no pleadings in the case before him to authorize the decree copied above. Relief cannot be granted for matters not charged, although the evidence may disclose a right to recover. "The reason of this," says Mr. Story, (Eq. Pl. § 257,) "is that the defendant may be apprised by the bill what the suggestions and allegations are, against which he is to prepare his defense." See, also, *Cameron v. Abbott*, 30 Ala. 416; *Flanagan v. Bank*, 32 Ala. 508; *O'Bannon v. Myers*, 36 Ala. 551; *Rea v. Longstreet*, 54 Ala. 291; *Copeland v. Kehoe*, 57 Ala. 246; *Winter v. Merrick*, 69 Ala. 86; *Meyer v. Mitchell*, 75 Ala. 475; *Webb v. Crawford*, 77 Ala. 440; *Park v. Lide*, 90 Ala. 246, 7 South. Rep. 805; *Porter v. Collins*, 90 Ala. 510, 8 South. Rep. 80. It is manifest from the statement of facts we have made—all of which are apparent on the face of the pleadings, and in the final decree—that the chancellor erred in the decree sustaining the demurrer to the amended bill of review, on any of the grounds set down. *Story*, Eq. Pl. § 405 et seq.; *McDougald v. Dougherty*, 39 Ala. 409; *Bishop v. Wood*, 59 Ala. 253; *Tankersley v. Pettis*, 61 Ala. 354; *Goldsby v. Goldsby*, 67 Ala. 560; *McCall v. McCurdy*, 69 Ala. 65; *Smythe v. Fitzsimmons*, (Ala.) 12 South. Rep. 48; *Ashford v. Patton*, 70 Ala. 479; *Banks v. Long*, 79 Ala. 319.

Reversed and remanded.

(101 Ala. 301)

# **BIBB v. MONTGOMERY IRON WORKS et al.**

(Supreme Court of Alabama. May 17, 1893.)  
CORPORATE BONDS—ISSUE TO STOCKHOLDERS—  
CANCELLATION.

Bonds issued to stockholders of a corporation will not be canceled at suit of another holder merely because of no consideration paid by the stockholders, where such bonds are not yet due, and no default has been made in payment of interest, or any impairment of the mortgaged property, and where also the holder does not have any control of the earnings or management of the company, or of the money received as a loan.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Bill by Josephine M. Bibb against the Montgomery Iron Works and others to have certain bonds of defendant corporation canceled, and praying that the holders of said bonds be required to account to the corporation for the interest received thereon. The defendants interposed several demurrers to the bill, and also moved to dismiss the bill for want of equity. The chancellor

overruled the demurrers, but sustained the motion, and dismissed the bill. The present appeal is prosecuted by complainant from this decree. *Affirmed.*

Roquemore & White and E. P. Morrisett, for appellant. Tompkins & Troy, for appellees.

COLEMAN, J. The bill avers that Joseph W. Dimmick, W. L. Chambers, George W. Craik, P. B. Bibb, A. M. Baldwin, and B. McAdam were the promoters, organizers, and corporators of the Montgomery Iron Works; that it was incorporated with its capital stock fixed at \$50,000, which was subscribed and paid for by them by "turning over and delivering to the corporation a certain lot of land, houses, and manufacturing material jointly owned by them, for which they paid \$25,000, in the following proportion and amounts: P. B. Bibb, \$7,500; Dimmick, Baldwin, and Chambers, each, \$5,000; and Craik, \$2,500; and that \$25,000 was its full value." This statement fails to account for the interest of McAdam. This omission may not be material for a determination of the questions raised in the record. The bill avers that stock was issued to the subscribers in double the amount of the respective sums paid by them, and that the amount actually paid in is of no greater value than the original cost of the purchase, to wit, \$25,000. The bill further charges that the corporation issued its bonds to the amount of \$50,000, which were secured by a mortgage upon its property. The bonds bore interest at 8 per cent., the interest payable annually, and upon default of payment of interest the mortgage might be foreclosed. The bonds do not mature for several years yet in the future. Of the \$50,000 of the issue of bonds, \$25,000 were placed in the treasury for the use of the company, and which have been used, sold, hypothecated, or placed as collateral security to the Montgomery Bank. Of the remaining bonds, not thus disposed of, complainant claims to be a bona fide holder and owner of \$7,500 for value, and without notice of any defect or irregularity in their issue; that the said Dimmick received \$5,000, Baldwin \$5,000, and Craik \$2,500, without paying any consideration therefor, but received them solely in consideration of being stockholders, and are not to account for them in any way. The bill further charges that the assets of the company are not equal in value to its liabilities; that the business is not successfully conducted, and to meet its liabilities it is compelled to borrow money, and increase its indebtedness; that either from its earnings or from money borrowed the annual interest accruing on its bonded indebtedness, including those bonds held by the said Dimmick, Baldwin, and Craik, is paid. The conclusion of the pleader is that the bonds held by the stockholders, for which they

paid nothing, are illegal, and in law are not proper charges upon the property of the company. The prayer of the bill is that these bonds be canceled, and that the holders be required to account to the corporation for the interest received by them on these bonds.

To properly understand the case made by the bill, it is necessary to note some omissions of averments which seem to us to be material for a proper consideration of the case intended to be raised by the bill. It is not stated that the company has made default in the payment of the interest due on its bonds, including those held by complainant. It is not stated that the corporation company is, in any manner, impairing the property mortgaged as a security for the payment of the bonds. It is not pretended that complainant has any lien upon, or claim to, or control of the earnings of the company, or its management, or the money received by it as a loan. What claim has the complainant, whose bonds are not yet due, and to whom there has been no default in the payment of interest, to the money earned by the corporation? or what right to enjoin its debtor from contracting other debts, or applying its own money to the discharge of other obligations, contracted in the regular course of its business? It is not pretended that the corporation company has in any manner misused or impaired the property which is mortgaged to secure complainant's debt. Some questions are presented and argued, upon which all the members of the court are not agreed, but their decision is not necessary for a determination of the case. The court is unanimous in the opinion that the bill is without equity, and that the decree of the chancellor, dismissing the bill, is free from error. *Affirmed.*

(70 Miss. 596)

#### WILSON v. STATE.

(Supreme Court of Mississippi. May 15, 1893.)  
CRIMINAL LAW — NEW TRIAL — MISCONDUCT OF  
PRIVATE PROSECUTOR—PRESENCE BEFORE GRAND  
JURY.

Where, on a trial for forgery, it appears that the attorney of the company alleged to have been defrauded had been before the grand jury, as a private prosecutor, urging the bringing of the indictment, a judgment of conviction will be reversed.

Appeal from circuit court, Lee county; L. E. Houston, Judge.

George Wilson was convicted of forgery, and appeals. Reversed.

For former report, see 12 South. Rep. 332.

Clark & Clark and Calhoun & Green, for appellant. Frank Johnston, Atty. Gen., for the State.

COOPER, J. The court erred in instructing the jury to find for the state upon the issue joined upon the defendant's plea in abatement. On the facts disclosed in the

evidence, the verdict on that plea should have been for the defendant. It is unquestionably shown that Mr. Finlay, who was the attorney for the telegraph company, alleged to have been defrauded, or attempted to be, by the forgery charged against the defendant, was before the grand jury, as a private prosecutor, for the purpose of securing the indictment of the accused. It is true, Mr. Finlay states that he was not employed by the company in the prosecution. He testified that: "I did it of my own motion. I was interested in seeing the defendant convicted, because I thought he was a great scoundrel." It is a serious mistake to suppose that the right of one accused or suspected of crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecution for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all other states; and though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot be doubted that one whose acts are then the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is as essential, before the one body as the other, that private ill will and malevolence shall be excluded. The candid statement by Mr. Finlay that he went before the grand jury because he thought the appellant to be a great scoundrel, and therefore desired his indictment and conviction, presents the precise reason why he should not have gone before the jury, for it is just such influence that the law forbids. He was not a witness before that body, and was not an officer having any duty to perform, touching the matter under examination. His purpose must have been to advance, in some way, the prosecution, and this is precisely what the law prohibits to be done. The case is covered by the decision in *Durr v. State*, 53 Miss. 427, and *Welch v. State*, 68 Miss. 841, 8 South. Rep. 673.

The judgment is reversed, and the cause remanded for a new trial.

(70 Miss. 835)

**H. WELTER MANUF'G CO. v. DINKINS et al.**

(Supreme Court of Mississippi. May 8, 1893.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS — VALIDITY — PREFERENCE — USURIOUS DEBT.**

Where, in an action to set aside an assignment for the benefit of creditors on the ground that preference had been made for a creditor to whom the assignor had agreed to pay a usurious rate of interest, it clearly appears from the assignment that the assignor intended to prefer such creditor only to an amount purged of all usurious interest, the fact that a mistake was made in the computation of such amount will not invalidate the assignment.

On rehearing.

For former report, see 12 South. Rep. 584.

**WOODS, J.** We are of opinion that the preference of Parker for \$1,550, only, in the deed of assignment, was an effort on the part of the assignor to purge the debt thus preferred of all usurious interest. In the calculations made by us on the former examination of the record we were of opinion that no usurious interest was to be found in the sum preferred. The superior arithmetical skill, however, of the counsel for appellants, has demonstrated our error, to the extent of \$10. But this mere error in computation will not invalidate the assignment; for, in express, though involved and obscure, terms, the assignee is directed to pay the amounts really due, if it shall be found that by mistake the amount of any debt has not been accurately stated in the assignment. The conclusion is irresistible that the assignor directed payment of Parker's debt purged of usury, as he mistakenly computed the debt and its usurious interest; and the assignee can and will pay Parker's preferred debt only in that way, and to that extent.

Affirmed.

(70 Miss. 558)

**OVERTON v. STATE.**

(Supreme Court of Mississippi. March 27, 1893.)

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — HAWKERS' AND PEDDLERS' LICENSE.**

The ordinance of the city of Vicksburg which provides for the payment of a privilege tax by all transient peddlers doing business in the city, so far as it applies to a traveling agent, a citizen of another state, selling goods only by sample for his principal, who resides in such other state, is an attempted regulation of interstate commerce, and unconstitutional. *Asher v. State of Texas*, 9 Sup. Ct. Rep. 1, 128 U. S. 129, and *Robbins v. Taxing Dist.*, 7 Sup. Ct. Rep. 592, 120 U. S. 489, followed.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

H. M. Overton was convicted of peddling in the city of Vicksburg without having paid the privilege tax, and appeals. Reversed.

H. M. Overton is a citizen of the city of New Orleans, and employed by the Southern Installment & Manufacturing Company, of that place. He was taking orders in the city of Vicksburg for goods to be supplied from New Orleans. He went from house to house, soliciting orders for goods, which he would forward to his employers to be filled. The house would then ship the goods directly to appellant, and he would deliver them to the customers, and collect the first payment. He sold no goods of his own, nor in any way than as above set out. The city of Vicksburg had an ordinance providing for the payment of a privilege tax of \$10 by all transient peddlers doing business in the city. Appellant refused to pay this tax, for which he was arrested, convicted, and fined. He

appealed to the circuit court, was again convicted, and appeals to the supreme court.

Geo. Anderson, for appellant. R. V. Booth, for appellee.

CAMPBELL, C. J. The facts of this case bring it fully within the cases declared in *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, and *Asher v. State of Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1, (followed reluctantly, and with manifest disapproval, in *State v. Agee*, 83 Ala. 110, 3 South. Rep. 856, and *Ex parte Murray*, 8 South. Rep. 868, by the same court, and *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848, 2 South. Rep. 592, and *Iron Range Co. v. Johnson*, 84 Ga. 754, 11 S. E. Rep. 233, and *McLaughlin v. City of South Bend*, 126 Ind. 471, 26 N. E. Rep. 185,) and, so long as the view on which that rule was announced shall prevail with the supreme court of the United States, however erroneous it may be regarded by the courts of the states, they must recognize and apply it. Constrained by the authoritative decision of the supreme court of the United States on this federal question, our duty is to reverse the judgment of the circuit court.

Reversed and remanded.

#### COLEMAN v. LOW.

(Supreme Court of Mississippi. April 17, 1893.)

REPLEVIN—TITLE TO MAINTAIN—EXTINGUISHMENT OF SECURITY.

1. In replevin, an instruction that the right to possession and the title must both be in plaintiff, to enable him to recover, is error, as the right to possession is sufficient to maintain the action.

2. In replevin of a mule, purchased by defendant of O., it appeared that the mule was embraced in a deed of trust executed by O. to plaintiff to secure a debt; that plaintiff agreed to accept in satisfaction of the debt certain notes, but refused to do so when they were tendered him. *Held*, that an instruction that the tender of the notes constituted an extinguishment of the security, and that, therefore, the verdict should be for defendant, was error.

Appeal from circuit court, Carroll county; C. H. Campbell, Judge.

Replevin by S. R. Coleman against D. R. Low. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action of replevin instituted by appellant in the circuit court of Carroll county against D. R. Low for the possession of a jack. Appellant claimed the jack as agent of M. Levy & Sons, assignees of one S. H. Sellinger, who had a deed of trust, executed by G. N. and Fannie Carr, including said jack, with other property, to secure two notes on which there was a balance due of about \$2,000. Appellees claimed the jack by virtue of a purchase from one Ogden Thomas, who purchased him from G. N. Carr. On the trial it was admitted that the jack was embraced in the trust deed, and that Carr

owed the above amount or thereabout. It was contended that appellant, as agent for M. Levy & Sons, had agreed to take certain notes taken by Carr for rent and sale of mules in satisfaction of the debt, and that Carr had been authorized to sell the jack, and pay the proceeds to Levy & Sons. Appellant denied that he agreed to take said rent and mule notes unless Carr had arranged to have the tenants furnished with supplies during the year 1892, which had not been done at the time the notes were tendered, and that he had only authorized Carr to sell the jack to one Brantly, who was to give his draft on M. Levy & Sons for the value of the jack. The court gave the following instructions for the defendant: "(3) The court instructs the jury that the burden of proof is on the plaintiff to show by a preponderance of the testimony to the satisfaction of the jury that he is entitled to the immediate possession of the property; and, if the right of possession or title is in any other than the plaintiff, the verdict should be for the defendant." (4) "If you believe from the evidence that Coleman, as the agent for plaintiff, authorized or instructed Carr to rent the land, take rent notes, and to sell the mules, and take notes, reserving title to himself, and that he (Coleman) would accept these rent and mule notes as credit on the debt, and that under Coleman's authority and direction Carr rented lands and sold mules as Coleman directed for an amount sufficient to pay the balance due, and tendered these notes to Coleman in accordance with their contract and agreement, and that Coleman refused to accept these notes when tendered unless Carr would get some merchant to advance supplies to the renters of the land and the purchasers of the mules, and that this condition was not a part of the original understanding between them, then, in law, the security of the debt was settled or extinguished, and you should find for the defendant, whether Coleman accepted these notes or not, if he gave no other reason for not doing so except that Carr had not secured a merchant to furnish said parties." There was a verdict and judgment for the defendant, and Coleman appealed.

S. R. Coleman, for appellant. Sommer-vill & McCaig, for appellee.

WOODS, J. The third instruction given for the defendant is erroneous. The right to possession of personal property may be in one, and the title to the same property in another. The instruction charges that the right to possession and the title must be both in the plaintiff. The fourth instruction for the defendant is also erroneous. The security for the debt was not extinguished by a tender of the notes of the mule purchasers and land renters. This question was settled in the case of *Institution v. Buchanan*, 60 Miss. 496. Reversed.

(70 Miss. 531)

**BRENNAN, Sheriff, et al. v. MISSISSIPPI HOME INS. CO.**

(Supreme Court of Mississippi. April 17, 1893.)

**DOMESTIC INSURANCE COMPANIES—TAXATION.**

Under Const. 1890, § 181, providing that "domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies," a domestic insurance company that has paid a privilege tax is exempt from an ad valorem tax for state, county, and municipal purposes, where such ad valorem tax does not exceed the tax required of foreign companies.

Appeal from chancery court, Warren county; Claud Pintard, Chancellor.

Bill by the Mississippi Home Insurance Company against J. M. A. Brennan, sheriff and tax collector of Warren county, and the city assessor and tax collector of Vicksburg, to restrain defendants from collecting a tax assessed against plaintiff. From a decree for plaintiff, entered upon an order overruling a demurrer to the bill, defendants appeal. Affirmed.

R. V. Booth, for appellants. Dabney & McCabe, for appellee.

CAMPBELL, C. J. The unmistakable purpose of section 181<sup>1</sup> of the constitution as to "domestic insurance companies" is to protect them from an aggregation of taxes whose sum shall exceed that required to be paid by foreign insurance companies doing business in this state, except where their assets are great enough to yield an ad valorem tax, which, added to any privilege tax required, will exceed the tax required of foreign insurance companies; and as the appellee, a domestic insurance company, has been required by the law to pay a privilege tax of \$1,000, the only way to make the guaranty of the constitution effective is to exempt it from any ad valorem tax until that shall exceed the tax required of foreign insurance companies of like character, and then tax any excess over the value which will produce the sum named. This is true if the legislature may exempt such property from taxation. The only provision of the constitution in view of which it may be contended that this may not be done is that in section 112, but the clause referred to relates to railroads and other like property extending from county to county. As the legislature has the right to exempt property from taxation by counties and cities, towns, and villages, and has required of appellee a privilege tax of \$1,000, which it has paid, in order to give effect to the constitutional provision the legislative re-

<sup>1</sup>Const. 1890, § 181, provides that "domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required to be paid by foreign insurance companies, except to the extent of the excess of their ad valorem tax over the privilege tax imposed upon such foreign companies."

quirement of a privilege tax must be regarded as declarative of an implied immunity from state, county, and municipal taxes until there shall arise an excess of taxation in the manner stated. This results necessarily, if the constitution and the law both are to be upheld, and in this way each has its full operation. Affirmed.

(70 Miss. 590)

**HOLLY et al. v. COOK.**

(Supreme Court of Mississippi. April 24, 1893.)

**EQUITY — JURISDICTION — COMPELLING SET-OFF — JUDGMENT AGAINST JUDGMENT.**

A bill in equity will not lie to compel the setting off of two judgments, where it appears that defendant had made an assignment of his judgment against plaintiff prior to the recovery of plaintiff's judgment against him.

Appeal from chancery court, Harrison county; W. T. Houston, Judge.

Bill in equity by Catherine Cook against L. B. Holly and others to compel the set-off of two judgments, and to restrain defendants from enforcing their judgment. From a decree for plaintiff, defendants appeal. Reversed.

In 1887, Mrs. Catherine Cook recovered a judgment against appellant Holly in an action for slander for \$100. Holly is insolvent, and the judgment still unpaid. While appellee's suit was pending against Holly, Holly recovered a judgment against her in a suit for slander for \$25. Soon after the rendition of this judgment it was assigned by Holly to his attorneys. The assignment was not entered on the docket, nor recorded nor entered on the judgment roll. In May, 1892, Holly had execution issued on his judgment, and levied by a constable on appellee's property. Appellee paid the amount for which the execution was levied to the constable. She then filed a bill in chancery, setting up all these facts, and asked that the two judgments be set off against each other, and the smaller judgment canceled, and the amount credited on her judgment against Holly, and that Holly be enjoined from enforcing his judgment. The constable retained the amount of the execution to await the decision of the court in this suit. Complainant afterwards amended her bill, making the assignees of Holly's judgment parties. Defendants demurred to this bill, which was overruled, and they answered, admitting all the material allegations of the bill, and claimed that the money belonged to the assignees. The cause was tried on the amended bill, answers, and agreed state of facts. There was a decree rendered directing the constable to refund the money in his hands to appellee, and perpetually enjoining the defendants from enforcing the judgment against her, and ordering that the smaller judgment be canceled, and the amount credited on the larger judgment. From this decree, defendants appealed.



R. Seal, for appellants. W. A. White, for appellee.

CAMPBELL, C. J. When Holly's judgment was recovered against the appellee and assigned, she had no claim against him which could be set off against this judgment, at law or in equity. When she obtained judgment against Holly, the judgment he had before against her had been assigned, and was not his, and she was not then entitled to have Holly's judgment credited on hers against him. The fact that she got judgment against him before she learned of his transfer of the judgment against her does not make any difference. Our "anticommercial statute" does not apply; judgments are not embraced by it; and we have no statute as to setting off judgments. That rests upon common-law rules, and under them the appellee was not entitled to the decree she got. The assignment of his judgment by Holly defeated her claim to use the judgment she afterwards obtained to pay the other judgment. 2 Black, Judgm. § 954, and cases cited in notes; Wat. Set-Off, §§ 368, 369, 373.

Reversed, and bill dismissed.

(45 La. Ann. 958)

#### STATE v. MURPHY. (No. 11,294.)

(Supreme Court of Louisiana. May 22, 1893.)

WITNESS—DEFENDANT IN CRIMINAL TRIAL—CROSS-EXAMINATION—SCOPE.

1. There are two modes of guarding against the abuse of a witness on cross-examination, who testifies, in his own behalf, as a defendant: (1) The privilege to decline to answer any question which may tend to charge him as a criminal; (2) the power of the court to protect the defendant from unreasonable or oppressive cross-examination. It is not shown that one or the other was denied.

2. Where, upon the trial, the defendant offers himself as a witness, and testifies in his own behalf, under the statute of 1886, he thereby becomes subject to the same rules, and is called upon to submit to the same tests, which are legally applied to other witnesses.

3. The question propounded to the defendant on his cross-examination was competent for the purpose of proving that he had been arrested for stealing prior to the date of the theft for which he was on trial.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James O. Molse, Judge.

Rick Murphy was convicted of larceny, and appeals. Affirmed.

J. J. Foley, for appellant. M. J. Cunningham, Atty. Gen., for the State.

BREAUX, J. The defendant was convicted of larceny. From the verdict and judgment he appeals, and urges as error that the prosecuting officer propounded to him, while he was testifying as a witness in his own behalf, the question, "Have you ever been arrested for stealing?" His grounds of objection were that he was compelled to answer, under the ruling of the trial judge, over his objections; that it tended to degrade his

character; that he had not put his character at issue; that the records were the primary evidence of the facts sought to be proven. In reference to the last objection the trial judge states as part of the recital in the bill of exceptions taken by the defendant that the defendant, as a witness, was not denied the privilege of explaining the circumstances of his arrest. Act 29 of 1886. The defendant, in availing himself of the privilege of testifying in his own behalf, was subject to all the rules that apply to other witnesses. The accused was not compelled to testify. The statute declares that the failure to testify shall not create any presumption against a defendant. Having offered himself as a witness, and having testified, he was called upon to submit to the same tests which are legally applied to other witnesses. The witness can decline to answer any question which may tend to charge him as a criminal. Moreover, the court has the power to protect him against unreasonable or oppressive cross-examination. These modes of guarding against the abuse possible under the statute are not in question. It is not suggested that they were disregarded. The question complained of was propounded for the purpose of impairing the credibility of the witness. The defendant appeared before the court in the dual capacity of an accused and that of a witness. As an accused, his character was not subject to attack, unless he opened the question. As a witness, his position was different; his credibility was subject to attack. State v. Walsh, 45 La. Ann. —, 11 South. Rep. 811; State v. Taylor, 45 La. Ann. —, 12 South. Rep. 927. The dividing line between the testimony admissible for the purpose of impeaching the credibility of a witness who testifies in his own behalf, and that not admissible on his cross-examination, as it may tend to criminate him, is not always apparent. As a defendant, his character could not be impeached; that issue not having been opened by him. As a witness, it could be impeached, as the character of any witness may be subjected to that test. In other words, he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty. While the attack upon the character of an accused is for the purpose of establishing that his plea is not supported by his attempt at proving character, and that he is guilty, much is left to the good judgment and discretion of the trial judge. His discretion was properly exercised, for the testimony was admitted on cross-examination, and, we understand, was afterwards referred to as admissible for the purpose only of proving the incredibility of the witness.

Proof of arrests, by defendant's testimony, admissible. The question propounded was competent in its character. It was not objectionable as proving a fact by secondary evidence, and the production of a record or

warrant could not be required. The mere arrests were provable by the testimony of the defendant on his cross-examination. The question was admissible for the purpose, whether or not there was a record. The warrant could issue from a court not of record. Parol evidence is admissible for the purpose of proving that a particular person has been in prison. Whart. Crim. Ev. p. 154. It follows that the testimony of the defendant was admissible to prove that he had been arrested at different times. The judgment should therefore be affirmed.

#### On Rehearing.

(May 31, 1893.)

**WATKINS, J.** The accused appealed from the judgment and sentence of the court under a conviction of larceny, and complains of our opinion as erroneous on the sole ground, to wit: Having elected to take the witness stand in his own behalf, he was compelled, over his objections, to answer the following question, viz.: "Have you ever been arrested for stealing?" and to which question counsel urged the objections: (1) That the accused had not put his character at issue, and the state could not do so; (2) that it tended to degrade his character; (3) that the judicial records, if such there were, constituted the best evidence of the fact sought to be elicited by the question. The theory of our opinion is that the accused, under the law, occupied the same plane as other witnesses, and, upon cross-examination, could be submitted to the same tests; that the question propounded did not tend to incriminate the accused, but to affect his credibility as a witness; he occupying at the time the dual position of accused and witness, and the weight and value of his testimony depending upon the credit same was entitled to receive. The court held that as an accused his character could not be attacked by the prosecution until put at issue as a means of defense; but as a witness his situation was altogether different, his credibility being open to attack by any reasonable and proper means or methods. Proceeding to deal with this question upon the principles laid down, the opinion states that in such a case the line of demarcation between the admissibility of testimony for purposes of impeaching credibility and its inadmissibility as impeaching character is not always apparent, and therefore much must be left to the good judgment and discretion of the trial judge, who is better able to decide, under the surroundings and circumstances of each particular case. Counsel's argument is that the objection urged is general, and would be equally applicable to any other witness than the accused; his insistence here being that want of credibility must be proved by general reputation, and not by particular incriminating facts. That proposition is true when the evidence is offered for the purpose of impeaching the witness' credit for veracity.

Such is the purport of the authorities cited. Greenl. Ev. § 461. But in this case the trial judge had before him a person accused of and on trial for the commission of a larceny. Accepting the grace of a special statute entitling him to be heard as a witness in his own favor, the veracity and credibility of the witness, generally, was proper subject-matter of investigation, because of the cloud that surrounded him, and necessitated closer scrutiny into his veracity than that of an ordinary witness. Being under charge of larceny, what more damaging fact could have been elicited on the trial of such charge than that he had been previously arrested for similar offenses? There is no force in the objection to parol evidence being admitted of the fact of the defendant's previous arrest. The object in view was to show that the one pending before the court was not the first accusation of the kind that had been preferred against him; not to show the truth or falsity of such charge. Both the points made in the lower court were correctly disposed of. Rehearing refused.

(45 La. Ann. 230)

#### **DESTREHAN v. LOUISIANA CYPRESS LUMBER CO., Limited.** (No. 11,242.)

(Supreme Court of Louisiana. May 22, 1893.)

#### **CUSTOM AND USAGE—EVIDENCE—MEASUREMENT OF TIMBER.**

1. Evidence to prove custom was properly admitted. Custom or usage may be proved, not only to explain the meaning of terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters of which the contract itself affords indication, or, it may be, no indication at all.

2. The defendant bound itself to pay tolls on all timber towed to its mill through plaintiff's canal, the measurement to be ascertained by reference to "Doyle's rule tables," as published in "Schribner's Lumber and Log Book," at a charge of 20 cents per 1,000 of inch board measure. The contract does not indicate the method to be followed in measuring a log,—whether by its "average diameter," or by taking the diameter of the small end. Board measure is the number of feet a log will yield when sawed. When the sellers of logs, and those who have a right to collect toll on them, do not choose to express their intention, in the contract, as to the mode of establishing the board measure, custom and usage furnish an explanation of the unexpressed intention.

3. The contract contains no stipulation about deductions for hollow or pecky logs. Custom was consulted to fix the amount due on board measure.

4. The receipt of payment of toll on logs, without stipulating that toll shall be paid on the steamboat or tug by which they were towed, precludes the right of collecting toll on the steamboat or tug.

5. Whatever an agent does within the scope of his authority is, in legal effect, the act of the principal, who is entitled to its advantages, and is also subject to its liabilities.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Louise Destrehan, widow of J. H. Harvey, against the Louisiana Cypress

Lumber Company, Limited. Defendant had judgment, and plaintiff appeals. Affirmed.

T. J. Semmes & Legendre, for appellant.  
Harry H. Hall & Sam. Henderson, Jr., for appellee.

BREAUX, J. It is alleged that the contract between plaintiff and defendant was only executed in part, and this suit was instituted to compel compliance. The plaintiff, represented by her son and agent, Horace H. Harvey, agreed to sell to the firm of Joseph Rathborne & Co. a certain piece of land, upon which they bound themselves to construct a lumber and shingle mill with a capacity of not less than 75,000 feet, lumber measure, per day. In this act the plaintiff agreed to lease to them other parcels of land, on terms set forth in the act; also, to grant certain privileges and rights of way. The plaintiff owns a canal extending from a point near the Mississippi river to Barataria bay,—a distance of about six miles. The parties to whom she agreed to sell proposed to tow cypress logs to their mill, to be erected near the canal, a short distance from the river. They promised, in their agreement to buy, to pay to the plaintiff a rate of tolls on all timber by them towed through the Harveys' canal, to be determined by taking the average diameter and total length of logs, and ascertaining the lumber measurement of the timber by Doyle's rule tables, (Schribner's Log and Lumber Book,) "at a charge of twenty cents per thousand of inch board measure." The charges were to be 20 cents per 1,000 of inch board measurement, thus obtained. The parties agreed to embody all the items, clauses, and other conditions of this preliminary agreement in an authentic act, to be signed by them within 60 days. In written suggestions from an attorney at the time acting for plaintiff, the timber was to be measured as stated. In due time, after the agreement to sell had been completed, an authentic deed of sale was signed by the parties, in which, for reasons not made clear, this act does not conform strictly with the preliminary agreement to sell. The purchasers bound themselves to pay to the vendor tolls during a period of 15 years from the date of the act. No reference is made whatever to "average diameter" of logs, as set forth in the agreement to sell, also in the suggestive propositions, in writing, preceding the act. In subsequent acts the defendant declared itself the successor of the rights and obligations of the partnership of J. Rathborne & Co. The mill was completed, and commenced running, in August, 1890. A log scaler was employed, selected by plaintiff's agent, to measure the logs, each party paying one-half of his wages. He was discharged by plaintiff in May, 1892, when she became dissatisfied with the measurement. The scaler testifies that he followed

the instructions of the parties concerned, by measuring the logs at the small end, and by deducting for hollows or pecky logs, and by not measuring logs that would not make merchantable lumber. In reference to the tolls on the tugs the witnesses for the defendant testify—and that testimony is not contradicted by plaintiff's witnesses—that it was stated by a representative of the plaintiff, before signing the contract, that it was silent about charges upon defendant's boat while towing logs in the canal, and that, therefore, no charge could be required by plaintiff. It is proven that the rule of measurement followed is general, and that the harbor master of another canal, in which are towed large numbers of logs, does not charge boats towing logs on which the toll is paid. This is corroborated by testimony of the owner of another mill on this canal, who does not pay toll on both the towing boats and the logs tolled. In May, 1892, a year and one month after the mill began operation, it is proven that 56,990 logs were sawed, and an agreement of record shows that there were 7,516,372 feet of board measurement in the logs towed between the 1st day of August, 1890, and the 1st of May, 1892. Prior to April, 1892, no complaint had been made. Payment was received without objection on the lumber measuring as above stated. Plaintiff claims toll on the steamboats, tugs, and log-pulling barge used to tow logs, in addition to tolls on the logs, of which the toll keeper kept no record prior to May, 1892, for the purpose of charging. Plaintiff, in her pleadings, complains that the logs are not measured by Doyle's rule tables; that the difference between the actual measurement and that required by the contract is equal to 40 per cent. to her prejudice; that the defendants wrongfully deduct 10 per cent. for hollow ends; that they measure every foot, and allow no deduction for inches; that she is entitled to tolls on all boats navigating the canal, as per her tariff charges. The defendant denies the correctness of plaintiff's interpretation of the contract, or Doyle's rule tables, and alleges that the scaler measured the logs, under the directions of her agent, at the smaller end; that he deducted for hollow butts, and rejected worthless logs; that this method of scaling cypress logs is always followed; that no tolls on boats towing logs were to be charged; that during two years bills were made out monthly, and plaintiff received payment. The defendant reconvenes, and prays for the execution of its contract, during the unexpired term, as heretofore executed.

#### Bill of Exceptions.

The record discloses several bills reserved to the admissibility of testimony of verbal declarations preceding the written acts, and to the testimony offered to prove the custom of mill men and others in measuring lumber;

the action plaintiff alleges being upon a contract. The questions being germane, they will be taken up together.

The "parol evidence rule assumes that parties, in choosing the solemn form to express their agreement, intended to fully express their intention, removing them beyond bad faith, or the treacherous tenure of slippery meaning." As between the parties, the instrument is conclusive as to the point which it covers. Several needful points to sustain plaintiff's contention are not covered by the act. "It being thus ascertained, as a preliminary question, that the written instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the court becomes merely one of interpretation and construction of the language employed, the object being to ascertain the expressed meaning of the parties. That meaning, once ascertained, is uncontrovertible by any parol evidence. No new words can be added. The court cannot, as is said, travel out of the four corners of the paper. But the language to be interpreted is to be read in the light of all surrounding circumstances, (as the phrase is,) it being obviously impossible to tell what a man has said until it is ascertained what he has meant to say. Any relevant evidence, therefore, which fairly partakes of explanation, or is reasonably calculated to place the court in the situation of the parties at the time of the execution, will, in general, be received." Best, Ev. p. 231. In reference to usage, this commentator approvingly quotes from Phillips on Evidence: "Evidence of usage has been admitted in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms. 'Optimus interpres rerum usus.'" Page 236. This court has decided, if a contract is silent as to quantity, parol evidence of the intention is admissible. *Campbell v. Short*, 35 La. Ann. 447. In the case before us for our decision, there is a difference between the two acts,—the promise to sell, and the sale,—in matter of ascertaining the measure. In neither act, reference is made to hollow butts, pecky logs, or tolls on steamboats. During two years the contract was executed without requiring payment for any of the items now claimed. The purpose not being to contradict, vary, or explain the written instrument, and it being obvious that the acts did not cover all the points of difference between the parties, evidence partaking of the nature of usage and evidence of explanation were admissible. The evidence was properly admitted.

The act of the legislature referred to by plaintiff's counsel (No. 87 of 1892) is not directly authoritative as law in this case, for it establishes a scale or rule for the measurement of pine sawlogs only, and can be applied, in measuring other logs than pine, not as absolutely binding, but as indicating the estimate placed on Doyle's rules by the law-

making power. It is almost supererogation to state that the contract and stipulations must determine in measuring the full contents of logs, and on all questions relating to saps, pecky lumber, and other defects. The difficulty arises from the fact that the contract is silent as to these. Doubtless the sellers of logs, who think the usage and custom too liberal and favorable to the purchaser, protect themselves by special contracts as to measurement. The contract is not full and explicit. Debatable questions are unavoidable. Both parties rely upon the "Lumber and Log Book" admitted in evidence. The plaintiff offers the context from pages 69 to 82. The defendant objects to that on pages 70 and 71, and contends that it is not covered by Doyle's rule tables, made the basis for calculating the measurement of logs. Turning to pages 70 and 71, the head lines read: "Log Table. Round Logs Reduced to Inch Board Measure by Doyle's Rule." And the instructions printed on these pages are to turn to the next page of Schribner's book for Doyle's table, printed therein. It is exceedingly difficult to determine which is Schribner's and which is Doyle's. It is "Schribner's Lumber and Log Book." His preface informs us that his original tables, and those of Doyle, were examined and revised, and that the Doyle log tables have been considerably extended. Conceding that the instructions headed as above stated are Doyle's, it does not follow that, in adopting Doyle's rule tables as a basis of the measurement, it includes the instructions or explanatory notes. To illustrate: Preceding Schribner's tables, which form part of the book in evidence, there are directions and notes. They are not part of the tables. If the logarithms of Napier, as embodied by Prof. Loomis in his works, were agreed upon to abridge mathematical calculations, the agreement would not include explanatory or illustrative observations, particularly if it were not known whether they were by the former or the latter. Moreover, the plaintiff, in the preliminary agreement, stipulated that the measurement should be made by calculating the average diameter of the logs. In the deed of sale the "average diameter" is omitted. A right well defined was abandoned. The rule of interpretation of authentic acts is the same as that of statutes. It is a well-settled rule of interpretation that when any statute is revised or one act passed, framed from another, some parts being omitted, the parts omitted are not to be revived by construction. *Ellis v. Paige*, 1 Pick. 45; *Blackburn v. Walpole*, 9 Pick. 104. "It is decisive of an intention to prescribe the provisions maintained in the later act, as the only one on that subject which shall be obligatory." *Murdock v. City of Memphis*, 20 Wall. 590. It was expressly stipulated in the promise to sell to insert "average diameter" in establishing the measure of logs. The words are omitted in the act in which it was agreed to

insert them. They are not to be revived by construction.

The plaintiff claims an amount on account of the 10 per cent. deduction on hollow, pecky logs, and for defective logs, that would not make merchantable lumber, not measured. Every witness—those for the plaintiff and those for the defendant—testified that by the custom of log inspection of cypress timber in round logs, when hollow or pecky, ten feet off length of logs shall be allowed and deducted as compensation for the defect, and that logs so defective that they will not produce merchantable lumber are not measured. Counsel for the plaintiff does not question the correctness of the testimony proving custom. They contend that the contract must be executed as written. That the intention of the parties is determinable without regard to custom. This would have been correct, if the contract had borne out the contention that the intention of the parties was expressed. No reference is made in the contract to defective logs, but it contains the following: "At a charge of twenty cents per thousand of inch board measure thus obtained" from the logs.

#### Board Measure.

There is no possibility of determining the board measure of each log without reference to rules of measurement established by custom. The act contains no statement upon the subject. Both as relates to the "average diameter" and to defective logs, the parties not having agreed, custom must be consulted in determining the number of boards each log will yield. If "board measure" had been omitted from the contract, the question would arise as to the actual dimensions of a round log, without allowing for saw kerfs, worthless saps, crooked or otherwise defective logs; but, being inserted in the act, it must be determined by reference to custom, and the actual quantity of lumber must be ascertained which a log will produce under a competent sawyer. We understand "board measure" to be the number of feet of board which a log will produce when sawed. The contract, the interpretation of which is involved in this suit, was executed without objection. The agent of the plaintiff had charge of her interest under it, and the logs were towed through the canal, and were measured and sawed into lumber. Monthly statements were made. He had a log scaler of his own selection. He conferred with the representatives of defendant as to the rules which should govern in measurement. They were followed. The plaintiff has not established error entitling her to relief. She is bound by the acts of her agent, acting within the scope of his authority. The settlements are final. It is not proven that they were made by the agent in ignorance of the facts. As a general rule the knowledge of the agent is the knowledge of the principal. *Seixas v. Bank*, 38 La. Ann. 435. Whatever an agent does, within

the scope of his authority, is, in legal effect, the act of his principal, who is entitled to its advantages, and is also subject to its liabilities. 1 Wait, Act. & Def. p. 220. His duty was to attend to plaintiff's interest under the contract. The supervision of the measurement of the logs was part of his duty. The plaintiff, after such a time, cannot be heard to question the correctness of the payments on the ground that she was not aware of the rule followed in the measurement.

#### Toll on Boats.

Plaintiff claims toll upon tugs or other vessels employed solely in towing logs under the contract. Having fixed a toll, and there being no stipulation for extra charge, it includes the logs, and the power towing them. The evidence proves that in matter of toll in other canals no extra charge is exacted of the steamboat towing logs upon which toll is paid.

#### Even Measure.

In reference to measuring the lumber in even length the judgment appealed from is silent. In board measure, it is stated in evidence, even length only is taken, and odd ends are thrown away as worthless. The contract, we have seen, provides for board measure.

Our views coincide with those of the judge of the district court in reference to the issues involved.

Judgment affirmed, at appellant's costs.

(99 Ala. 553)

#### MOODY v. ALABAMA G. S. R. CO.

(Supreme Court of Alabama. May 2, 1893.)

RAILROAD COMPANIES—STOCK KILLING—INSTRUCTIONS—ARGUMENTS OF COUNSEL—DEPOSITIONS.

1. Where, in an action against a railroad company for the killing of a cow, there was evidence that the cow got on defendant's track some distance in front of the engine, and ran along for 60 yards before being overtaken and killed, an instruction that the jury should find for defendant, if they believed all the evidence, is error, as such instruction prevents the jury from drawing the legitimate inference from such evidence that defendant's employees were negligent in not stopping the train, or so slackening its speed as to admit of the cow's escape.

2. Code, § 2810, providing that all objections to the admissibility of an entire deposition must be made before entering on the trial, applies not only to depositions taken pursuant to section 2802, relating to their form and manner of taking, but also to depositions irregularly taken, and lacking the preliminary affidavit required by section 2802.

3. In an action against a railroad company for the killing of a cow, a statement of counsel, in argument, that, if the employees of defendant testified otherwise than they did, they would be discharged, was properly ruled out, it appearing that there was no evidence to support such statement.

On rehearing. Opinion in 10 South. Rep. 905, withdrawn.

For former appeals, see 9 South. Rep. 233, 8 South. Rep. 57.

This is an action to recover damages for the killing of a Galloway cow, and was brought by the appellant, F. S. Moody, against the appellee corporation. This is the second appeal in this case. On the reversal of the cause on the second trial in the circuit court, verdict was rendered for the defendant. The defendant admitted the killing of the cow by one of its trains at the date and place mentioned in the complaint, but denied any liability therefor. The testimony for the defendant showed that the train, the engine of which killed the cow in question, was properly manned and equipped with skillful, competent, and careful men and machinery; that the engineer was at his post, and keeping proper lookout; that he saw the cattle on the track before he came up to them; that he blew the cattle alarm, and blew for brakes; that he brought his train to nearly a full stop, and that after the cattle had left the track he started his train up again; that after the train got under headway the cow which was killed then ran back on the track, right in front of the engine; that he could not possibly stop his train again in time to avert the accident, and the result was that the cow was killed. The evidence showed that the engineer did all that he could to avert the accident. The evidence for the plaintiff, as testified by the witness Hamner, tended to show that, near the place where the cow was killed, there were cow tracks going up on the railroad track, and after getting on the railroad track the cow tracks could be seen for about 40 yards, and all the cow tracks then left the railroad track, but one, which went about 20 yards further up, and then disappeared, and that opposite this portion of the track, where the tracks of the cow disappeared, the body of the cow was found, at the bottom of the embankment. Upon the defendant offering to introduce in evidence the deposition of one William T. Ham, who was the conductor on the train that killed the said cow, the plaintiff objected, and moved the court to suppress the deposition, on the ground "that the answer of said witness to the interrogatories showed that he was a resident of Birmingham, and within 100 miles of the place of trial, and upon the further ground that no affidavit was filed with the clerk of the circuit court in the said case, as required by law, as a basis for filing interrogatories, and taking the deposition of said witness Ham." But the court overruled the plaintiff's objection and motion, and allowed the said deposition to be read in evidence; "the case having been entered, the plaintiff having introduced his evidence, and rested his case, before any objection was made to the introduction of said deposition." To this action of the court the plaintiff duly excepted. The part of the argument of the plaintiff's counsel which was ruled out of court is stated in the opinion. To this action of the court the plain-

tiff duly excepted. The bill of exceptions recites: "The court then charged the jury orally, and stated to the counsel on both sides, and to the jury, that this case having once before been tried, and the supreme court having passed upon it, the evidence being substantially the same as upon the former trial, and the supreme court having decided in that case that the general charge should have been given, 'if the jury believe the evidence, they must find for the defendant,' the court would in this case give said charge, if asked for; that in his opinion the supreme court, by its decision, had settled the case." To these remarks of the court the plaintiff excepted, and he also excepted to the giving of the general affirmative charge at the request of the defendant. The plaintiff now brings this appeal, and assigns as error the rulings of the lower court.

F. S. Moody and J. M. Foster, for appellant. A. G. Smith, for appellee.

McCLELLAN, J. This is the second appeal in this case. On the former appeal it was held that the evidence was free from conflict or adverse inference to the negation of all negligence on the part of defendant's trainmen in respect of the killing of plaintiff's cow, and hence that the general affirmative charge, with hypothesis, should have been given for defendant. *Railroad Co. v. Moody*, 90 Ala. 46, 8 South. Rep. 57. When the case came on for trial again below the court was of opinion that the evidence adduced was the same as upon the first trial, and therefore charged affirmatively for the defendant. A verdict was returned accordingly, and from the judgment thereon this appeal is prosecuted. This court was at first of the opinion that the evidence on the two trials was the same; that it showed, without conflict, that defendant was not negligent; and that the trial court properly gave the affirmative charge for defendant. We have come to a different conclusion, however, on the application for rehearing, and the former opinion on this appeal is withdrawn. On the last trial the witness John Hamner testified to facts from which the jury might legitimately have inferred that the animal did not come upon the track and stop so immediately in front of the engine that it was impossible to avoid striking her, as deposed to by the trainmen, but that, to the contrary, it got on the track some distance in front of the engine, and ran along it for 60 yards before being overtaken and killed by the train. This evidence was not in the case on the first trial, or, at least, was not presented here by the bill of exceptions taken on that trial. If the jury believed Hamner they could not believe the account given of the accident by the engineer; and, believing Hamner, they had a right to infer that defendant's employees were negligent in not stopping the train, or

so slacking its speed as to admit of the escape of the animal. The charge given by the trial court deprived the jury of this right, and was therefore erroneous. *Railroad Co. v. Ladd*, 92 Ala. 287, 9 South. Rep. 169.

The statute provides that "all objections to the admissibility of the entire deposition in evidence must be made before entering on the trial, and not afterwards, unless the matter is not disclosed in the deposition, and appears after the commencement of the trial." Code, § 2810. It is insisted for appellant that this statute "means a deposition taken pursuant to section 2802 of the Code," and has no application to or bearing upon a paper filed in the cause as a deposition, and offered on the trial as such, and which is in the form of a deposition, but which appears on its face not to have been regularly taken, in that, for instance,—the present case,—the preliminary affidavit has not been made, as required by the section last referred to. This construction, we think, is entirely too narrow. Its adoption would lead to the practical emasculation of the statute quoted first above, since objections to entire depositions are in many, if not most, instances, based upon some infirmity of the deposition, resulting from nonconformity to section 2802. We apprehend the true interpretation of the act to be such as to make it applicable to every paper filed in a cause which is in the form of a deposition taken therein, wholly irrespective of the defects it discloses in the manner of taking it. In one sense, no paper in this form, which the court adjudges to be inadmissible, is "a deposition," and the judgment of exclusion is essentially a judgment that it is not a deposition; but manifestly this is not the sense of the word, as used in section 2810, else the operation of that section would be confined to depositions regularly taken in all respects, but containing no evidence relevant to the issue,—a case which could rarely occur, and in which, when it does occur, the statute, if it applies at all, might be easily avoided by making separate motions to exclude different parts of the deponent's testimony. We are clear that a deposition, the infirmity of which lies in the absence of the affidavit required by section 2802, should not be excluded on a motion made after the commencement of the trial, and hence that the court's action on the objection made by plaintiff, after the trial had been entered into, to the deposition of the witness Ham as an entirety, was free from error.

It does not appear in this record that the court prevented any line of argument on the part of plaintiff's counsel, as is here insisted. What was done is thus stated in the bill of exceptions: "Plaintiff's counsel, in addressing the jury in his argument, stated: 'The witnesses whose depositions had been read, and who were employes of the defendant, were bound to testify as they did. That if they had testified differently they

would have been promptly discharged.' Counsel for defendant objected to this argument, and asked the court to rule it out, which motion the court granted." This action of the court was not with reference to counsel's further argument, but solely upon, and with reference to, a statement wholly unsupported by evidence, which had already been made in argument. That this statement was improper and properly ruled out by the court, we do not doubt. *Railroad Co. v. Bayliss*, 75 Ala. 471; *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. Rep. 360. It is not conceivable that this action of the court could have denied to plaintiff the benefit of any legitimate argument his counsel might thereafter have seen proper to advance. For the error pointed out the judgment is reversed, and the cause remanded.

(70 Miss. 690)

#### SNEED v. MOREHEAD et al.

(Supreme Court of Mississippi. May 1, 1893.)

#### INNKEEPERS—INJURIES TO GUEST—SUFFICIENCY OF DECLARATION.

The declaration, in an action against an innkeeper for injuries received while defendant's guest, alleged that access to plaintiff's room, in defendant's inn, was had by a gallery five or six feet high; that such gallery had no railing around it; that defendant kept no lights burning in it; that plaintiff, before going to supper on the night of the injury, fastened back the door of her room, and so placed a lamp as to guide her return; that, while at supper, defendant's servant closed the door, thus shutting off the light; and that, as plaintiff returned, she fell from the gallery, and was injured,—held not to state a cause of action.

Appeal from circuit court, Copiah county; J. B. Cheesman, Judge.

Action by Elizabeth Sneed against Mary Morehead and others for injuries received by plaintiff while a guest at defendants' hotel. From a judgment dismissing the action, entered upon an order sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

This is an action brought by Elizabeth Sneed to recover damages from appellees for injuries sustained by her while the guest of appellees at their hotel at Brown's Wells. The declaration set out that appellant was a boarder at appellees' hotel, at Brown's Wells, and had a room there, which was about 175 feet from the dining room, where all the guests in the hotel were in the habit of taking their meals, and that the gallery in front of appellant's room, which was within a few feet of the end of the same, was five or six feet high, and was not protected by any railing, and there were no lights kept by the owners of the property, which they used as an hotel, and that, as she was returning from supper one night, she fell from the gallery, which extended just beyond her room, and sustained injuries of a very serious nature. The declaration further shows that before appellant went to supper she lighted a lamp, and

propped open her door, and so placed the light as to guide her return to her room, and that while she was at supper the servant of appellees shut the door, cutting off the light, and thus made the injury of appellant possible, notwithstanding her previous caution. There was a demurrer to the declaration, assigning for cause that the declaration states no ground of action, and that it shows contributory negligence on the part of appellant. The demurrer was sustained, and the suit dismissed, and, from this, Elizabeth Sneed appealed.

J. S. Sexton, for appellant. Mays & Harris, for appellees.

CAMPBELL, C. J. The declaration does not show liability of the defendants for the injury suffered by the plaintiff. They were under no obligation to have a railing or other protection around the gallery. The possibility that some one might fall off was not sufficient to suggest that a railing should be put there. The situation was known to the plaintiff, and the necessity for precaution had suggested itself to her, as shown by her putting the light so as to guide her on her return to her room. Her error, resulting in serious injury, consisted in going on when she found the light gone. Her misfortune is deplorable, but reparation cannot be made by despoiling the defendants, who were under no greater obligation to have railings around galleries than other persons who have galleries, and invite visitors to their houses. Affirmed.

#### MCLEAN v. WARRING.

(Supreme Court of Mississippi. May 1, 1893.)  
SLANDER — PLEADING — BILL OF PARTICULARS —  
TRUTH AS A DEFENSE.

1. Where, in an action brought under Code 1880, § 1004, making actionable words which, from their usual construction and common acceptance, are considered insults, plaintiff has, on motion, furnished a bill of particulars giving the actionable words, the time when, the place at which, and the names of the persons to whom, they were spoken, defendant's motion for a more full and complete bill of particulars was properly overruled.

2. In an action brought under Code 1880, § 1004, making actionable words which, from their usual construction and common acceptance, are considered insults, the truth of the words spoken constitutes no defense, and can only go to the jury in mitigation of damages.

3. In such action no special damages need be alleged or proved.

Appeal from circuit court, Amite county; W. P. Cassidy, Judge.

Action by Lottie Warring, by her next friend, against Minnie D. McLean, for slander. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee, Lottie Warring, a minor, brought this action by her next friend to recover damages against appellant, Mrs. Min-

nle McLean, for slander, founded on the statute of this state making actionable words which, from their usual construction and common acceptance, are considered insults. The declaration alleges that on the 18th day of June, 1892, and afterwards, Mrs. Minnie McLean did falsely and maliciously utter and circulate a certain false, scandalous, and mischievous report, among other things, the following: "I saw Lot Warring kiss and hug some man in Mrs. Warring's bedroom up stairs at the hotel, and throw the blinds open, it looked like to exhibit themselves. I thought, to be charitable as I could, I would say it was her father, but, lo and behold, I looked, and saw Mr. Warring coming across the street, and it was not him." To the declaration the defendant pleaded the general issue and justification, and under the general issue gave notice that she would prove that said words were not uttered in a defamatory sense; that they were uttered in confidence, and as a privileged communication. On motion of appellant the plaintiff furnished a bill of particulars setting forth the time, place, and the persons to whom the slanderous words were spoken. Defendant then moved for a more full and complete bill of particulars, which motion was overruled, and defendant excepted. There was verdict and judgment in favor of plaintiff for \$500, and from this defendant appealed.

D. C. Bramlette, for appellant. E. H. Ratcliff, for appellee.

WOODS, J. The bill of particulars furnished by the appellee on motion of appellant was full and precise. It gave the actionable words spoken by appellant, the time when, and the place at which, and the names of the persons to whom, the communication was made. More than this could not be expected or required. The action of the court on rulings as to exclusion of evidence and instructions is clearly correct. The suit is founded on our statute<sup>1</sup> making actionable all words which, from their usual construction and common acceptance, are considered as insults, and lead to violence or breach of the peace. The appellant sought to have the cause considered and tried as a common-law suit for the recovery of damages for slander, and in this was in error. The truth or falsity of the words spoken was not the real inquiry, for the truth of the words spoken, if established, constituted no defense, but could only go to the jury in mitigation of damages. No special damages need have been alleged or proved. The action was not for damages, for actual injuries done, but for the speaking of the words which are commonly considered as insults, and lead to violence or breach of the peace. We see no error in the action of the court below, and the judgment is affirmed.

<sup>1</sup>Code 1880, § 1004.



(70 Miss. 602)

## CRIGHTO v. DAHMER et al.

(Supreme Court of Mississippi. May 1, 1893.)

## INJUNCTION—RESTRAINING CRIMINAL PROSECUTION.

Injunction will not lie at the instance of a tenant to restrain a criminal prosecution by a landlord for alleged trespass.

Appeal from chancery court, Chickasaw county; Baxter McFarland, Chancellor.

Action by William Crighto against Henry Dahmer and others to restrain defendants from criminally prosecuting plaintiff. From an order dissolving the temporary injunction, plaintiff appeals. Affirmed.

W. J. Lacey, for appellant. Orr & Stockette, for appellees.

COOPER, J. The appellant exhibited his bill in chancery against Henry, Peter, Andrew, and John Dahmer. He avers that John Dahmer is the owner of a certain farm now occupied by complainant, and on the 26th day of November, 1891, leased the same to one Delmont for the term of three years beginning January 1, 1892, and delivered possession thereof to Delmont, who entered and occupied and held the same until November 14, 1892, when he assigned the remainder of his term to complainant, and put him in possession of the farm. That complainant continued in the quiet and peaceable possession of said farm until the — day of —, 1892, when during his temporary absence the defendants Andrew and Peter Dahmer forcibly entered upon the premises, and by violence broke into the residence then occupied by him, in which action they were advised and directed by the defendant Henry Dahmer. That complainant afterwards, and in the absence of said trespassing defendants, re-entered and reoccupied, and yet holds possession thereof. That the defendant Henry Dahmer, pretending at first to act as the agent of the defendant John Dahmer, and afterwards as the lessee of the premises under the said John, caused complainant to be arrested on a charge of trespass, and now threatens to continue to have him arrested from day to day as a trespasser because of his occupancy of said premises and his refusal to deliver possession thereof to said defendant Henry. That his purpose in so doing is to compel complainant to surrender possession of the premises, or to expend large sums of money in defense of said criminal prosecutions. That Henry Dahmer, if he has or believes he has any just right to the possession of said premises, could test the same by a civil proceeding, but that, knowing that he has no such right, he uses his pretended lease from the defendant John as a foundation to vex, harass, and annoy and oppress complainant, by resorting to criminal prosecutions against him. That said pretended lease casts a cloud upon the title of complainant

to his term in the premises, and in equity should be canceled and annulled. The prayer for relief is that said lease claim by Henry shall be canceled, and that an injunction may issue prohibiting the said defendants, or either of them, from instituting other criminal prosecutions against complainant, or from entering upon the premises without due process of law. An injunction was granted as prayed, and the defendants moved to dissolve the same upon the face of the bill. This motion was sustained, and the injunction dissolved, from which order the complainant has been granted an appeal to this court by the chancellor, in order that the principles involved may be settled by this court. From the statement of the cause it is apparent that the defendants Andrew and Peter Dahmer have or claim no sort of interest in the property in controversy, and there is no averment by which it appears that the defendant John claims any present right to the possession thereof. As to these defendants the bill is a pure and simple effort to enjoin the institution and prosecution of criminal prosecutions against complainant. The relief sought, as against the defendant Henry, is somewhat further supported by the fact that a property right is in dispute between him and the complainant, as to which a court of equity has jurisdiction to afford relief. If the complainant may not sustain his right to enjoin the defendant Henry from the prosecution of criminal charges against him, a fortiori may he not find relief in equity by injunction against such prosecutions by the other defendants. A somewhat extended examination of the approved text writers and of judicial decisions has disclosed no suggestion among the writers that the jurisdiction invoked may be exercised by courts of equity, nor have we found a decided case by which it is upheld, other than two cases decided by the judges of the district courts of the United States, sitting in equity upon the circuit, in which the jurisdiction of equity to enjoin criminal prosecutions has been pressed to great, and, as we think, unwarrantable, lengths. The cases to which we refer are *Bottling Co. v. Welch*, 42 Fed. Rep. 561, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222. In the first of these cases prosecutions under a state law against unlawful retailing were enjoined upon the ground that the complainant was engaged in interstate commerce, and in the other prosecution under a statute of Louisiana, forbidding the vending of lottery tickets on the drawing of a lottery, on the ground that the state by contract with the complainant had granted to it the right to do the forbidden act. In neither case was there a pending suit involving property rights, but the bill in each was exhibited for the primary and original purpose of enjoining criminal prosecutions in the state court, and necessarily involved the power and jurisdiction of a court of equity

to draw to itself the investigation of the guilt or innocence of the complainant of the offense, which was or would be the question for investigation of the courts of the state having jurisdiction thereof. We think no English case can be found of modern times, and no case in the United States, other than the two above noted, in which a court of equity has enjoined the prosecution of criminal proceedings. In *Mayor, etc., v. Pilkington*, 2 Atk. 302, the complainants had exhibited their bill in chancery to establish their sole right of fishery in the river Ouse. While the suit was pending they caused the agent of the defendant to be indicted in the sessions at York, where they were judges, for breach of the peace in fishing in their liberty. On motion of the defendant, Lord Chancellor Hardwicke made an order restraining the plaintiff from proceeding at the sessions till the hearing of the cause. In *Kerr v. Corporation of Preston*, 6 Ch. Div. 467, Jessel, M. R., declared that with the exception of *Mayor v. Pilkington* there was no instance in which a court of equity had interfered in criminal cases, and that in *Saull v. Browne*, L. R. 10 Ch. App. 64, he had declined to follow that "doubtful decision," and on appeal his decision was affirmed. Where an officer of a court acting under its direction tore down some houses which were the subject of litigation, one of the parties to the suit was restrained from proceeding criminally against him. *Turner v. Turner*, 2 Eng. Law & Eq. 180. The vice chancellor, Lord Cranworth, declared the distinction to be an obvious one, for while the court had no jurisdiction over an indictment in general, as over a mere civil proceeding, yet, when a court made an order in a cause over which it had jurisdiction, its execution could not be made the ground of a criminal prosecution by one of the parties, for the officer would be punished by the court if he failed to comply therewith. *Mayor, etc., v. Pilkington* and *Turner v. Turner* are the only English cases with which we are acquainted in which the prosecution of criminal proceedings has been restrained, and in each the relief was granted by a mere order of the court acting upon parties to a pending suit in which the court was proceeding, and not by injunction under the seal of the court. In *Saull v. Browne*, supra, the court refused to make an order restraining one of the parties from at the same time prosecuting a criminal proceeding. As against general criminal prosecutions, relief has uniformly been refused. *Montague v. Dudman*, 2 Ves. Sr. 396; *Holderstaffe v. Saunders*, 6 Mod. 16; *Attorney General v. Cleaver*, 18 Ves. 211. The supreme court of the United States, in *Re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, reviewed the decisions in England and Amer-

ica, and declared that there was no jurisdiction in chancery to enjoin prosecutions for crime, except in cases in which the order is made to restrain a party to a suit already pending before the court, and to try the same right that is in issue there. Sawyer, who had been arrested for contempt of the injunction of a federal court, was discharged on habeas corpus, upon the ground of an entire want of power in the court to grant the injunction. There are many cases to be found, proceeding upon an obvious and clear distinction, in which courts of equity have enjoined acts affecting property rights, notwithstanding the fact that such acts might also be ground for indictment. To this class are to be assigned the cases of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217; *Spinnig Co. v. Riley*, L. R. 6 Eq. 551. In the latter case the chancellor said: "The truth, I apprehend, is that the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property." To the same class belong numerous other decisions which rest upon the same principle, which is clear and easily distinguishable from that of enjoining the ordinary criminal prosecutions which affect the property rights more or less indirectly, and in which no jurisdiction can be taken in courts of equity. In the cases of *Bottling Co. v. Welch*, 42 Fed. Rep. 561, and *Lottery Co. v. Fitzpatrick*, authorities for the exercise of the jurisdiction in the one class were cited as upholding it in the other, but it is notable that in neither case was a decision cited, either English or American, in which the precise point involved had been ruled in favor of the jurisdiction. In *Montague v. Dudman*, 2 Ves. Sr. 396, Lord Chancellor Hardwicke declared he was unable to discover a precedent for the exercise of the power, and said: "I will go by Littleton's rule, that it is a good argument, an action lies not, because one was never brought. I never knew a bill of this kind, and therefore will not make the precedent." There are a few cases in which the enforcement of void municipal ordinances, the execution of which directly affected property rights, have been enjoined, and criminal prosecutions before the municipal authorities restrained. *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106; *Shinkle v. City of Covington*, 83 Ky. 420. But, with the exception of *Bottling Co. v. Welch* and *Lottery Co. v. Fitzpatrick*, we have found no decisions of any court that a bill in equity may be exhibited for the single purpose of enjoining criminal prosecutions, and against these decisions stand the unbroken decisions of all courts of authority.

Judgment affirmed.

(70 Miss. 636)

**CARY-HALIDY LUMBER CO. v. CAIN et al.**

(Supreme Court of Mississippi. May 1, 1893.)

**ATTACHMENT—INTERVENTION—EVIDENCE—BILL OF SALE.**

1. Where a claimant in attachment bases its right to the property upon a bill of sale from defendant in attachment, a corporation, the exclusion of the bill of sale on the ground that it did not bear the corporate seal of such defendant is error.

2. The exclusion of the bill of sale on the ground that it was not shown to have been authorized by defendant in attachment is error; it appearing that it was executed by the corporation's manager, through whom the claimant had become the creditor of the corporation.

3. It is competent for the claimant to show by the corporation's agent and manager the execution of the bill of sale.

4. The fact that there was an understanding between the parties to a bill of sale that the purchaser was to reconvey the property to the seller when the purchaser was paid a certain debt does not render the bill of sale void as to subsequent attaching creditors.

Appeal from circuit court, Jefferson county; W. P. Cassedy, Judge.

Cain & Howe sued out a writ of attachment against the Church Hill Lumber Company. The Cary-Halidy Lumber Company filed a plea in intervention, claiming the property under a bill of sale from the Church Hill Lumber Company. From a judgment for plaintiff, entered upon a verdict directed by the court, the Cary-Halidy Lumber Company appeals. Reversed.

Cain & Howe, appellees, sued out a writ of attachment against the Church Hill Lumber Company, and had it levied on property then in the possession of the Cary-Halidy Lumber Company. There was no plea in abatement by the Church Hill Lumber Company, and there was a judgment by default against it. The Cary-Halidy Lumber Company interposed a claim to the property. On the trial of the claimant's issue, appellants offered in evidence the bill of sale from the Church Hill Lumber Company to the Cary-Halidy Lumber Company. Counsel for plaintiffs in attachment objected to its introduction (1) because there was no corporate seal attached; (2) because it did not appear that said sale had been authorized by the Church Hill Lumber Company. This objection was sustained, and the bill of sale was excluded. The appellants then offered to prove the sale by Gray, the agent and manager of the Cary-Halidy Lumber Company. Objection to this, by appellees' counsel, was also sustained. There was a peremptory instruction to find for the plaintiff in attachment, and claimants appealed.

J. J. Whitney and Bayer & Butler, for appellant. Mays & Harris, for appellees.

CAMPBELL, C. J. The court erred in excluding the bill of sale, and the proposed testimony of the witness Gray, and in the general instruction for the plaintiff. It is a mistake to suppose that a corporation may not

speak or act except by a seal, or that the agency for it may not be procured as for a natural person, or that authority conferred by a corporation may not be implied as in other cases. Woodworth was the manager of the business of the corporation in this state, its sole representative here, and the person through whom the plaintiff had become the creditor of the corporation for the debt in suit; and, *prima facie*, he had authority to sell the property of the corporation to pay its debts, as he had authority to contract the debt with the plaintiffs. If the Church Hill Lumber Company owed the appellant, and sold its property to the latter, in good faith, to pay the debt, there was nothing wrong in the transaction, even if there was an understanding between the agents that the property would be reconveyed when the vendee was fully paid. The testimony of Sullivan amounted to nothing more than that he learned from Woodworth and Gray that the sale was to pay a debt, and that the buyer did not desire the property, and would part with it when fully paid for its purchase. It seems probable that the transaction was a legitimate one, and full inquiry should be permitted, to learn its true nature. If the one owed the other, and a sale was agreed on for the purpose of paying or securing the creditor, the fact that the creditor was willing to reconvey, when paid, or knew that there were other creditors, and was anxious to have the transaction for its security or payment consummated before interference by others, does not cause condemnation of the sale. The law requires good faith, but it does not pronounce it bad faith for one to look after his own interests, and protect them, requiring, only, in doing so, that he must not do anything in fraud of other creditors.

Reversed, and remanded for a new trial.

(70 Miss. 868)

**DELTA BANK et al. v. OLIVER FINNIE GROCERY CO. et al.**

(Supreme Court of Mississippi. April 24, 1893.)

**CREDITORS' BILL—DECREE.**

1. Where, in an action against L., M., and a bank to subject to the payment of plaintiff's claim against L. property fraudulently transferred by L. to the bank, it appeared that M.'s relation to the transaction was merely that of the bank's representative, he being its president, a decree against him personally is error.

2. In such action, a decree fixing the value of the property at the price named as the consideration in the conveyance by L. to the bank is error, it appearing that the property was in fact worth much less.

Appeal from chancery court, Leflore county; W. R. Triggs, Chancellor.

Creditors' bill by the Oliver Finnie Grocery Company and others against Harry Lee, J. S. McDonald, J. K. Ottley, and the Delta Bank. From a decree for plaintiffs, the Delta Bank and J. S. McDonald appeal. Reversed.

Harry Lee was a merchant doing a general mercantile and saloon business at Greenwood, Miss. On the 24th day of November, 1890, he sold his entire stock of merchandise, his retail saloon, his real estate, and all other property owned by him to the Delta Bank of Greenwood. This is a creditors' bill, filed in the chancery court of Leflore county, against said Harry Lee, J. S. McDonald, and the Delta Bank, seeking to set aside as fraudulent this sale. The bill alleges a partnership between Harry Lee, J. S. McDonald, and J. K. Ottley, doing business under the firm name of Harry Lee. It charges that Harry Lee, with intent to and for the purpose of hindering, delaying, and defrauding complainants and other creditors, did, on the 24th day of November, 1890, sell and convey all his property, as well as property not in his possession and beyond his control, to the Delta Bank of Greenwood; that said bank had a full knowledge of the intent of said Lee, and of his purpose to delay, hinder, and defraud complainants and other creditors; and that said bank induced the said Lee to sell to it for the purpose of defrauding complainants, well knowing that complainants would be defrauded, delayed, and hindered in the collection of their debts by reason of said sale; and did thereby purposely assist the said Lee in defrauding complainants; that the property so conveyed was worth \$17,000, and that a large part of the consideration of the \$14,000 named in the bill of sale was fictitious, usurious, and fraudulent. It charges that, if said indebtedness was real, it was permitted on the part of the bank with the intention of ultimately absorbing the property of Lee, and appropriating it to its own use. It charges that Lee was used as a medium by and through which the property of complainants was fraudulently transferred to said bank without any value being paid therefor, and that the purchase of the goods by Lee was fraudulent, which was well known to the bank; and that said J. S. McDonald, the president of the Delta Bank, knew that Lee had no property or money upon which to base a credit, and he, knowing this, and being the president of the bank, by letters, words, and telegrams induced and procured credit to be given to said Lee, fraudulently combining with said Lee, that, after large amounts of goods had been purchased, and real estate had been acquired and paid for with proceeds of goods, he transferred and assigned to said bank all of said real and personal property, which said fraudulent acts rendered said McDonald and the Delta Bank liable to complainants for the full value of said property. The bill asks for the statutory lien on all the property purchased by the Delta Bank; that the sale be set aside; that the bank be declared a trustee for the benefit of complainants and other creditors; and asks for a decree against all the defendants. The several answers were under

oath, and denied all the material allegations of the bill. The proceedings were discontinued as to J. K. Ottley. There was a decree against Lee, J. S. McDonald, and the Delta Bank for the entire amounts sued for, the entire recovery against the bank not to exceed \$12,588, as shown by the report of the commissioner, as the net amount of the assets received by said bank from Harry Lee. From this decree McDonald and the Delta Bank appealed.

Mays & Harris, for appellants. Rush & Gardener and J. E. Gwinn, for appellees.

CAMPBELL, C. J. The decree must be reversed. It is not warranted by the pleadings and proof. The only aspect in which the bill is maintained is that the bank, by reason of the action of McDonald in co-operation with Lee, was disabled to become the grantee as against Lee's creditors of his assets. The conclusion is irresistible that Lee's purpose was to defraud, and the bank, through McDonald, is chargeable with notice of this design, and because of this the bank was not a bona fide purchaser. Hence the bank is to be held liable to Lee's creditors for what it got by his fraudulent conveyance. But the decree was improperly rendered against McDonald. He was, as to the transaction with Lee, the bank, and because of this the bank, and not he, is chargeable as trustee of what was conveyed to it by Lee. The decree is wrong in fixing the value of the property conveyed by Lee at the price agreed on between Lee and the bank, in view of the evidence that it was worth less. All that the bank is answerable for is the just value of property it disposed of, and property yet on hand may be decreed to be sold. Decree reversed, and cause remanded, with direction for the decree to be made in accordance with this opinion, unless the complainants will take a decree here, as they may, for the sum shown by the evidence to have been realized by the bank from the assets conveyed by Lee to it, and for the sale of property in its hands derived from Lee, not disposed of by it.

#### EVANS v. PARKS.

(Supreme Court of Mississippi. May 1, 1893.)

#### REPLEVIN WRIT—SUFFICIENCY OF DESCRIPTION.

A writ of replevin which contains no description whatever of the property sought to be levied on should be quashed in the absence of a motion for leave to amend.

Appeal from circuit court, Wayne county; S. H. Terrell, Judge.

Action by W. A. Parks against M. Evans. From a judgment for plaintiff, defendant appeals. Reversed.

J. A. Anderson, for appellant.

**WOODS, J.** The motion to quash the writ should have been sustained, in the absence of any counter motion on the part of the appellee for leave to amend his writ. It contained no description whatever of the property sought to be levied upon. It had no description as to age, color, sex, or name by which the officer levying could identify the animals, and intelligently execute the process. The verdict is not supported by the evidence. Moreover, there is no identification of the animals levied upon as those embraced in the deed of trust. There is an absolute failure of proof on this point.

Reversed and remanded.

(70 Miss. 896)

**GIARDINA v. CITY OF GREENVILLE.**  
(Supreme Court of Mississippi. March 27, 1893.)

**MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCE — OBSTRUCTING STREETS — SUFFICIENCY OF INFORMATION.**

1. An ordinance of a city makes it a misdemeanor for any person to place on any sidewalk in said city any goods, wares, or merchandise of any kind. *Held*, that a conviction cannot be had, under this section, on an affidavit charging defendant with obstructing a sidewalk by allowing and permitting certain barrels to remain thereon, as such affidavit does not allege that the barrels were so placed by defendant.

2. An ordinance of a city makes it a misdemeanor for any person to place on any street or sidewalk in said city any "straw, chips, dirt, shells, tin cans, iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags, hair, or such rubbish." *Held*, that a conviction cannot be had under this section on an affidavit charging defendant with obstructing a sidewalk by allowing certain barrels to remain thereon, as "barrels" are not included in such ordinance.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

B. Giardina was convicted of a violation of an ordinance of the city of Greenville, and appeals. Reversed.

On October 29, 1892, W. H. Neal made the following affidavit before the mayor of Greenville: "State of Mississippi, Washington county, city of Greenville. W. H. Neal, who being duly sworn, deposes and says that in said city, on the 29th day of October, 1892, one E. Giardina did obstruct the public sidewalks and streets in said city, in front of his store, on Washington avenue, by allowing and permitting certain barrels to remain thereon, in violation of the ordinance in that behalf, and against the peace and dignity of the city of Greenville." Under the head of "misdemeanors," in the charter and ordinances of Greenville, is the following: "Sec. 26. To place in or upon any sidewalk any goods, wares, or merchandise, or poultry, or other thing, of any kind or character whatsoever, or to exhibit on said street any goods or other thing for sale or show." "Sec. 40. For any person to place any straw, chips, dirt, shells, tin cans and iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, v.18so.no.5—16

shavings, rags, or hair, whether offensive to health or not, and whether it amounts to an obstruction or not, or to permit any such rubbish to be thrown by others, or to remain in front of one's house or business place, in any street, alley, or sidewalk of said city." Giardina was tried before said mayor, found guilty, and fined five dollars and costs. From this he appealed to the circuit court. In the circuit court, Giardina made a motion to quash the indictment, but this motion was overruled, and he pleaded not guilty. He was again found guilty, and fined five dollars and costs, from which verdict and judgment he appealed.

Wasson & Wasson, for appellant. J. M. Jayne and O. H. Perry, for appellee.

**CAMPBELL, C. J.** Tried by the ordinance under which appellant's counsel say the affidavit was made, and the conviction had, the affidavit is bad, and, tested by the ordinance relied on by the counsel of appellee to sustain the conviction, the affidavit is not good, and the motion to quash should have been sustained. The thing mentioned in the affidavit ("barrel") is not charged to have been placed upon the sidewalk by the defendant, and therefore the offense denounced by the twenty-sixth clause (page 44) of the charter and ordinances of Greenville is not charged; and barrels are neither "straws, chips, dirt, shells, tin cans, iron hoops, swill, nails, iron, glass, fruit peelings, melon rinds, shavings, rags, hair, or such rubbish," although they might contain such things, or have iron hoops around them, and nails in their make-up; and therefore the affidavit does not charge the offense of the fortieth subdivision, on page 45, of the charter and ordinance. We assume that these are the only provisions of the ordinance applicable, as no other is invoked by either party. Reversed, and remanded for further proceedings in accordance with law.

(70 Miss. 825)

**HARTLEY v. O'BRIEN.**

(Supreme Court of Mississippi. April 3, 1893.)  
**TRUSTS—SUBSTITUTION OF TRUSTEE—SALE—RIGHTS OF PURCHASER.**

A deed conveying land to T., as trustee, to secure a debt owed G. by the grantor, contained a power of sale if default should be made in payment of the debt secured, and provided for the appointment by G. of another trustee in case T. refused or was unable to act. *Held*, that the power of appointing a substitute trustee, being personal to G., could not be delegated to another, and hence a sale made, on default of the payment of the debt, by a trustee appointed by G.'s agent, conferred no title on the purchaser.

Appeal from chancery court, Quitman county; W. R. Trigg, Chancellor.

Bill in equity by Susan H. Hartley against Mary O'Brien to remove a cloud from plaintiff's title to a certain piece of land. From a decree for defendant, entered upon an order

sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

Mary O'Brien and her husband, James O'Brien, conveyed the land in controversy, by a deed of trust, to M. Gavin & Co., to secure a debt of \$411.80. Default was made in the payment of the debt, and the land was sold by a substituted trustee, appointed by J. S. Montgomery, agent of Gavin & Co., and bought in by M. Gavin & Co. Gavin & Co. afterwards sold the land to said J. S. Montgomery, who sold it to complainant, Mrs. Susan H. Hartley. James O'Brien died, leaving his wife, Mary O'Brien, his sole heir, and in possession of the land, who refused to surrender possession of same. Mrs. Hartley then filed this bill in chancery, alleging that she had a valid title to the land, and that Mrs. O'Brien made some sort of claim to said land, which was a cloud on her title, praying a decree confirming her title, and removing clouds from same, and for a writ of assistance to put her in possession. Defendant demurred to this bill, and the demurrer was sustained by the court, and Mrs. Hartley, complainant, appealed.

F. A. Montgomery, for appellant. F. M. Hamblett, for appellee.

COOPER, J. The decree of the chancellor must be affirmed, for the reason that the complainant is not shown to have either a legal or equitable title to the lands in controversy. On the 18th day of March, 1891, the appellee and her husband executed a conveyance of the land to one W. S. Turner as trustee to secure a debt therein described, to M. Gavin & Co. The deed contained a power of sale if default should be made in the payment of the debt secured, and also a provision that if the trustee should die, or become unable or refuse to execute the trust, then M. Gavin & Co. should have power to appoint another trustee, who should have the same power as the said Turner. Default was made by the grantors, whereupon Turner, the trustee, advertised the lands for sale under the provisions of the deed, but failed to appear to make the sale, whereupon John A. Cooper was appointed as substituted trustee by one J. S. Montgomery, professing to act as the agent and attorney in fact of M. Gavin & Co. Cooper proceeded to make the sale, and the lands were bid in by or for M. Gavin & Co., who received a conveyance thereof from said Cooper, and afterwards conveyed the lands to Montgomery, who conveyed them to complainant. It thus appears that the title asserted by complainant rests upon the conveyance from Cooper, the person attempted to be appointed by Montgomery as trustee, under the power of appointment contained in the deed of trust. The appointment of Cooper by Montgomery was a nullity, and conferred no power on him to make the sale of the land. The power conferred on Gavin

& Co. by the grantors in the deed of trust was in the nature of a trust, and, it is well settled, is personal to the donee, and cannot be delegated to another. "Delegatus non potest delegare." 1 Perry, Trusts, §§ 294-511; Sugd. Powers, 286; Clark v. Wilson, 53 Miss. 119; Bonner v. Lessley, 61 Miss. 392.

Decree affirmed.

(70 Miss. 553)

FIRST NAT. BANK OF GREENVILLE  
et al. v. MONTGOMERY.

(Supreme Court of Mississippi. May 1, 1893.)

TROVER—SUFFICIENCY OF EVIDENCE.

In trover to recover a stock of goods, such as are usually kept by a country merchant, it appeared that only a part of the stock was converted. The evidence failed to show the quantity and character of the converted articles, or the value of any one of them, or to suggest the class to which they, or any one of them, belonged. Held, that the direction of a verdict for defendant was proper.

Appeal from circuit court, Sunflower county; R. W. Williamson, Judge.

Trover by the First National Bank of Greenville and another against H. M. Montgomery. From a judgment for defendant, entered on a verdict directed by the court, plaintiffs appeal. Affirmed.

Rucks & Dunbar, a firm doing business in Balrds, Miss., became indebted to the First National Bank of Greenville and the Merchants' & Planters' Bank of Greenville to a considerable amount, and, being in failing circumstances, sold to the two banks their entire stock of goods at Balrds, in Sunflower county. The goods inventoried some over \$1,900 at the time the sale was made. The goods were placed in charge of one Hill when they were purchased by the two banks. Hill remained in possession a few days, selling \$80 or \$40 worth of goods, which he paid over to James E. Negus, president of the First National Bank, who had charge of the goods. Hill went to Greenville, and informed Negus that he could not attend to the business any longer. Hill says that, when in Greenville, Negus asked him to name some suitable person to take charge of the store, and he suggested one Whitehead, to which Negus agreed, and asked him to turn over the goods to Whitehead, and say to him to sell the goods little by little. Negus says he did not tell Hill to turn over the goods to Whitehead, but asked him to come back later, when he would inform him what to do. Hill turned the goods over to Whitehead, and gave him the keys to the store. Whitehead said Hill told him they belonged to the banks, and he wanted them sold out. Whitehead took charge of the goods, and sold them out in three or four days, realizing for the entire stock \$275. These goods were sold to various parties. Among them was defendant, Montgomery. Appellants brought this action of trover against appellee, Montgomery, filing the following declaration: "The First National Bank of Greenville, a

corporation created under the laws of the United States of America, and domiciled at Greenville, Miss., and the Merchants & Planters' Bank of Greenville, Miss., a corporation chartered under the laws of the state of Mississippi, and domiciled at Greenville, Miss., by attorney, complain of H. M. Montgomery, defendant in an action of trespass on the case, for that whereas the said plaintiffs heretofore, to wit, on the 1st day of March, 1890, were lawfully seised and possessed of certain goods and chattels, to wit, a large amount of merchandise, consisting of clothes, boots, shoes, hats, caps, pants, shirts, coats, calico, towels, linens, cotton goods, meats, canned goods, canned meats, canned fruits, flour, corn, molasses, meal, sugar, candies, and sundry other things and articles usually kept in a general merchandise business in a small town, an exact memorandum of which plaintiffs have not, and cannot file herewith, the said stock of goods being all of the goods, wares, and merchandise owned by plaintiffs in the town of Bairds, in the county of Sunflower, state of Mississippi, and being in that certain storehouse then occupied by plaintiffs, said storehouse being the one owned by Hardensen & Bros., of the value of \$2,500, and plaintiffs being so possessed, to wit, on the day and year aforesaid, casually lost said goods out of their possession, and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the said defendant by finding, yet the said defendant, well knowing the said goods and chattels to belong to the said plaintiffs, and to be the property of the said plaintiffs, but intending to fraudulently deceive and defraud said plaintiffs in their behalf, has not yet delivered the said goods and chattels, or any part thereof, to said plaintiffs, or either of them, though often requested so to do, but has hitherto wholly refused, and still refuses, and afterwards, to wit, on the day and year aforesaid, converted and disposed of said goods and chattels to defendant's own use, to the plaintiffs' damage in the sum of \$3,000, wherefore they bring this suit," etc. To this declaration, Montgomery filed a plea of not guilty. Before the trial, plaintiffs filed a petition praying discovery of the defendant of what goods he had gotten. Montgomery answered the petition, alleging that he had purchased some of plaintiffs' goods from one of their agents, but could not remember the articles purchased, nor the price. The court gave a peremptory instruction to find for the defendant. The jury found accordingly, and judgment was entered for the defendant.

Jayne & Watson and A. G. Paxton, for appellants. Calhoun & Green and T. R. Baird, for appellee.

COOPER, J. The insuperable obstacle to a recovery by the plaintiffs in this action is the want of identification, by the evidence, of the goods of the plaintiffs which came to

the hands of the defendant, and were by him converted. Not only does the evidence fail to show the quantity and character of the several articles, or the value of any one of them, but it also fails to suggest the class to which they, or any of them, belong. The whole proof is that, out of a stock of goods such as are usually kept by a country merchant, the defendant got goods, of some sort, of about the value of \$175. This, we think, is too indefinite to warrant a recovery in this action. The plaintiffs counted for the entire stock of goods situated in their storehouse in the town of Bairds. It may be conceded, for the purposes of this examination, that the description of the property would have been sufficient to support a verdict, if the evidence had shown a conversion of the whole stock by the defendant, or that there was any concerted action between him and Whitehead, by whom, according to the evidence of the plaintiffs, the entire stock was converted. In *Edgerly v. Emerson*, 23 N. H. 555, a very similar description was held insufficient, even after verdict, and the judgment was arrested. But if the description should be held sufficient, as applied to the whole stock, the difficulty of the plaintiffs' situation is not obviated, for the evidence tends only to show the conversion of some indefinite quantity of goods, of an uncertain character, worth about \$175. It is thus the same particularity of description of the property is not now required as formerly, and that less is necessary in detinue or replevin, in which the specific thing is sought to be recovered. But though the action of trover is now considered as one for damages, and greater liberality prevails in relation to the description of the property, it is yet necessary that the res for the conversion of which the action is brought should be, at least generally, described in the declaration, and identified by the evidence. It has been held that trover for "400 ends of deal boards" was a sufficient description, because the words had a known meaning to the trade, and so for "two packs of flax and two of hemp," without setting out the weight or quantity, and for "three ricks or stacks of straw," without alleging the quantity in each, and for "six parcels of lead," and for "a library of books," without expressing what the books were. *Taylor v. Wells*, 2 Saund. 74, and note. But in all these cases the nature of the articles taken is at least generally given. The evidence here tends only to show that personal property, of some character, such as would be found in a mercantile establishment, of the value of \$175, was taken and converted by the defendant. We have been able to find no precedent which would support a verdict on this evidence in an action of trover, and the judgment of the court must be affirmed.

CAMPBELL, J., being disqualified by reason of interest, takes no part in this decision.

(69 Miss. 126)

LOUISVILLE, N. O. & T. RY. CO. v.  
HIRSCH.(Supreme Court of Mississippi. Oct. Term,  
1891.)RAILROADS—USE OF TRACK AT STATION—IMPUTED  
NEGLIGENCE—CHILDREN.

1. The necessity of passing over several tracks to reach a station from the business portion of a town, taken with the fact that no crossings are provided, must be regarded as an invitation to use such tracks.

2. In an action against a railroad for personal injuries to two girls, aged 7 and 14, accompanied by an older person, an instruction imputing to both the negligence of such person is improper; the older girl being at an age where some capacity, at least, is presumed.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by Mrs. Henrietta Hirsch against the Louisville, New Orleans & Texas Railway Company to recover for the death of her 7 year old daughter, and injuries to her 14 year old daughter, both of whom were struck and run over by a train at the town of Leland. The suit was for loss of services of the two sisters, medical bill, funeral expenses, etc. Defendant pleaded the general issue, and gave notice that it would prove contributory negligence on the part of the children, and also on the part of the persons who were at the time in charge of the children. The town of Leland is situated on the east side of the defendant's tracks, and the depot building, containing a waiting room for passengers, and a ticket office, is on the west side. Between the main business street of the town and the depot there are four railroad tracks,—one main line and three switches,—running parallel for some distance north and south. The shopkeepers of the town had constructed several plank walks across the street that run parallel with the tracks, and these walks were generally used by the public in going to and from the depot. The tracks in the vicinity of the depot were made level by being filled with cinders. The company kept up a crossing several hundred feet north of the depot, but there was no crossing near the depot building, where people generally crossed the tracks. The children were in charge of Henry Dreyfus and his wife, and a Mr. Kauffman was with them. They had been on a visit to Mr. and Mrs. Dreyfus, and were returning to their home in Greenville. They left the business part of the town a short while before 10 o'clock at night to go to the depot, a few minutes before the time for the train to leave for Greenville. They went to one of the crossings, which was blocked by a freight train standing on one of the tracks. Evidence for the defendant showed that there was an opening made by the freight train at the crossing north of the depot. The children, and those with them, went south to get around the freight train, thinking that was the nearest and best way around. It being a dark night, they could

not see the north end of the train, nor the opening made at the crossing. The two children were immediately in front of Mr. and Mrs. Dreyfus, and Mr. Kauffman was near them. As they passed in front of the engine, it was blowing off steam, and the evidence tends to show it started to move. They passed the engine hurriedly, making no stop, and the two children collided with a passenger train which was at the time backing on a track east of the freight train. The younger girl died from the injuries received, and the other one was seriously injured. Defendant asked the following instruction, mentioned in the opinion of the court as the fourteenth, which was refused: "The court instructs the jury that if Henry Dreyfus had charge of the children for whose injuries this suit is brought, and, in endeavoring to reach the depot of the defendant from the town of Leland, he hurried in front of a freight engine of defendant standing upon one of its tracks, and knowing that there were other tracks between the track upon which the said freight engine was standing and the depot, and that trains of the defendant were liable to be passing backward and forward upon said other track,—without stopping to look or listen for such trains, he allowed the children to go upon the track of the defendant, where they were struck by a train,—they will find for the defendant." There was a verdict for plaintiff for \$7,500, but this was thought to be excessive by the court, and a remittitur of \$5,700 was entered, and a judgment given for \$1,800. Defendant appeals. Affirmed.

J. B. Harris, for appellant. Campbell & Starling, for appellee.

WOODS, J. The death of one of appellee's children, and the serious disablement of the other, resulted from their being run over by a backing train of appellant. There is no controversy touching this fact. The negligence of the appellant is thus made out prima facie, and it becomes its duty to relieve itself of the burden of liability by showing circumstances of justification or excuse. As matter of fact the jury which tried the issue below found that appellant's evidence did not absolve the defendant corporation from liability, and a careful and protracted examination of all the testimony in the record leaves us unable to declare that the verdict is unsupported by the evidence. In our opinion the children were not trespassers on appellant's premises at the time of the occurrence of the wretched catastrophe. They were not on appellant's grounds by mere permission, only. The location of the depot, with its waiting room and ticket office; the place at which the trains uniformly were stopped to receive and disembark all passengers, (white persons;) the necessity of crossing the grounds and tracks of appellant by passengers taking or leaving its



cars at Leland, owing to the location of the station house, and the laying out of the main line and side tracks of appellant's railway at that place, at or near the point of its depot; the fact that no crossing, other than the space in front of the station house, and between it and the contiguous town, had been prepared for, or was used by, either the railroad officials and servants or the general public, for pedestrians, in passing to and fro between the railway station house and the town adjacent,—in a word, the location, layout, and surroundings of the station house and tracks must be regarded as an invitation to the public to approach and depart from the depot over and across the short, smooth, and convenient space lying between the railway offices and the business street of the town. It is true some of the witnesses state that the only public crossings at Leland are two, viz. one beyond Deer creek from the town and the depot, (whose mention even, in this case, seems idle,) and another about 600 feet northwardly from the station house and hotel in which the ticket office and waiting room were kept, at the point denominated the "Fifth Street Crossing." Whether any crossing for persons on foot was to be found where Fifth street crossing was intersected by the railway tracks seems doubtful, to say the least. That a foot walk had been prepared by the defendant corporation on the west of this crossing, designed to be used by persons passing from the crossing, or the company's warehouse near the crossing, to the depot immediately across the tracks from the business part of the town, is shown by the evidence of one witness; but that this was known to the public, or any part of it, desiring to embark upon or disembark from trains of appellant, does not appear, nor is there any evidence showing that any human being, railway servant, or stranger ever used said prepared walk on the west of the tracks in passing from Leland to the station house of appellant. It is safe to say that no passenger, stranger to Leland and the railway buildings and lay-out of tracks, on disembarking at the station house at that point, either by day or by night, and particularly by night, would have walked up northwardly for 600 feet on the west side of the lines to the Fifth street crossing, and there have walked over the tracks, and then have turned southwardly, and walked back 600 feet to the town, when the absence of all beaten and defined walks leading to the town from the depot invited him to use the smooth, convenient, cindered ground over which the line ran, immediately in front of the depot, and beyond which, in immediate reach and view, lay the town.

So inviting passengers to approach its depot in this town, the appellant was under strong obligation to exercise the utmost care and caution in the movement of its trains and the handling of its cars, so as to prevent injuries

to persons going to or from its offices. Did it exercise the utmost care and caution in moving its trains at the time when the injuries complained of were inflicted? The jury has found that it did not, and the facts are not so clearly and strongly in conflict with this finding as to justify a reversal by us. That the injuries were inflicted by the train of appellant is confessedly shown, and prima facie its negligence is thereby made out. Is the evidence clear and convincing that the injuries were inflicted under circumstances of excuse or justification, whereby the appellant is absolved of wrong? We are not warranted in so affirming. The harrowing accident occurred in a second, almost in the twinkling of an eye, as appellant's counsel graphically characterize the time, and every incident connected with or accompanying it transpired in a moment or two, at the outside. The night was dark, and the surroundings unfavorable for exact observation or minute examination. As to the occurrence and its attendant circumstances, there is, as was to have been expected, even from persons altogether truthful and trustworthy, much seeming, and some real, contradiction. The theory of the appellee was that the children were passing around a motionless train, and when on the track, in front of it, the same was suddenly put in motion, and steam was blown off, and that in escaping this threatened danger, caused by appellant's servants, the children, in their alarm and confusion, blinded by the glare of the headlight of the train thus suddenly put in motion, and their vision and hearing obstructed and impaired by the steam being blown off by this engine, were caused to come into contact with another train, backing down upon another track, which had been hidden from them by a long train of cars, whose engine they had undertaken to pass around. The theory of the appellant was that the children unnecessarily rushed around a motionless engine, and, without using any precaution, recklessly ran upon another train, being cautiously, and in the usual manner, moved upon another track. There is evidence to support each of these theories, and the jury might properly have found the facts as contended for by either party; but, having found as the jury did, the question is not whether we would have so found, but whether such finding can be said to rest on evidence.

It is contended, further, that the trial court erred in its action upon the instructions asked by appellant, and refused. We might content ourselves by saying that the instructions given for appellant fully stated the law for defendant below, and that those refused were properly withheld from the jury. We think it proper to consider the action of the court in refusing appellant's fourteenth instruction, however, and to show the correctness of such action. The instruction wholly excludes from the mind of the jury

the element of the responsibility of the two children, and of the reciprocal rights and duties of them and the railroad company. The elder child had presumptively arrived at the age when discretion is usually exercised, though not in perfect degree. She, at any rate, was no longer an infant in leading strings, nor a minor of such tender years as to preclude discretion on her part, and accountability and responsibility proportionate to her discretion. Where the child is not wholly irresponsible, the capacity and experience of such child are to be considered; and whether, in the particular case, the injured minor exercised the care and caution usually looked for in other children, of like age and capacity with the one complaining, is a question for the jury's determination. The wholly irresponsible infant has imputed to it, without limit or qualification, the conduct of the parent, or other person standing in loco parentis, but this is not the rule of reason or law in case of a child who has arrived at an age where capacity and discretion are presumed. The supposed negligence of Henry Dreyfus is imputed bodily to both children, and any consideration of their capacity, experience, and discretion is excluded from the jury. The knowledge of Henry Dreyfus as to the situation of the depot at Leland, the lay-out of the tracks, and the movement of trains is imputed, in its entirety, to the children. The absolute imputation of the negligence of Dreyfus was improper, and the instruction was erroneous, to the extent indicated. Affirmed.

(69 Miss. 180)

**ALABAMA & V. RY. CO. v. HANES.**

(Supreme Court of Mississippi. Oct. 1891.)

**ACTION AGAINST COMMON CARRIER — PLEADING AND PROOF — VARIANCE — SPECIAL DAMAGES.**

1. In an action against a common carrier for "willfully, negligently, and wrongfully" failing to stop its trains at a certain station, and compelling plaintiff to leave the train and walk back, where the evidence showed negligence only, it was proper to treat the averment of willfulness as surplusage, and to overrule a motion to exclude the evidence for variance.

2. In an action of tort against a common carrier for taking plaintiff beyond his destination, and compelling him to walk back, the declaration need not specifically allege special damages in order to entitle plaintiff to recover for them.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

This is an action brought by John W. Hanes against the Alabama & Vicksburg Railway Company for damages. The declaration alleges that the defendant "willfully, negligently, and wrongfully refused to stop the train at Four-Mile Bridge, and willfully and wrongfully refused to back the train to the station, and willfully and wrongfully compelled him to leave the train, \* \* \* in consequence whereof he was hurt, bruised, and suffered great discomfort in body and mind, and for a long time there-

after made sick, and caused to suffer, to his damage \$5,000." The evidence was that plaintiff took passage on defendant's train at Vicksburg, and paid his fare to Four-Mile Bridge, a flag station a few miles from Vicksburg. The train ran by the station some distance,—some of the witnesses say, about a mile; others, a short distance. The plaintiff was forced to walk over a rough and muddy road, on a cold and dark night in November, in order to get home, and contracted a severe cold, causing inflammation of the throat, and injury to the vocal organs, and seriously affecting his power of speech. Other injuries, to his eyes and face, were shown. The evidence for the plaintiff tended to show that when the train stopped, and the passengers were assisted to get off, complaint was made that they were not at the station, and the conductor said the station was "just back there," and gave the signal to start. There was evidence for the defendant that the conductor attempted, ineffectually, to signal the engineer to stop, and that he told the passengers, as they were getting off, to stay in the car, and they would back the train to the station, and that some of the party said: "Go ahead. We are all right." The defendant moved to exclude the evidence of plaintiff (1) because the declaration, which was in tort, averred a willful and wrongful refusal and negligent failure to stop the train, a willful and wrongful refusal to back the train, and a willful and wrongful compulsion of plaintiff to alight, whereas the evidence showed no intentional wrong in reference to any of these acts, but, at most, only negligence; (2) because no itemized bill or claim of damages was set out in the declaration, or accompanied it, and the special damages given in evidence were not recoverable. This motion was overruled. Plaintiff recovered a verdict and judgment for \$2,200, and defendant appealed. Affirmed.

Birchett & Shelton and Nugent & McWille, for appellant. L. W. Magruder and Martin Marshall, for appellee.

WOODS, J. The action of the trial court in refusing to entertain the appellant's motion to exclude all the evidence offered by appellee was not erroneous. The motion is based upon the idea that the declaration alleging that certain wrongs, set out in that pleading, were done willfully, and the evidence of the plaintiff showing that they were negligently done, at the worst, there was a fatal variance, and a failure to support the complaint by competent evidence. The pleading averred wrongs done willfully. The evidence tended to show wrongs done negligently. The supposed wrongdoer was a common carrier of passengers, owing certain duties to the public. The wrongdoing averred in the pleading was a willful disregard of some of these public duties.

The wrongdoing which the evidence tended to show was a negligent disregard of some of these public duties. The pleading alleged a particular wrong, and the proof showed, or tended to show, a wrong of the character referred to in the declaration, but of a lesser degree. The pleading averred negligence, and more than mere negligence. The evidence showed negligence merely. It was altogether permissible to treat the averments of willfulness as surplusage. Striking out that part of the complaint charging willfulness, there yet remained a sufficient declaration for wrongs negligently done. In support of this contention, appellant's counsel refer to several decisions on this point made by the supreme court of Alabama. The Alabama court, in the very recent case of *Railroad Co. v. Winn*, 93 Ala. 306, 9 South. Rep. 509, in substance, says that this question was decided in *Johnston's Case*, 79 Ala. 436, and that the point,—the fatal variance between an averment of a willful act and the evidence of a negligent act,—though somewhat technical, having been passed upon by that court, it will not now be departed from. The cases of *Railroad Co. v. Bell*, 112 Ill. 360, and *Railway Co. v. Coble*, 113 Ill. 115, afford no reasonable support for the view contended for by counsel. The two Illinois cases are to the effect that where plaintiff has alleged a particular act as negligently done, and upon which the right of action is founded, he will not be permitted to prove another act negligently done as the ground for recovery. It is apparent, at a glance, that the question passed upon by the supreme court of Illinois in both the cases referred to was widely different from the one involved in this contention. The only remaining authority cited by counsel is 2 *Thomp. Neg. p.* 1247. In this reference we find nothing to aid the counsel's contention. On the contrary, this author lays it down that, if negligence is sufficiently averred, further allegations that the negligence was willful may be treated as mere surplusage. The action complained of was clearly right, and the current of authority in support of it is almost unbroken. 1 *Chit. Pl.* 389; 1 *Hill. Torts*, 123; *Panton v. Holland*, 17 *Johns.* 92; *McCord v. High*, 24 *Iowa*, 336; *Taylor v. Holman*, 45 *Mo.* 371, and many others.

The refusal of the eighth instruction asked by appellant in the court below raises the only other question to be considered. This refused instruction said that, "the declaration containing no specifications of the nature and kind of damage claimed, the jury can only allow the plaintiff such as naturally and proximately arose out of the fact that he was carried beyond his station, and put out, or got out, at the point shown in the evidence. This damage will be compensated for by allowing a sum sufficient, in the estimation of the jury, to cover the inconvenience of having to walk a greater distance

to his house than he would have walked, had he gotten out at the flag station." In support of this assignment of error, counsel insist that the case before us is one in which the rules applicable in suits for damages for the mere breach of a contract, pure and simple, are to be invoked. There was a breach of an implied contract shown on the part of this common carrier of passengers, but was that all? Connected with this breach of an implied contract, there is shown a negligent omission to discharge a duty to the public by the carrier. The declaration and the evidence are for a tort. The mistake of counsel arises from failure to bear in mind the difference in the standards for assessing damages for breaches of contracts, merely, and in those for torts. The text writer cited by counsel as holding this view (1 *Suth. Dam. pp.* 74-101) certainly states the law as counsel quote in their brief, but the author is treating of damages for breaches of contracts, pure and simple. And the case of *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111, supposed by counsel to be cited approvingly by Sutherland, is cited by the author only to be criticised and condemned. The English court, in that case, appears to have held to the views advanced by the counsel in the case in hand, but the view receives no countenance from the learned author referred to above. The case of *Murdock v. Railroad Co.*, 133 *Mass.* 15, is not at all authority for counsel's contention. *Murdock*, the plaintiff in that case, brought an action for the recovery of damages for a breach of contract to carry him to North Adams. He sued upon his contract of carriage, in the form appropriate to that cause of action, and was denied a recovery for wrongs maintainable only in an action of tort. The distinction is clearly drawn by the court in its opinion. The case of *Walsh v. Railway Co.*, 42 *Wis.* 23, affords no ground for the contention here pressed on us. While *Walsh's* suit was for the failure of the defendant corporation to carry plaintiff from Watertown to Madison, yet the facts disclosed clearly showed only a breach of a special contract; and the action, as we think, on the facts, was properly held to be an action upon the special contract, and not for a tort. The facts showed a special contract for a Sunday train, and a breach of that contract, but no breach of the common carrier's general duty to the public; the railroad company not running passenger trains on Sunday for the accommodation of the public, nor holding itself out as ready to transport passengers on that day. We apprehend, however, that there is no conflict in authority on this point. Wherever there seems conflict, it will be found to arise from a failure to keep in mind the distinction between damages for a breach of contract, pure and simple, and damages for a tort. The refused charge 8, in spirit and letter, is in conflict with the settled law of this state. See *Railroad Co. v. Mask*, 64 *Miss.* 738, 2 *South.*

Rep. 360; Railroad Co. v. Scurr, 59 Miss. 456; Railroad Co. v. Kendrick, 40 Miss. 374; Helm v. McCaughan, 32 Miss. 17.

The other rulings of the court, of which complaint is made, appear to us to be so clearly right as to demand no remark. The jury has passed upon all the facts offered in evidence, and has determined the issue favorably to the appellee. We cannot say that the jury could not, on the evidence offered, find that appellee's loss of voice, and the chorea which dismally afflicts him, are not the natural, probable, or direct consequences of the wrong which, his evidence tended to show, was done him. Affirmed.

(69 Miss. 870)

**SELLECK et al. v. POLLOCK et al.**  
(Supreme Court of Mississippi. April, 1892.)  
**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—**  
**VALIDITY—ATTORNEYS' FEES.**

A deed of assignment for the benefit of creditors, directing the payment of a sum to a specified attorney, not only for drawing the instrument, but for future services for the assignors, in defending it, if necessary, is void.

Appeal from chancery court, Noxubee county; T. B. Graham, Chancellor.

Bill by J. Pollock and others against Selleck & Bush and others to set aside a mortgage and an assignment for the benefit of creditors on the ground of fraud. Decree for complainants, and defendants appeal. Affirmed.

On December 11, 1890, Selleck & Bush executed to A. C. Bogle a mortgage to secure a note for \$1,500, due in 10 days, on their stock of general merchandise, in the town of Macon. On the same day they executed a general voluntary assignment for the benefit of creditors, with preferences, the first preference being this note. This mortgage was filed for record at 7:30 A. M. on December 12th, and the assignment was filed at 8:30 A. M. on the same day. J. Pollock and other creditors filed a general creditors' bill to set aside the mortgage and assignment on the ground that they were one and the same scheme to defraud creditors, and that the consideration of the mortgage was a fee to A. C. Bogle, not only for drawing the assignment but for defending any suits that might be brought against the assignors and their assignee. The assignors, the assignee, and A. C. Bogle answered the bill, and stated that the assignors employed said Bogle to draw said assignment, and to defend them in maintaining it against any charges that might be brought against them on account of said assignment, and they expressly contracted and agreed with him that that was the full extent to which he was to represent them. Selleck testified that the consideration of the \$1,500 was that A. C. Bogle was to draw the assignment, and defend it, and that it and the mortgage were made about the same time, the mortgage being signed first. Defendants were afterwards permit-

ted to amend their answer by inserting the following: "That the fee for \$1,500 was for Bogle to advise and counsel with them in regard to and prepare the said assignment for them, and see to its proper legal execution." A. C. Bogle testified that there was no understanding as to what the fee was for, but that he expected to defend the assignment, and that he thought it was his legal obligation, and that he filed the answers with that understanding. The chancellor held that the provision as to the attorney's fee rendered the assignment fraudulent as to creditors, vacated the assignment and mortgage, and ordered the proceeds distributed among the complainants. Defendants appealed.

W. H. Bogle, Brame & Alexander, and A. C. Bogle, for appellants. Rives & Rives, R. C. Beckett, and Orr & Dinsmore, for appellees.

**CAMPBELL, C. J.** In *Mattison v. Judd*, 59 Miss. 99, we held that a direction in the deed of assignment to pay the just and proper charge of counsel for services about the assignment was harmless as a ground of attack on it. In the same case it was said that a stipulation for the payment of counsel fees, which the assignors might thereafter become liable for in any litigation growing out of the assignment, would avoid it. The distinction is between counsel fees for services in making and maintaining an assignment, which may be provided for by an assignment, by including a proper fee earned by services rendered in making it, and by expressly authorizing the doing by the assignee of what he could do if nothing was contained in the instrument on the subject. The provision for paying the fee earned is proper, and the express authorization to the assignee to employ and pay counsel for defending the assignment against attack in the courts is harmless, since he has that power anyhow. The clause of the deed of assignment in that case as to counsel fees was of doubtful interpretation, and the doubt was resolved in favor of the validity of the stipulation. In the present case, considering the instrument for the security of the counsel fees as part of the assignment, as we must, we are confronted by the question whether a preferential assignment may provide for the payment of counsel fees, to a fixed amount, for services to be rendered in future by a particular attorney, absolutely and unconditionally, whether his services are necessary or not. The most favorable view of the case, for the validity of the assignment, presents this precise question. The instrument is assailed as providing for the payment of counsel for future services to the assignors personally. It is defended on the ground that the provision for counsel fees had reference only to the maintaining

of the assignment, and this is probably the true view of the facts. The fee was not wholly for past services, or services then completed. It had some relation to the future. Services to be rendered for the assignors in maintaining the assignment constituted a factor in making up the amount of the fee. How large an element this was cannot be known, but it is indisputable that it was one. The \$1,500 were not for what was done and completed when the assignment was drawn. It was contemplated that future service was to be rendered, and, as it was uncertain what of this might be required, it was estimated for, and liberal provision was made for contingencies. This is, no doubt, the very truth of the case, for on no other theory can all that the record contains be explained creditably to the persons concerned. We are satisfied that no wrong was intended by any of the parties, and that they did only what they thought was proper and that they had the right to do. The question is, did they have the right to do what they did? By the provision for payment of \$1,500 for counsel fees that sum was absolutely withdrawn from creditors, and devoted to the payment of the attorney. It was to be paid at all events, whether he was called on for any future service or not. It is a fixed sum, not dependent on any part of it being earned hereafter, and payable as if past due. It cannot be said that it was properly payable as a fee for past services. That would not be true, and the parties did not so consider. It must be regarded, as the parties regarded it, as binding the attorney to render any future service which might be required, not by the assignee, (for the attorney told him he was not to serve him,) but by the assignors, in case any question was raised as to their honesty and good faith in the transaction. Assuming, as we do, that this was to uphold and maintain the assignment, by vindicating the good faith of the assignors, and thus inure to the assignee, whose duty it was to defend the assignment, and whose title depended on the good faith of the assignors, we must pronounce the stipulation inadmissible and vicious, to the extent of invalidating the assignment. It is the dead fly in the ointment, tainting and destroying the whole. It causes this otherwise unobjectionable assignment to fall below the high standard prescribed by the courts for transfers of this kind.

A failing debtor may devote all he has to pay a favored creditor. He may buy property from one, and, before paying for it, may transfer it to another, and prefer him at the expense of the wronged creditor, whom he owes for this very property. A debtor may prefer his creditor by selling

property, or by confessing a judgment, or by giving him a mortgage, and in such mortgage he may stipulate for time, and for retention of possession and control of the mortgaged property. He may sell all he has to pay his wife, and then devote his entire time and labor to her service, as against creditors, however meritorious. Great indulgence is shown to special and particular arrangements whereby a debtor secures his creditor, but when one undertakes to make an assignment for the benefit of creditors a higher standard is erected; and if preferences are ventured on, in this form, great strictness prevails,—so great as to make any such attempt extremely hazardous, as the many wrecks strewn along this route attest. It is like the garden of Eden, where all was free for use, except one tree, eating whose forbidden fruit was attended by dire calamity. It seems probable that the idea of the courts as to general assignments for creditors was derived from the dealing with the luckless Ananias and Sapphira, who, having undertaken to sell their possessions, and bring the proceeds to the common treasury, after selling their land, reported only a part, and withheld the balance of the money received, with terrible results to both, as recorded in Acts, v. But the serious consequences of any withholding of part, or other deviation from the allowable course in making an assignment, is not made to fall on the assignors, as the punishment of their hypocrisy did on Ananias and Sapphira; but it is visited on innocent creditors, who, for some mere error of judgment on the part of the drawer of the assignment, or inadvertence it may be, or other trivial circumstance with which they have no connection, are deprived of the provision their debtor has made for them, and, instead of reaping its fruits, are made to witness its enjoyment by the unpreferred creditor, who successfully attacks the assignment, for a very small fly in the jar of ointment, and having made that the point of his successful assault, appropriates all to the satisfaction of his own demand, to the loss and chagrin of the other creditors. Like the moral law, in its entirety, which, broken in the least, is broken throughout, an assignment, however meritorious in the main, however free from censure in its chief provisions, however perfect, except in some small particular, is condemned for that. Like some beautiful design in art, marred by but a single blemish, its perfections are all merged and lost in that which causes its rejection. For all else except assignments there is toleration, and some indulgence. For them there is no dispensation of grace, but the terrors of the stern and rigorous law ever confront them; and, under this relentless and rigorous rule, this assignment must fall. Affirmed.

(45 La. Ann. 350)

CARRAU v. CHAPOTEL et ux. (No. 11,228.)

(Supreme Court of Louisiana. May 15, 1893.)

PARTIES—JOINDER OF DEFENDANTS—HUSBAND AND WIFE.

Without alleging some mutuality or priority of obligation, as mandataries, husband and wife cannot be proceeded against, as joint or solidary obligors, on that account.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by Francis Carrau against Louis A. Chapotel and wife. From a judgment sustaining exceptions to his petition, plaintiff appeals. Affirmed.

Benjamin R. Forman, for appellant. Walter B. Sommerville and Charles J. Theard, for appellees.

WATKINS, J. In the lower court there was judgment maintaining the several exceptions of defendants, to wit, misjoinder of parties, vagueness, indefiniteness, inconsistent and contrary demands, etc.; and it also dismissed the suit as to Mrs. Chapotel, as of nonsuit, and required the plaintiff to so amend his petition as to preserve only one cause of action, and further required him to elect whether his demand should be for a money judgment, or for the possession of the property sued for, or, in the alternative, that his suit be dismissed. It is from this judgment that plaintiff prosecutes this appeal.

The following is a synoptical resume of the plaintiff's petition, viz:

"That Mrs. Marie Louise Carrau, wife of Louis A. Chapotel, and Louis A. Chapotel, are indebted in solido to petitioner in the sum of \$38,000 11/50 for this, to wit: That petitioner and the said Mrs. Marie Louise Carrau, wife of Chapotel, are the only children and heirs of their mother, Mrs. Widow John Carrau. That said Marie Louise Carrau, wife of Louis A. Chapotel, with the knowledge and authority of her said husband, about the 19th of November, 1887, became the mandatary and agent of the mother of petitioner, who was old and infirm, and unable to read and write, and was partially paralyzed, and who trusted to her said daughter as her mandatary and agent. That as said mandatary and agent, said Mrs. Chapotel collected notes from various persons named in the schedule annexed, and made part hereof, to the amount of \$24,975, and as such mandatary she received from petitioner's said mother, in money, \$17,460, and in mortgage notes, \$5,000, and collected the rents of various houses from November 19, 1887, to September 10, 1890, at \$850 per month, according to annexed schedule,—say for two years and 10 months, \$28,900; total, \$76,335. Petitioner's mother died in this city on the 10th of September, 1890, without having received any account or settlement with her said mandatary and agent. That said Louis A. Chap-

otel was without means or resources, and on the 28th of February, 1888, he bought a property from Mrs. Margaret E. Davis for \$2,500 cash, and the 18th of August, 1888, he bought another property from John Trisconi for \$400, and he made extensive repairs and additions, all of which was done with the money of said Mrs. Widow John Carrau, in the hands of the wife of said Chapotel, as agent. [Here follows a description of two pieces of the property just referred to.] Wherefore, petitioner prays that Mrs. Marie Louise Carrau, wife of Louis A. Chapotel, and the said Louis A. Chapotel, be cited to appear, and, after due proceedings, be condemned to render a full and perfect account of the agency aforesaid, and be condemned, in solido, to pay to your petitioner thirty-eight thousand one hundred and eleven and 50-100 dollars, with legal interest from judicial demand, and such other sum as may be found to be due, and that it be decreed that the property hereinabove described be decreed to belong, one-half to petitioner; and petitioner prays for costs and for general relief. [Signed] Francis Carrau. [Signed] B. R. Forman, of counsel."

Schedule attached to petition:

"Memorandum of Cash.

1887.

Money and notes collected, to wit:	
Peter Gonzales .....	\$ 5,000 00
Paul Roussel .....	2,500 00
D. Hamel .....	300 00
Wm. Nicholas .....	249 00
N. O. I. A. for Kenner, Prop. ....	1,650 00
Cash in hands of P. E. Theard...	2,461 00
Rents collected for 10½ mo. of '87	7,885 00

\$19,825 00"

"Notes Held by my Mother, and not Collected or Accounted for.

Honorine Grima, 2 notes, \$400 each .....	\$ 800 00
Michel Shenck, 4 mortgage notes, \$587.50 .....	2,350 00
A. Marque, duebill to ma. ....	200 00
W. A. Bienvenue, mortgage, \$800.00 .....	800 00
Carrouche, duebill .....	400 00
D. Hamel, note mortgage .....	500 00
Jacob Baltz, promissory note .....	100 00

\$5,150 00"

Upon a fair consideration of the foregoing petition, and annexed tabular statements, we are of opinion there is no joint obligation or solidarity of liability of the two defendants, who are husband and wife, alleged, and no privity of contract, for the charge of the petition is that Mrs. Marie Louise Carrau, wife of Chapotel, became mandatary and agent of the mother of the petitioner, albeit with the knowledge and authority of her husband; that as such agent and mandatary she collected notes and rents, and received from her principal money, and failed to render account thereof; that said husband was at the time without means, and shortly afterwards made considerable purchases for cash. Conceding this statement to be every whit true, and what privity of contract is there alleged? It

does not alter or increase the obligation of the wife to her mother, as principal, that her husband used a part of the money she collected, and for which she failed to account. It is not alleged that the husband came under any obligation as mandatory of plaintiff's mother, or that he ever incurred any obligation to her for the shortcomings of his wife, as such. It is clear that, upon the showing made, plaintiff cannot call upon the husband, Chapotel, for an accounting. Evidently, plaintiff has set out no cause of action against him. It is inconsistent to demand of the defendants an accounting as unfaithful agents, and, at one and the same time, call upon them for the restitution of personal or real property, other than such as may have passed under their custody and control as agents. Everything considered, we are satisfied that the plaintiff's demands should be readjusted, and his petition reconstructed. Judgment affirmed.

(70 Miss. 614)

MARTIN et al. v. TILLMAN et al.

(Supreme Court of Mississippi. May 8, 1893.)

ESTOPPEL — WHAT CONSTITUTES — SALE OF DECEASED WIFE'S LANDS—RIGHTS OF HUSBAND.

1. A judgment debtor, with a view of defrauding his creditors, induced B. to purchase the judgment, furnishing him with the money to do so. An execution was then issued, and a levy made upon the land of the debtor. At the sale under the execution the debtor's wife became the purchaser of the land, no consideration passing, and a deed was made out to her. *Held*, in an action between the executors of the debtor and the heirs of the wife, involving the title to this land, that the executors were estopped from denying the validity of the wife's title.

2. In an action by the executors of a judgment debtor against the heirs of his wife, involving the title to certain lands, it appeared that by a fraudulent device of the debtor the title to the lands had become vested in the wife; that the wife died intestate; that the debtor then sold the lands, inducing the heirs to quitclaim their interest upon promise of a payment to them of the purchase price. *Held*, that a decree deducting from such purchase price, for the credit of the executors, as the debtor's curtesy, the rental value of the lands from the date of the sale to the date of the debtor's death, is erroneous.

Appeal from chancery court, Copiah county; H. O. Conn, Chancellor.

Action by A. G. B. Martin and another, executors of the estate of B. F. Martin, deceased, against P. A. Tillman and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

B. F. Martin, prior to 1876, was the owner of a tract of land in Sunflower county, Miss. In 1876 the firm of Wesson & Drane recovered a judgment against him for \$1,096.75. Martin was largely indebted to various parties. One A. P. Barry purchased this judgment, and had execution issued thereon, and levied on all the estate of Martin. The land in Sunflower county was purchased by Mrs. E. J. Martin, wife of B. F. Martin. In 1876,

Mrs. E. J. Martin died intestate, leaving her husband, B. F. Martin, and the appellants and appellees here, as her heirs. The Sunflower lands were afterwards sold by B. F. Martin to one J. M. Goff for \$4,400. In 1891, B. F. Martin died, leaving a will in which he appointed A. G. B. Martin and R. N. A. Martin his executors, and directed them to pay his debts. After the will had been probated, and letters of administration taken out by the executors, the appellees called upon them for their respective portions of the purchase money received by said B. F. Martin on the Sunflower lands, claiming that they had signed a quitclaim deed to Goff on the express promise of B. F. Martin that he would pay over to them the purchase money as soon as received, and that he had received, and not accounted for, it, as promised. The executors declined to pay anything to appellees on their claim, and each of them instituted suit for the amount claimed by them; and the executors filed a bill in the chancery court of Copiah county, alleging that B. F. Martin, being largely indebted, entered into a scheme to defraud his creditors, and induced A. P. Barry to act for him, in the name of his wife, and buy the judgment of Wesson & Drane, and have execution issued on same, and sell Martin out; that, in pursuance of this scheme, Martin furnished Barry money to pay the judgment of Wesson & Drane, and have the judgment transferred to him, and had executions issued on same, and levied on all the property of B. F. Martin, and sold, including the Sunflower land, and that this land was sold to E. J. Martin, wife of B. F. Martin, in pursuance of the original scheme; that the deed was made in her name, and so remained until her death, and that Martin continued to control the land as before the sale; that Martin, after this, settled with his creditors, and still exercised acts of ownership over the land, just as he had before; that, when Martin concluded to sell the land to Goff, he (Goff) would not buy unless the heirs of E. J. Martin would make him a quitclaim to said lands, and thereupon Martin procured the said heirs to quitclaim to one R. N. Miller, who in turn was to deed the same to Goff. The bill charges that the heirs of E. J. Martin never acquired any title to said lands from their mother, because the judgment of Wesson & Drane was paid before execution issued thereon, and because B. F. Martin acquired title against his wife by adverse possession, and because E. J. Martin was a party to the scheme to defraud the creditors of B. F. Martin, and acquired no title. The bill further charges that Martin, by his will, had made bequests in favor of appellees exceeding the amounts claimed by them. The bill then alleges that all the suits filed in the circuit court involved the same questions, and asks that the further prosecution of same be enjoined, to prevent a multiplicity

of suits. The appellees answered, denying all the material allegations of the bill, asserting that the Wesson & Drane judgment was purchased with money belonging to E. J. Martin, and that she had execution issued thereon, and purchased the Sunflower land, and claimed the same until her death, and that Martin knew, when the sale was made to Goff, that the title was in his wife's children, and promised them that if they would sign the deed the money would be paid over to them. The defendants moved for a dissolution of the injunction, but the court overruled the motion, and sustained the bill. Defendants then filed a cross bill alleging their inheritance from E. J. Martin of these lands, and the sale of the land by B. F. Martin, with the distinct understanding that he would pay over the purchase money to them, or account to them for it. The court below held that Martin's scheme was void as to creditors, but good between the parties and their heirs; that the heirs of E. J. Martin should recover of the executors of B. F. Martin to the extent of the property sold by Martin; that the heirs should recover the remainder of the interest in the lands sold, which they inherited from their mother, less the amount of \$100 paid them by Martin. The court ordered a reference to ascertain the rental value of the lands after the disposition of the same by Martin until his death, and to ascertain the separate value of that portion of the land sold by Martin and his wife through one George Watts, as attorney in fact for Martin and his wife. These amounts being agreed upon, they were ordered credited on the amount of the purchase money due to the heirs. From this decree the executors appealed, and the defendants prosecuted a cross appeal.

Geo. S. Dodds and R. N. Miller, for appellants. J. S. Sexton, for appellees.

WOODS, J. It is undisputed that title to the Sunflower lands was vested in Mrs. E. J. Martin by virtue of a sale under a fraudulent execution issued at the instance of B. F. Martin, as part of a fraudulent scheme by him to hinder, delay, and defraud his creditors. He was the author and finisher of the fraudulent plan by which title to his lands was vested in his wife. He was the principal actor in the whole transaction, and not a mere silent looker on while a sale was made by others under an invalid or void execution. His consent brings him clearly within the terms of our statute of frauds, and neither he nor his heirs could be heard to assail the title of his wife or her heirs to the lands so fraudulently contrived by him to be vested in her. And this view virtually disposes of the case. If the lands belonged to Mrs. Martin's heirs, as we hold they did, it needed no specific promise of B. F. Martin to pay over to them the funds arising from a sale of their lands. Without any promise, he

was answerable for the money had and received in such sale. The contention of the cross appellees, both as to the deduction of the \$844, the agreed value of the portion of the lands sold by Watts, attorney in fact, and as to the deduction of the \$250 rents of the lands from the date of sale to Goff until Martin's death, is well taken. These lands were in the possession of Martin, as tenant by curtesy, and were all embraced in the deed to Goff and the quitclaim to Miller; and we find no intimation anywhere in the record that any distribution was made, or any agreement had, by which the purchase money of only the lands outside of those sold by Watts was to be accounted for by B. F. Martin. The appellees were induced to sign a quitclaim deed to all the lands therein embraced, on an express or implied understanding of their father to account to them for the proceeds arising under such sale. Whether their title to the lands once conveyed away by Watts was good or bad, no way concerned the real controversy. They quitclaimed all the lands, including those once sold by Watts, for \$4,400, and this was the sum they were entitled to be paid by their father, who received it. Of course, the father was entitled to the rents up to the day of his death, but the agreed amount of such rents should not have been deducted from the \$4,400. B. F. Martin's estate was chargeable with interest at 6 per cent. per annum on the sum received by him, after deducting the several amounts paid Mrs. Martin's heirs immediately after the sale to Goff and Miller, from the day of his death, and no reference to rents in accounting should have been made. In all other respects we concur with the learned court below. Decree will be reversed in the particulars indicated, and decree entered here for appellees and cross appellees for one-eighth, each, of \$4,400 less the sum of \$100 paid by B. F. Martin to Mrs. Tillman and heir, Redus, and \$50 paid Mrs. Mullins, respectively, immediately after the sale to Goff and Miller, with interest at 6 per cent. per annum on the amounts thus found to be due them, severally, from the day of B. F. Martin's death to date.

(70 Miss. 683)

LINDENMAYER et al. v. GUNST et al.

(Supreme Court of Mississippi. May 1, 1893.)

ADVERSE POSSESSION—NONRESIDENTS—POSSESSION BY TENANTS.

A nonresident may acquire title to land by the adverse possession of those claiming under him as tenants.

Appeal from circuit court, Wilkinson county; W. P. Cassidy, Judge.

Ejectment by E. L. Lindenmayer, Dixie L. Rogers, and others against Ralph Gunst. J. U. Payne was admitted as a party defendant. From a judgment for plaintiff Rogers for a



part of the land, the other plaintiffs appeal. Affirmed.

Gunst, who was a tenant of J. U. Payne, did not defend, and Payne was admitted to defend, and filed his plea and claim for improvements. Both parties claim title through one Ben Rogers. Plaintiffs claim as heirs and devisees of Ben Rogers. Rogers died in possession of the land, and by will devised all his property to his wife for life, and then to certain of his children named in the will, some of them not being provided for in the will. Plaintiffs rely on the nonresidence of defendant Payne to prevent the running of the statute of limitation, and, if wrong in this, then that defendant cannot claim more under the statutes than he held possessione pedum. Dixie L. Rogers bases his claim on the following additional facts: His father was the son of Ben Rogers, and omitted from the will. He was in the Confederate army. Up to the time of the battle of Shiloh, his family heard from him regularly. Since that time, nothing has been heard of him. Robert Rogers and Mary Rogers, brother and sister of Dixie L. Rogers' father, died after their father did, unmarried, leaving no children. This suit was brought before Dixie Rogers was 31 years old. And that his father was killed at the battle of Shiloh, or that the presumption of death from seven years' absence ensued before the termination of the life estate, which was in 1870. Defendant Payne sets up a deed of trust from Ben Rogers to Loeb, trustee for Levy & Dieter, and a foreclosure deed from one J. S. Van Eaton, substituted trustee, to Levy & Dieter, and a deed from one Kellogg, register in bankruptcy, to Norton, and a deed from Norton to Payne, not under seal, and a deed from Norton to Payne after the bankrupt court had ceased to exist. Then a deed from Payne to Payne & Kenedy; a deed from Payne & Kenedy to Foster, trustee; and from Foster to Payne. Defendant, and those under whom he holds, have had tenants on the land continuously since the sale by Van Eaton to Levy & Dieter, more than 25 years ago, till the bringing of this suit. The court rendered judgment in favor of Dixie L. Rogers for 1-120 of the land and rents for six years prior to the suit, and for a like proportion of the costs, and against the other plaintiffs for balance of the costs. From this, plaintiffs appealed.

A. G. Shannon, for appellants. D. C. Bramlette, for appellees.

CAMPBELL, C. J. The judgment is correct. Payne acquired title by adverse possession for 10 years. Section 2678' of the Code

<sup>1</sup>Code 1880, § 2678, provides that "if, after any cause of action shall have accrued in this state, the person against whom it has accrued shall be absent from, and reside out of, the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after his return."

of 1880 (section 2748, Code 1892) has no application. It applies only where a cause of action accrues in this state, and the person against whom it has accrued goes from, and resides out of, the state. A nonresident may acquire title to land by adverse possession held for him by others. An action against the tenant would give the possession to the true owner, and prevent the ripening of the possession into title. The successful plaintiff had no right to rent for more than six years. Affirmed.

(70 Miss. 327)

# PHOENIX INS. CO. v. SUMMERFIELD.

(Supreme Court of Mississippi. May 1, 1893.)

FIRE INSURANCE—ACTION ON POLICY—INSTRUCTIONS—REVERSAL ON APPEAL—PENDENCY OF REMOVAL PROCEEDINGS.

1. In an action on a policy of insurance the evidence showed that, though plaintiff swore falsely as to the quantity and value of the goods in making out his proofs of loss, they exceeded in value the amount of the insurance. *Held*, that error could not be predicated on an instruction that "no false swearing in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and willfully swore falsely as to some material fact, and that the burden of proof is on the defendant to show the willful intent."

2. The supreme court will not reverse a judgment on appeal because of the pendency in a federal court of a motion to remand the cause to such court.

Appeal from circuit court, Yalobusha county.

Action by A. Summerfield against the Phoenix Insurance Company on two policies of insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

On January 30, 1890, appellant issued its policy of insurance to appellee for \$2,000, covering a stock of goods for one year. On September 20, 1890, it issued a second policy, for \$3,000, upon the same property for one year. On January 13, 1891, the property was destroyed by fire. Notice was given to appellant, and its adjuster visited the scene of the loss in a few days thereafter, and, after investigating, refused to pay the full amount of the policies. Appellee submitted all his books to the examination of the adjuster, and was himself examined under oath by the adjuster. A clause of the policy required that, if a matter of difference arose as to the value of the property destroyed, either party could demand arbitration, and that the decision of the arbitrators as to the amount of the loss should be binding upon both parties, and that until this arbitration was had no suit could be brought on the policies. Appellee demanded an arbitration under this clause. The appellant refused to submit to arbitration, and for the first time denied all liability. Appellee, on the 23d day of July, 1891, instituted suit upon each policy. At the return term appellant appeared, filed pleas to each suit, made affidavit to merits, and the suits were con-

tinued until the April, 1892, term of the court. At that term appellant withdrew all its pleas, and moved to consolidate the two suits, and the motion was sustained, and the two suits were consolidated. After consolidation, there were bonds and petitions filed for the removal of the cause to the United States court, but the motion was overruled. Appellant then filed its pleas, and went to trial. There was some evidence tending to show that the plaintiff swore falsely, in his preliminary proofs of loss, to material facts. The record was sent to the United States court at Oxford, where motion to remand is now pending. The cause in the state court went to trial, and there was a jury and verdict for the plaintiff for the full amount of the policies, with interest, and from a judgment upon said verdict the insurance company appealed.

The court gave the following instruction for plaintiff: "(3) No false swearing by the plaintiff in making proof of loss will avoid the policy, unless the evidence satisfies the jury that the plaintiff knowingly and willfully swore falsely as to some material fact. There must be a willful intent to defraud, and the burden of proof is upon the defendant to establish its defense. No mere error in judgment in statement will avoid the policy."

Mays & Harris and Slack & Doty, for appellant. W. C. McLean, for appellee.

CAMPBELL, C. J. Amid the diversities of view among the judges of the various courts of the United States, and in the absence of an authoritative utterance by the supreme court of the United States as to the interpretation of the late legislation by congress as to the removal of cases from the state courts, we have determined as matter of policy, rather than conviction, to maintain the decision of the circuit court against the removal of the case to the court of the United States. It seems to us probable that it will be held finally that the right of removal is not confined to cases in which the action might have been instituted in the court of the United States; but, in doubt as to this federal question, which we cannot decide authoritatively, and because of the history of this case in the state court, we decline to reverse the judgment because of the removal proceedings. The only other question worthy of serious consideration is as to the propriety of the third instruction for the plaintiff, and our conclusion is that, as applied to the facts of this case, it is unobjectionable. It is subject to the criticism of seeming to require the production by the defendant of independent evidence of an intention to defraud by false swearing in order to defeat a recovery on this ground. If it means that, it is wrong, for the false swearing to any material matter calculated to mislead or deceive the insurer, knowingly and intentionally done, would defeat a re-

covery; while false swearing as to a fact wholly foreign to the matter involved, or a mistake, or an unintentional misstatement, would not have that effect. We concur in the view held in *Claffin v. Assurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507, but think the instruction mentioned, when applied to the matter in dispute here, is not inconsistent with the sound doctrine of that case. Its dominant thought is that false swearing must have been intentional to defraud, and that is true. The dispute was as to the quantity and value of the goods destroyed. The alleged false swearing had relation to that inquiry, and was, therefore, material, and, if it was intentionally false, it was sufficient to defeat recovery. The instruction, although in a dangerous form, does not controvert this proposition, and, in view of the instruction on the same subject obtained by the defendant, and the satisfactory evidence that the goods destroyed by fire exceeded in value the amount of the insurance, the judgment will be affirmed.

(69 Miss. 208)

CRESCENT INS. CO. v. VICKSBURG, Y.  
& S. R. PACKET CO.

(Supreme Court of Mississippi. Oct. Term, 1891.)

MARINE INSURANCE—TERMS OF POLICY—PERILS OF RIVER—WHAT CONSTITUTE—NEGLIGENCE OF BOAT'S CREW—EFFECT ON INSURER'S LIABILITY.

1. Where cotton is thrown into the river by the careening of a steamboat from which it is being unloaded, the injury to the cotton is caused by a peril of the river, within the meaning of an insurance policy which provides that "the liabilities and perils assumed by the company are of rivers, fires, jettisons, and all other perils," and losses caused by reason of such dangers.

2. The insurance company is not relieved of liability on the policy for such injury because the cotton was thrown into the river by the mere carelessness or unskillfulness of those engaged in unloading it.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by the Vicksburg, Yazoo & Sunflower River Packet Company against the Crescent Insurance Company on an insurance policy issued by defendant on a cargo of cotton transported on plaintiff's steamboat, and damaged by water. From a judgment for plaintiff, defendant appeals. Affirmed.

The steamboat, Addie E. Faison, plying the Yazoo river, owned by the Vicksburg, Yazoo & Sunflower River Packet Company, on the trip in question was loaded with cotton. The master of the boat at Yazoo City took out a policy of insurance on it from Yazoo City to Vicksburg, for their protection. This is a suit by the packet company to recover damages sustained to the cotton while the boat was being unloaded at Vicksburg. By agreement the cause was submitted to the court without a jury on the declaration, plea of general issue, the protest

of the master of the boat, and the affidavit of the president of the packet company, and a copy of the insurance policy. The policy provides that "the liabilities and perils assumed by the company are of rivers, fires, jettisons, and all other perils, losses, and misfortunes that have or shall come to the injury, damage, or detriment of said property, or any part thereof, by reason of the dangers aforesaid;" and that "the insurer shall not be liable for damage to goods by breakage, wet, or dampness, or by being spotted, discolored, mouldy, or rusty, unless the same be caused by some disaster to the vessel, by which said goods shall have come into contact with water." The protest of the master recited that "the steamboat Lena Lee landed alongside the steamer Addie E. Faison, and began, with her crew, to move and transfer the New Orleans cotton from the Faison to the Lena Lee, as is the custom for the New Orleans boats to do at Vicksburg. While this was being done under the control of the mate of the Lena Lee, a portion of the cargo of cotton on the starboard side of the Addie E. Faison was dumped into the river, then a portion on the larboard side." The affidavit recited "that a short time after the arrival of said steamer at the landing at Vicksburg, by reason of accident to said boat, caused by too much freight being taken from one side by the officers of the Lena Lee, to whom its cargo was being in whole or in part transferred, said steamer careened and turned over to one side, by means of which fifty bales of cotton were thrown into the river."

Birchett & Shelton, for appellant. Dabney & McCabe, for appellee.

CAMPBELL, C. J. The injury to the cotton by water of the river, into which it was thrown by a mishap to the boat, was a peril of the river, within the terms of the policy; and, if it be true that the careening of the boat resulted from negligence in unloading, the insurer is liable. *Redman v. Wilson*, 14 Mees. & W. 476. The immediate cause of injury to the cotton was water of the river. That it got into the river because of some carelessness or unskillfulness of those engaged in unloading does not relieve the insurer from liability. To relieve from liability because of acts of the master or crew, there must be want of good faith and honesty of purpose. 1 Phil. Ins. § 1049; May, Ins. § 408; Fland. Ins. 477; 14 Amer. & Eng. Enc. Law, p. 383, note 2; and numerous cases. On this subject there is no difference between marine and other insurance. Whatever diversity of view on this question once existed, it is now firmly settled in England and America as stated above. "Where a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into." *Insurance Co. v. Sherwood*, 14 How. 361.

Affirmed.

(89 Miss. 355)

STATE ex rel. ADAMS, Revenue Agent, v. LODGE NO. 95, BENEVOLENT & PROTECTIVE ORDER OF ELKS.

(Supreme Court of Mississippi. April Term, 1892.)

REVENUE AGENT — ACTION TO COLLECT UNPAID LIQUOR LICENSE TAX—WHEN WILL LIE.

Act Feb. 22, 1890, § 2, authorizing actions by revenue agents, in the name of the state, against persons selling liquor without a license, to recover the privilege tax, was repealed by Code 1892, c. 116, entitled "Revenue," which went into immediate effect, without any provision for saving pending suits or existing rights of action. Another provision of such Code, saving such rights, did not take effect until several months later. *Held*, that such action could not be maintained after such repeal, and before the taking effect of the latter provision of the Code.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by the state, on the relation of Wirt Adams, revenue agent, against Lodge No. 95, Benevolent & Protective Order of Elks, to collect unpaid privilege license for the sale of intoxicating liquors. From a judgment for defendant, plaintiff appeals. Affirmed.

The action was begun in March, 1892. The declaration charged that on the 1st day of April, 1890, and continuously thereafter until the 1st day of March, 1892, defendant sold vinous, spirituous, and malt liquors, in less quantities than one gallon, in the city of Vicksburg, Warren county, Miss., without paying the privilege license imposed by law, whereby it became indebted to plaintiff in the sum of \$300, the sum required by law to be paid by all licensed retail dealers in vinous, spirituous, and malt liquors, and that the sheriff and tax collector of said county was duly notified of defendant's action, and willfully neglected to collect said privilege tax of \$300. It was agreed that said lodge should be deemed and held as a corporation, and liable as such. A demurrer to the declaration was sustained.

Calhoon & Green, for appellant. J. M. Gibson, for appellee.

CAMPBELL, C. J. It was by virtue of section 2 of the act of February 22, 1890, alone, that this action was maintainable, and the repeal of that act, effected by the act putting into immediate operation the chapter of the Code of 1892 entitled "Revenue," without any provision for saving pending suits or existing rights of action, necessitates the failure of this action. The Code contains a suitable provision to avoid any evil result from a change of the law effected by it, but that provision will not be operative until next November, and no present effect can be given to it. The immediate abrogation of certain laws, without guarding against the inevitable legal con-

\*July 1, 1892.

\*Chapter 116.

sequence sanctioned by all courts, and often declared in this state, leaves no alternative but the defeat of all actions depending for support on the repealed laws. There cannot be a doubt of the repeal of section 2 of the act of February 22, 1890, for a new law, to take the place of the old, and supersede it, was adopted, and this section was omitted from the new, and by universal consent this abrogated the omitted provision. The result may be a surprise to the authors of the mischief, but it exceeds the power of the courts to rectify the blunder, however disappointing or disastrous the consequences.

**Affirmed.**

(99 Ala. 300)

**SHAPPEY v. HODGE et al.**

(Supreme Court of Alabama. May 25, 1893.)  
JUDGMENT—ACTION TO ENJOIN—WHEN WILL LIE  
—NEGLECT OF JUDGMENT DEBTOR.

Where, without fraud on plaintiff's part, a defendant permits judgment to go against him by reason of his misapprehension of the amount claimed by the former, caused by his own negligence, he cannot maintain an action to enjoin the enforcement of the judgment on showing that he has a meritorious defense to a part of the claim for which it was rendered, and tendering judgment for the balance.

Appeal from chancery court, Lee county; S. K. McSpadden, Chancellor.

Action by F. C. Shappey against Hodge Bros. to enjoin the enforcement of a judgment. From a judgment for defendants, plaintiff appeals. **Affirmed.**

J. J. Abercrombie, for appellant. A. & R. B. Barnes, for appellees.

**McCLELLAN, J.** The object of the present bill, which is prosecuted by Shappey, is to enjoin the enforcement and collection of a money judgment recovered against him by Hodge Bros. in the Lee circuit court. Its averments make the following case: Complainant owed defendants about \$325, evidenced by a promissory note. This was a balance left unpaid of an originally larger indebtedness. Hodge Bros. brought their action in the circuit court for the amount of this original debt. Summons and copy of the complaint were regularly served on Shappey, the defendant. He, as the bill alleges, "carelessly put the summons and complaint in his pocket, and never read it. He told his attorney of it, but did not show the summons and complaint to him, but informed him (said attorney) that the suit was for said three hundred and twenty-five dollars, and no more." The trial term of the case coming on, his attorney was, by leave of the court, absent, in attendance upon a court of another state, but before his departure he consented with the attorney for plaintiffs, or there was an agreement between them, that judgment should be rendered for plaintiffs. This consent was given, or this agreement was entered into, by Shappey's attorney, under the supposition and belief on his part,

induced by frequent statements of his client to that effect, that the suit was for the said sum of \$325, and he therefore thought that he was consenting and agreeing to the rendition of a judgment in that amount. In pursuance of this consent and agreement, judgment was in fact had for the larger amount claimed in the complaint. The bill contains no averment or intimation, even, of any fraud on the part of plaintiffs in procuring the judgment. They were in no wise responsible for the erroneous supposition indulged by the defendant and his attorney as to the amount claimed in the action, nor were they aware of this misrepresentation on the part of defendant's attorney, or of his consent to judgment being given with reference thereto. The bill is manifestly without equity. While it alleges a meritorious defense as to a part of the demand for which judgment passed, and tenders that part as to which no defense existed, it not only fails to negative fault on the part of complainant in respect of making his defense in the circuit court, but, to the contrary, affirmatively shows that his failure to defend was the result of his own omission, fault, or neglect; and there is an utter absence of averment of any fraud or any act on the part of the plaintiffs to which defendant's failure to defend can be attributed. There was therefore no error in the decree of the chancery court, sustaining demurrers to the bill, and granting the motion to dismiss it for the want of equity. 3 Brick. Dig. p. 347, § 230 et seq.; Noble v. Moses, 74 Ala. 604; Watts v. Frazer, 80 Ala. 186; Hall v. Pegram, 85 Ala. 522, 5 South. Rep. 209, 6 South. Rep. 612.

**Affirmed.**

(101 Ala. 102)

**HEARD v. HICKS et al.**

(Supreme Court of Alabama. May 17, 1893.)  
DETINUE—ACTION ON DELIVERY BOND—RETURN  
OF PROPERTY—PLEADING.

1. Attorneys' fees are not recoverable in an action on a replevin bond given by defendants in detinue, which contains no stipulation for the payment of damages.

2. Demurrers will not be considered on appeal where the rulings thereon are shown only in the bill of exceptions, but it will be presumed that they were abandoned.

3. Where, pending an action of detinue, and after the execution by defendants of a replevin bond, part of the property was destroyed by fire, defendants could tender, and it was the duty of plaintiff to receive, the value of such property, as found in the detinue suit.

4. Plaintiff was not bound to accept property damaged, but not destroyed, by fire, pending the action, and after the execution of the bond, in discharge of the bond, without being compensated for its depreciation in value.

5. It is a question for the jury whether, after the tender of property recovered from defendants in detinue, for which they had given a replevin bond, plaintiff, by exercising control over it, received it, and waived all claim for damages to it by fire while in defendants' possession.

6. If plaintiff in detinue received property in lieu of that for which he sued, and for which defendants gave a replevin bond, and,

after being informed of the substitution, retained the substituted property, he would be estopped to insist on a forfeiture of the bond.

Appeal from circuit court, Butler county; John P. Hubbard, Judge.

Action by George P. Heard against J. A. Hicks and others on a replevin bond given plaintiff by defendants in a prior action of detinue, in which there was judgment that plaintiff recover the property sought. From a judgment for defendants, plaintiff appeals. Reversed.

Part of the property recovered by plaintiff in the action of detinue consisted of a mill and gin, and as to such property the trial court gave the following instruction, being the ruling referred to in the opinion: "That it was competent for the defendants, if they committed a breach of the bond as to the mill and gin and their fixtures, to take the amount of their value, and that it was the duty of Heard to receive it, if a tender as to that was made."

J. C. Richardson, for appellant. Stallings & Wilkerson, for appellees.

STONE, C. J. An action was brought by the plaintiff, Heard, against J. A. Hicks, C. B. Hicks, and J. E. Hicks, for the recovery of certain chattels in specie, under section 2717 of the Code of 1886. The plaintiff made oath and gave bond, and obtained a writ of seizure, which the sheriff executed by seizing the property sued for. This property the sheriff permitted to remain with defendants, upon the execution by them of a bond to the plaintiff, with Owen, Parker, and two Goodwins as sureties. The condition of this bond was that "if the said J. A. Hicks et al., defendants in said suit, within thirty days after the determination thereof, if cast in said suit, deliver to the said George P. Heard the above-described property, then this obligation is to become void; otherwise, to remain in full force and effect." The bond contains no condition or obligation to pay costs or damages. The bond expresses as its penalty the sum of \$700, and we have copied the entire condition. It will be seen that it does not conform to the statutory requirements. Code, § 2717. The trial of the detinue suit, or suit for the recovery of chattels in specie, took place November 25, 1887, and resulted in a verdict and judgment for plaintiff for most of the property sued for. The judgment, following the verdict, was as follows: "It is therefore considered by the court that the plaintiff have and recover of the said J. A. Hicks and J. E. Hicks the said steam engine and fixtures, said gin and fixtures, said gristmill and fixtures, said bay mare mule, said wagon, and said three head of cattle, or the alternate value of said steam engine and fixtures, of three hundred dollars; the value of the gin and fixtures, of seventy-five dollars; the value of the

gristmill and fixtures, seventy-five dollars; the value of the bay mare mule, of fifty dollars; the value of the wagon, ten dollars; and the value of the three head of cattle, of \$8.00 each, being twenty-four dollars." There was neither verdict nor judgment for damages for the detention of the property, nor was there inquiry in the detinue suit, so far as the present record informs us, of any damage done the property pending the suit. After the institution of the detinue suit, but before trial and judgment,—the property sued for being in the possession of J. A. and J. E. Hicks,—the mill and gin and their fixtures were burned, and the engine was seriously impaired in value, as a consequence of the burning. The breach complained of, and damages claimed in each count of the complaint, are stated as follows: "And the plaintiff avers that the said J. A. Hicks was cast in said suit, and within thirty days after the determination thereof did not deliver to said George P. Heard the above-described property, and that the plaintiff has been greatly damaged thereby, in this: (1) That by reason of said failure of said J. A. Hicks to deliver the said steam engine, aforesaid, the plaintiff has been damaged in the sum of \$300, with the interest thereon from, to wit, the 26th day of December 1887. (2) That by reason of the failure of the said J. A. Hicks to deliver the said gristmill to plaintiff, as aforesaid, the plaintiff has been damaged in the sum of \$75, with the interest thereon from the 25th day of December, 1887. (3) That by reason of the said failure of the said J. A. Hicks to deliver the said gin the plaintiff has been damaged in the sum of \$75, with the interest thereon from, to wit, the 25th day of December, 1887. (4) That by reason of the failure of the said J. A. Hicks to deliver the said bay mare mule the plaintiff has been damaged in the sum of \$50, with the interest thereon from the 25th day of December, 1887. (5) That by reason of the failure of J. A. Hicks to deliver said wagon the plaintiff has been damaged in the sum of \$10, with the interest thereon from the 25th day of December, 1887. (6) That by reason of the failure of said J. A. Hicks to deliver the said three head of cattle the plaintiff has been damaged in the sum of \$24, with the interest thereon from December, 25, 1887."

It will be borne in mind that the delivery or replevin bond contains no stipulation binding the obligors for any damages that the plaintiff might suffer in consequence of the giving thereof. For this, as well as other reasons, it is unnecessary for us to consider the claim asserted in this suit for attorneys' fees incurred in the detinue suit. Sureties are bound only to the extent expressed in their obligation, or imposed by law. They stand on the terms of their contract.

Several pleas were interposed to the action, to some of which plaintiff filed demur-

rers. The rulings on the demurrers are shown only in the bill of exceptions. Under our rules of practice, we are forbidden to consider these demurrers, but must presume they were abandoned. 3 Brick. Dig. p. 78, § 7; *Powell v. State*, 89 Ala. 172, 8 South. Rep. 109; *Beck v. West*, 91 Ala. 312, 9 South. Rep. 199. It results that we must try this case as on issue joined on all the pleas, without considering their legal sufficiency.

Pending the detinue suit, and after the execution of the replevin bond, a fire destroyed the mill and gin, and damaged the engine. No proof was offered in explanation of the fire, or its origin, and no special blame is imputed to the defendants on account thereof. The recovery in the detinue suit, however, demonstrates that, to the extent the plaintiff had verdict and judgment, the property was his at the institution of the suit, and as a consequence the possession and use of it by the defendants in the detinue suit was wrongful.

The rulings of the circuit court in reference to the gin, the mill, the mule, and the wagon were clearly free from error. The mule and wagon were tendered within 30 days after the judgment was rendered, and the plaintiff had the benefit of them. The mill and gin having been entirely destroyed by fire, they could not be delivered. Their alternate values had been assessed, and made the judgment of the court, and before the 30 days expired those alternate values were tendered to the plaintiff. The complaint in the present suit claims the values of the mill and gin only at the prices fixed in the detinue recovery. The proof fully sustained this branch of the defense, and the circuit court's rulings in reference thereto are free from error.

The engine and boiler present a different and graver question. These had been injured by the fire, but were not destroyed. The defense relied on as to these was tender, but no offer was made to pay for the depreciation caused by the burning. The circuit court refused to receive testimony of such injury, and the plaintiff excepted. The chattel or chattels sued for, together with damages for the detention, are the primary recovery in an action of detinue. But inasmuch as the chattel may perish, or become otherwise inaccessible, the rule and law of this action are that the alternate value of the property sued for must be ascertained and adjudged, and when more chattels than one are the subject of the recovery the separate values must be ascertained and determined. This, because some of the chattels may, after judgment, be accessible and recoverable in specie, while others may be beyond reach. In this way the successful plaintiff has his rights secured to him, not alone by regaining possession of his property that remains accessible, but also by recovering the ascertained value of such part as may have gotten beyond the reach of process. So,

when there is a recovery in detinue, the plaintiff must accept the specific thing recovered, unless by some default of the defendant he has armed the plaintiff with the right to demand, at his option, not the property itself, but its ascertained, alternate value. The damages for detention, recoverable by plaintiff, are intended to compensate him for the injury he has sustained by being kept out of the possession and use of his property. Reasonable hire, taking into account the injury to the chattel, caused by its use, if there be no exceptional features in the case, will mark the plaintiff's measure of recovery under the head of damages for detention. But exceptional cases arise. The chattel detained may sustain a serious injury, very materially impairing its value beyond that which would result ordinarily from its use. Now, as this injury and impairment of value accrue to plaintiff's property while defendant is tortiously withholding from him his right to possess and enjoy it, this abuse becomes a legitimate item and subject for the inquiry of damages for the detention. This for the reason that if the chattel had not been wrongfully detained it does not appear that the injury would have ensued. Hence, *prima facie*, the injury is the result of the detention—the wrongful detention—which withholds the property from its rightful owner. In *Wortham v. Gurley*, 75 Ala. 356, 363, this court said "that the damages required to be assessed for the detention of the property included any deterioration in its value, occasioned by the default of the wrongdoer, through neglect, abuse, or nonuse, during the period of detention. This injury is shown to have resulted from the tortious act of seizure and detention, as its natural and proximate cause, and was a legitimate element of damage, in addition to the value of rent or hire." See, also, 2 Sedg. Dam. (7th Ed.) 498 et seq.; *Freer v. Cowles*, 44 Ala. 314; *Wilkerson v. McDougall*, 48 Ala. 517; *Archer v. Williams*, 2 Car. & K. 26.

Having ascertained the extent of liability the defendant Hicks rested under for the use and abuse of the engine pending the detinue suit, what is the liability of his sureties on the replevin bond in relation thereto? They bound themselves, as sureties of Hicks, that the latter, if cast in the action, would within 30 days surrender the property. They thereby took upon themselves the same duty and obligation to surrender the property which rested on Hicks, and assumed all his liabilities for the nondelivery. We have shown that his possession of the property pending the litigation was that of a tortfeasor, and that this was conclusively shown by the verdict and judgment in the detinue suit. We have shown, further, that detaining and holding the property, as he did, without right, it was his duty to restore it in the condition it was in when he executed the bond, ordinary wear and care excepted. Burning a house over the engine could not fail to in-

jure it materially, beyond the mere deterioration of it from use, and therefore brought it within the principle that a tender of property thus circumstanced is not a full discharge of the obligation to deliver. The circuit court erred in not receiving testimony of the injury done the engine from the burning, and in holding that the plaintiff was bound to accept the engine, if materially damaged, in discharge of the bond. There was some testimony tending to show that after the alleged tender the plaintiff exercised some control over the engine. If this be so it will present a question for consideration by the jury, under the court's direction, whether or not he received the engine, and whether he thereby waived, or intended to waive, all claim for damage it had sustained.

The question in reference to the cattle: If the plaintiff, with knowledge, received one or more cows in lieu of those embraced in the mortgage, or if, after being informed of the substitution, he retained such substituted cows, exercising acts of ownership over them, this would estop him from claiming a forfeiture of the bond for the nondelivery of the cattle, or any part of them.

Reversed and remanded.

(96 Ala. 463)

# NEWTON v. ALABAMA MIDLAND RY. CO.

(Supreme Court of Alabama. May 18, 1893.)  
CONDEMNATION PROCEEDINGS—JUDGMENT ON APPEAL—MOTION TO SET ASIDE.

1. A judgment in favor of a railroad company in condemnation proceedings, rendered on appeal from a judgment dismissing the company's petition, will not be set aside on the ground that no notice of appeal was served on defendant, or on any one authorized to act for her, where the record shows that she duly appeared in the appellate court by her attorney.

2. Nor, in such case, will the judgment be set aside on the ground that the petition was amended in the appellate court so as to include more land than was included in the original petition.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Condemnation proceedings by the Alabama Midland Railway Company against Nancy E. H. Newton. From a judgment denying defendant's motion to set aside a judgment for plaintiff, defendant appeals. Affirmed.

Farnham & Crum and Richardson & Reese, for appellant. A. A. Wiley, for appellee.

HEAD, J. The Alabama Midland Railway Company instituted proceedings in the probate court of Montgomery county to condemn a right of way over the lands of the appellant, under article 2, c. 15, tit. 2, pt. 3, of the Code. Such proceedings were had in that court that on the 27th day of April, 1891, the petition was dismissed. On November 11, 1891, the petitioner obtained an

appeal to the circuit court of the county from the order of dismissal, and the cause was regularly certified to and docketed in that court. The same counsel who had been employed by Mrs. Newton to represent her, and who did represent her in the probate court, appeared to represent, and did represent, her cause on appeal in the circuit court. In that court, counsel of Mrs. Newton being present, the petition was amended so as to enlarge the right of way sought to be condemned from 80 feet to 100 feet in width; and, the cause then coming on for trial, on the 11th day of February, 1892, as the judgment entry recites, all the parties appeared by their attorneys, and a trial was had by jury, who rendered a verdict in favor of the petitioner, and assessed the damages to be paid to Mrs. Newton at \$700, and thereupon the court rendered judgment of condemnation in due form. At the next term of the court thereafter the appellant moved the circuit court to set aside the judgment on the ground that it was void, for the reasons: First. That no notice of the appeal was served upon her, or upon any one authorized to act for her, and that she never authorized or empowered any one to accept service or waive notice in that behalf for her. Second. The petition as filed and tried in said probate court, and upon which judgment was rendered in her favor, asked for the condemnation of 80 feet of land in width running through her entire premises, and that after the cause was removed by appeal from the probate court the petition was amended by asking for the condemnation of a strip of land running through her premises 100 feet wide, and thus changed to that extent the subject-matter of the suit.

1. It is immaterial whether notice of the appeal was served on Mrs. Newton or her counsel or not, since the record shows she duly appeared in the cause in the appellate court by her attorneys. The purpose of notice to a party is to bring him into court. If he voluntarily appears, notice is unnecessary. The fact of such appearance, when it is shown by the record, cannot be disputed on motion to set aside the judgment. The record is conclusive in such a case. *Pettus v. McOlanahan*, 52 Ala. 55; 2 Brick. Dig. p. 140, §§ 137-140.

2. Under our liberal system of amendments the circuit court had authority to permit the amendment of the petition. It embraced the same land as that sought to be condemned by the original petition, and 20 feet in width in addition. The parties were before the court when the amendment was allowed, and the cause was tried on it. *Ex parte North*, 49 Ala. 385; *Dothard v. Teague*, 40 Ala. 583; 1 Brick. Dig. p. 75, § 77 et seq. The judgment is not, for any reason, void on its face, and the court had no power to set it aside at a subsequent term. Affirmed.

(101 Ala. 407)

**KNIGHT v. ALABAMA MIDLAND RY. CO.**

(Supreme Court of Alabama. May 18, 1893.)

**DEED TO RAILROAD COMPANY — CONSTRUCTION — RIGHT OF WAY — EJECTMENT — TITLE TO SUPPORT.**

Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other point in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over the right of way granted in the deed, from M., by A., to L., a station south of M., and in the direction of C. *Held*, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Ejectment by Thomas D. Knight against the Alabama Midland Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The cause was tried upon an agreed statement of facts, of which the following are material to the cause: On April 10, 1886, the plaintiff owned the land sued for in this action, together with his wife, and on that day executed the following deed: "Know all men by these presents, that whereas, the formation of an incorporated railway company for the building of a line of railway from Montgomery, Alabama, by Ada, Alabama, to Chattahoochee, Florida, or other point in southeast Alabama or Florida, is contemplated by certain citizens of Alabama and of New York, upon condition that certain donations of land are made, and other benefits are granted, to aid in its construction, which said railway company will be known and called the Montgomery & Florida Railway Company; and whereas, we, T. D. Knight and D. A. Knight, of said county, desiring to aid in the building of said road, and desiring that said line of road, when built, shall pass over my lands, or as near my lands, in said county, as possible: Now, therefore, in consideration of the premises, and in order to encourage and promote the organization of such a company to build such a railway, and to aid the building of such a railway by any such company as may be organized for the purpose of building it, and as an inducement and aid to such company to construct its line of railway upon and across my premises, or as near thereto as practicable, and in further consideration of ten dollars to me in hand paid by V. B. Watson, trustee, the receipt whereof is hereby acknowledged, we, the aforesaid T. D. Knight and D. A. Knight, his wife, do hereby grant, bargain, sell, and convey unto the said Watson, as trustee for any such railway company as is contemplated herein, and referred to above, in the county of —, a right of way for said railway over and across any or all of my lands in Montgomery county, in said

state, seventy-five feet on each side from the center of the track and roadbed, to be selected and located by such company, with the right and privilege of entering upon and using said right of way, and all earth, timber, and trees thereupon, for the construction of said railway. If said railway is built across my said lands, the said company shall have the right to fell any trees outside of the right of way, which, in its judgment, shall in any manner injure its roadbed or tracks, by shading the same or otherwise, and to cut all necessary ditches to properly drain and protect said roadbed and track and right of way, and to divert any stream flowing on said right of way for the same purpose, and to use the dirt or stone on the land adjacent to construct a roadbed. If said railway passes upon or near my said lands, the privilege of using any stream or lake of water on the same, or the lands adjacent, for uses of said railway, and of crossing my lands to convey the water to the railway, provided the water is not taken from more than half a mile from said railway. To have and to hold the real estate, rights of way, the rights and uses of water, and other privileges hereby conveyed unto the said V. B. Watson, trustee, as aforesaid, his successors in trust, and assigns, forever, in fee simple. When said railway company is organized the said V. B. Watson, trustee, shall, without delay, and upon request of said company, execute and deliver to said company, in its corporate name, its successors and assigns, a conveyance investing them with the rights, title, and interest to and in the property, grants, and privileges hereby conveyed and bestowed, just as it is by this conveyance vested in such trustee, named herein. This deed shall also be void, and of no effect, if said railway is not constructed within three years from the first day of July, 1886." The Montgomery & Florida Railway Company, having been duly incorporated under the general incorporation laws of the state of Alabama, built, equipped, and operated a railroad in a due southerly direction from Montgomery, Ala., via Ada, to Luverne, a station 51 miles south of Montgomery, in the direction of Chattahoochee, Fla., or other point in southeast Alabama or Florida. This road was built by the Montgomery & Florida Railway Company, was constructed over and along the right of way mentioned in the deed from plaintiff to Watson as trustee, and the right of way, as selected by said railway company, and occupied by it, was 75 feet wide on each side from the center of its track. After the Montgomery & Florida Railway had been built and equipped, and was being operated, via Ada, to Luverne, as aforesaid, all its rights, franchises, tracks, roadbed, rolling stock, rights of way, equipments, lands, and appurtenances, including the estate here sued for, were sold at public outcry, under a foreclosure decree of the United States circuit



court, to satisfy a first-mortgage bonded indebtedness thereon. Said Knight never interposed any objection whatever to said sale, and never made known or asserted to said purchasers any right, title, claim, or interest whatsoever to any of the estate here sued for. Shortly after said purchase the purchasers of said railroad, in the mode prescribed by statute, incorporated and organized the Northwest & Florida Railroad Company as the successor and assign of the Montgomery & Florida Railway Company, and operated the said road between its terminal points—Montgomery and Luverne—until July, 1889. In July, 1889, the Alabama Midland Railway Company, incorporated and duly organized under the laws of Alabama, purchased the property and franchises of the Northwest & Florida Railroad Company, and consolidated the two roads, in the manner prescribed by statute, under the name of the Alabama Midland Railway Company, and still operates the branch of this road from the city of Montgomery to Luverne. On the 16th day of June, 1890, the said V. B. Watson, as trustee, executed to the Alabama Midland Railway Company a deed conveying the right of way conveyed by T. D. Knight and wife to V. B. Watson as trustee. The said Montgomery & Florida Railway Company, the Northwest & Florida Railroad Company, and the Alabama Midland Railway Company, continuously, in the order named, and as the successors and assigns, the one of and to the other, have in good faith held actual, open, notorious possession of the land conveyed as a right of way, and the interest therein sued for in this action, from April 10, 1886, up to and including the day of the trial, which was in 1891,—a period of more than three years before the commencement of this suit. Upon this agreed statement of facts the plaintiff requested the court to give the general affirmative charge in his behalf, and duly excepted to the court's refusal to give said charge. The court, at the request of the defendant, gave the following written charge to the jury: "If they believe all the evidence they must find for the defendant." To the giving of this charge the plaintiff duly excepted.

Arrington & Graham and Watts & Son, for appellants. A. A. Wiley, for appellee.

McCLELLAN, J. We hold that the town of Luverne is in southeast Alabama, within the terms of the deed from Knight to Watson, trustee, etc., and that the building, within three years from the date thereof, of the Montgomery & Florida Railroad, by the town of Ada, to that point, was a compliance with the condition subsequent contained in said deed, the purpose of which was to avoid the conveyance in the event a railroad was not built within the time mentioned "from Montgomery, Alabama, to Chattahoochee, Florida, or some other point in southeast Alabama or Florida;" the fact being that

the land involved is situate along the line of said road, as built between Luverne and Montgomery. Affirmed.

(36 Ala. 253)

BUTLER et al. v. WALKER et al.

(Supreme Court of Alabama. May 17, 1893.)

MUNICIPAL CORPORATIONS—FORFEITURE OF CHARTER—NONUSER—REINCORPORATION—OFFICERS.

1. Although a municipal charter is not forfeited by nonuser without legislative or judicial action repealing the charter or adjudging it forfeited, yet it was competent for the legislature to provide by Act March 8, 1871, chartering the town of Rutledge, that, if there should be a failure to hold the annual election for intendant and council on the day mentioned in the act, all its powers, immunities, and franchises should cease; and, there having been failure to hold such election, the corporation ceased, and there was no impediment to the subsequent incorporation of the town under Code 1876, §§ 1763-1802, as amended by Acts 1879 and 1881.

2. Since Code 1876, § 1763, and Code 1886, § 1486, provide for the incorporation by a judge of probate of the inhabitants of a town "not incorporated," proceedings to incorporate the inhabitants of a town already incorporated are abortive and void, notwithstanding nonuser after such prior incorporation.

3. After a town had been incorporated under Code 1876, §§ 1763-1802, as amended by Acts 1879 and 1881, a reincorporation was attempted because of the supposed forfeiture of the charter by nonuser, which reincorporation, however, was abortive, the charter not having been in fact forfeited. Under the supposed new incorporation an election was held by the sheriff for an intendant and councilmen, and the persons elected assumed and performed the official functions. When their terms ended they ordered the election of their successors. *Held*, that the persons elected on the order of the sheriff were de facto officers, and that their successors, elected on their order, were de jure incumbents of de jure offices, their titles being derived from the first charter.

Appeal from circuit court, Crenshaw county; John P. Hubbard, Judge.

Petition by H. H. Butler and others, praying the issuance of a rule to John M. Walker and others, intendant and councilmen of the town of Rutledge, to show cause why they should not be ousted from their respective offices. From a judgment denying the petition and dismissing the same, petitioners appeal. Affirmed.

Gamble & Bricken, for appellants. I. H. Parks, for appellees.

McCLELLAN, J. The proposition that a municipal charter is not forfeited by nonuser for any period of time, and that to this end there must be legislative action by repeal of the act of incorporation, or judicial action adjudging forfeiture, may be conceded, for all the purposes of this case, to be thoroughly established; indeed, we entertain no doubt of their soundness. But it is equally clear, we think, that, the legislature having plenary power in the premises, may create such corporations conditionally,—that is, make provision for corporate existence

upon a vote of the people within the territorial limits of the proposed corporation accepting the franchises, privileges, and immunities granted in the act, and also, as a corollary to this power, to prescribe a condition precedent,—the charter act may provide a condition subsequent to continued corporate existence, or even may absolutely limit the duration of the corporation it creates; in either of which cases the provision is no more than a precedent legislative determination and declaration of forfeiture or surrender of corporate existence at a certain time or upon the happening of a certain event, and is, to our minds, as efficacious to the destruction of corporate entity as would be contemporaneous legislative abrogation of the charter. We are therefore of the opinion that it was entirely within legislative competency to make provision in the act of March 8, 1871, chartering the town of Rutledge, for the dissolution of the corporation upon an event therein specified, and that the clause of that act which is in this language: "If there should be a failure to hold the annual election for Intendant and councilmen on the day mentioned in this act for that purpose, then all the powers, rights, privileges, immunities, and franchises heretofore or hereinafter conferred on the said Intendant and council as a corporation shall forever cease and determine, and be of no force and effect whatever,"—is a sufficient legislative determination and declaration of dissolution, in and of itself working corporate destruction *ipso facto* on the happening of the condition upon which it was intended to become operative. That the condition did transpire—that there was a failure to hold the annual election—within a year or two after the original organization of the municipality under the act, and for each year since that time, is admitted in this case; and we feel safe in the conclusion that this failure of the corporation to comply with the organic law of its existence entailed upon it the destructive consequences prescribed by that law, and that the town of Rutledge thereupon became as if it had never been erected into an incorporation at all. There was, therefore, no legal impediment to the subsequent incorporation of the town of Rutledge under the general law then embodied in the Code of 1876, §§ 1763-1802, as amended by acts passed in 1879 and 1881, and now, with these amendments, constituting section 1486 et seq. of the Code of 1888; and the town was in fact duly and regularly incorporated under that law in the latter part of the year 1881. There is no provision for forfeiture of incorporation for nonuser or other cause in the general law. There has been no legislative declaration of forfeiture, and no judicial dissolution of that corporation since then. On the principles stated in the outset of this opinion, and to the soundness of which counsel upon either hand subscribe, that corporate entity has existed at every

moment of time since the decree of the probate judge to that end was rendered, and it exists to-day, notwithstanding organization under it, which was regularly perfected upon the passing of the decree, was not kept up; the fact being, the officers elected for the year 1883, after entering upon the discharge of their duties and discharging them for a time, ceased so to do before the expiration of their terms, and afterwards for several years no elections were held.

It may be said to be axiomatic that two distinct charters for one corporation cannot exist at the same time, and, of consequence, that a corporation already in existence, and having a valid charter, cannot be reincorporated through proceedings before the judge of probate, who has no authority to repeal, annul, or declare forfeited an existing charter, but whose powers are, to the contrary, expressly limited to the incorporation of the inhabitants of a town "not incorporated." Code 1876, § 1763; Code 1888, § 1486. It follows, of course, that the efforts of the inhabitants of Rutledge to reincorporate the town by proceedings before the probate judge in 1888, and again in 1891, on the mistaken idea that the nonuser after the incorporation of 1881 had forfeited corporate existence, were entirely abortive, the orders and decrees of the judge of probate in that behalf were utterly void, and all that was done, ordered, and decreed in those connections is now to be taken as if no such efforts had ever been made, and as if no such orders or decrees had ever in fact been entered. Yet, under the supposed new incorporation of 1891,—as, also, under that of 1888,—an election was held by the sheriff, as provided in section 1493 of the present Code, for an Intendant and five councilmen, and the persons elected were inducted into office, and discharged the duties thereof for the term prescribed by the statute. At the end of this term, these persons thus in fact constituting the Intendant and council of the town, and performing all corporate functions incident to these positions, ordered, we feel warranted in assuming from the pleadings and agreed facts in this record, an election for the selection of an Intendant and five councilmen for the ensuing year, and at this election were chosen the respondents to this petition, who thereupon qualified and entered upon the discharge of their duties. The present proceeding is, in one aspect, in the nature of an information for *quo warranto*, and seeks to have the respondents adjudged usurpers of the offices they now assume to occupy, and ousted therefrom; in another aspect, it is more in the nature of an application for *certiorari* than anything else, and seeks to have certain ordinances enacted by the respondents declared void and expunged. It is very clear to us that the petition is bad for duplicity, if for no other reason; but we need not discuss that point. This we pretermit, because

It is equally clear that there is no merit in the case presented by petitioner in either aspect, or in both combined, conceding they admitted of combination. The corporation, as brought into existence by the proceedings before the probate judge in 1881, has, as we have indicated, been ever since then an existing *de jure* corporation, and is so now, notwithstanding there have in the interim been two periods of time during which there was no municipal organization, and the functions of the corporation were not exercised. As a necessary incident to this continued corporate existence, or rather as an essential and inherent part of it, there have also existed during all that time the offices in the corporation created by the statute, and designated as one intendand and five councilmen; and these offices are the same in all respects,—the statutes in this regard being identical at the times of the original valid incorporation and the subsequent attempted reincorporation,—under the incorporation of 1881, which still exists, as they were supposed to be under the void incorporations of 1888 and 1891. These *de jure* offices were irregularly filled by an election held by the sheriff in 1891, and the persons then elected entered upon and discharged the duties incident thereto under the color of right afforded by the proceedings of that year before the probate judge. These duties were the same, and in like manner discharged, as they would have been and would have been performed had there been no attempted reincorporation. The only point of difference lies in the fact that the incumbents erroneously referred their titles to the void proceeding of 1891, instead of the valid and still subsisting charter of 1881. The only real infirmity in that title resulted from the irregularity with respect to the election of 1891, in that it was called and held by the sheriff under section 1493, instead of by their predecessors in office, under section 1495 of the Code. This irregularity cannot have the effect of impugning the validity of the acts done by these persons which were within the competency of the intendand and councilmen of the town. The offices were those prescribed by the valid charter of 1881. Their functions were those prescribed by that charter. They had no existence save by virtue of that charter. The law refers the title of the incumbents to that charter. They were clearly *de jure* offices. They were filled by persons claiming to have been elected to them and to be the intendand and councilmen of the town of Rutledge, which they could only be by the force of that charter, and who as such, unchallenged, carried on the government of the municipality. There can be no question, we think, but that these men, notwithstanding the irregularity of their election, were in every sense *de facto* incumbents of *de jure* offices,—and that their acts, as between the corporation and the public, or third persons, in their official capacities, are as valid for

all purposes as had they been regular successors, through regular elections duly ordered and held, of the intendand and council chosen upon the original organization of the municipality in 1881. 1 Dill. Mun. Corp. §§ 221, note, 256, note, 276, and authorities cited; *People v. Bartlett*, 6 Wend. 422; *Lynch v. Laffland*, 4 Cold. 96; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121; 2 Brick. Dig. p. 289, § 18 et seq.; 3 Brick. Dig. p. 681, § 14 et seq.; *Floyd v. State*, 79 Ala. 39, and authorities cited. Among the official acts done by these *de facto* officers was the ordering of an election for the selection of their successors in office, as prescribed by the statute, and as the same would have been ordered had there been no lapse in corporate organization. This act, and the election held under it, were regular and valid. At this election the present respondents were chosen to be intendand and councilmen of the town of Rutledge. Under the principles we have stated, there can be no impeachment of this election or of the title of those chosen thereat to the offices in question. That title is referable to the charter of 1881, through this election, ordered and held as required by that charter. They are *de jure* incumbents of *de jure* offices; and the circuit court properly dismissed the petition, which sought, on the facts we have adverted to, to oust them of their offices, and have their acts while in office annulled. Affirmed.

(101 Ala. 401)

TROY et al. v. MAY.

(Supreme Court of Alabama. May 18, 1893.)

MORTGAGES—REDEMPTION—RIGHTS OF PURCHASER ON EXECUTION.

The purchaser of land on execution, having the right to redeem from a prior mortgage by the debtor, on a sale under the mortgage is entitled to the proceeds of the sale in excess of the mortgage debt.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Bill by J. T. May against D. S. Troy and others to enforce a vendor's lien on land. From a decree holding that defendant Troy has no interest in the land, or in the use, occupation, and rents of the same, that defendant appeals. Reversed.

Tompkins & Troy, for appelland. Brickell, Semple & Gunter, for appellee.

STONE, C. J. The litigation presented in this appeal may truly be styled many-sided. It originated in a bill filed by appellee, May, to enforce a vendor's lien on lands purchased by Walter Bros. from Ferrell. The purchase by Walter Bros. was made May 12, 1885, and they then gave as purchase money three several notes, each for the sum of \$600; but they obtained no title from Ferrell until August 13, 1885. Under a judgment against Ferrell, obtained in the circuit court of the United States after May 12th, aforesaid, and

under execution issued thereon, the marshal sold the land on September 13, 1885, and Troy became the purchaser, receiving a conveyance. Up to this time Walter Bros. had not taken visible possession of the land so purchased from Ferrell; nor was there any notice of their purchase, actual or constructive, until the registration of the Ferrell deed to them, soon after its execution in August. The execution under which Troy purchased went into the hands of the marshal June 20, 1885. A few days after the purchase of Walter Bros. from Ferrell, and before the judgment was rendered under which Troy purchased, Ferrell sold and transferred to May the second and third of the purchase-money notes given by Walter Bros. No question is raised on the bona fides of this transfer, nor on the sufficiency of the consideration paid by May. There is testimony tending to show that, before making this purchase, May consulted Walter Bros., and was assured by them that they had no defense to the notes; and no question is raised on this feature of the controversy by any assignment of error. Before May's suit was brought to a hearing, Walter Bros., in July, 1887, filed an original bill in the nature of a cross bill, and made May, Troy, and Ferrell defendants to their suit. In their bill they mentioned the other purchase-money note which had not been transferred to May, charged that it too had been assigned to some person, alleged to be unknown. That suit was brought to this court by appeal, and is reported as *Troy v. Walter Bros.*, in 87 Ala. 233, 6 South. Rep. 54. The substance of the facts as then presented in the pleadings and proof is set forth in the report of that case. It will be seen that up to that time it was not shown or averred who held the other note,—the one not purchased by May,—nor was it brought to the notice of the court in either of the suits that there was an outstanding, unsatisfied mortgage on the lands, executed by Ferrell, and duly recorded, which was older than the sale to Walter Bros. On the facts as they then appeared, when the marshal made the sale and conveyance to Troy, the legal title of the lands was in Ferrell, and that legal title, for the term of Ferrell's life, passed by the conveyance to Troy. We so ruled on that appeal. *Id.*; *Daniel v. Sorrells*, 9 Ala. 436; *Jordan v. Mead*, 12 Ala. 247; *Preston v. McMillan*, 58 Ala. 84; *Wood v. Lake*, 62 Ala. 489; *McCarthy v. Nicrosi*, 72 Ala. 332; *Watt v. Parsons*, 73 Ala. 202; *Dickerson v. Carroll*, 76 Ala. 377; *King v. Paulk*, 85 Ala. 186, 4 South. Rep. 825; *Paulk v. King*, 86 Ala. 332, 6 South. Rep. 612. After the reversal in this court (87 Ala. 233, 6 South. Rep. 54) the pleadings were changed in the court below, and the issues thereby materially enlarged. It was averred that long before the agreement of sale from Ferrell to Walter Bros., Ferrell, being indebted to Molton for money borrowed and

unpaid, had executed a mortgage to said Molton, conveying said land as security for the payment of the debt, with a power in the mortgagee to foreclose by a sale of the land, if there was default in payment. This mortgage had been duly and properly recorded. There was a balance due and still unpaid on the mortgage debt. Soon after the agreement of sale by Ferrell to Walter Bros. the former turned over to Molton the purchase-money note, the first of the series, (the one not traded or transferred to May,) as collateral security for the debt he owed him, so secured by the mortgage. This is the note which Walter Bros. alleged in their bill had been transferred, but they did not know to whom. It was also averred in the amended pleadings that at a time, which was probably after the reversal in this court, Molton had advertised and sold said lands under the power contained in his mortgage, and that Walter Bros. became the purchasers, and received a conveyance. It is shown that at this sale by Molton the bid and purchase were at a sum in excess of the balance due Molton on the debt secured by the mortgage, including expense of sale, and that this excess was paid by Walter Bros. to Molton, and by him to Ferrell. Molton was made a party to the litigation at this stage, and answered. All the foregoing averments were shown to be true, and there was no conflict in the testimony as to any of them. They are the admitted facts in the case, as now presented.

As we have said, when this case was first before us, (87 Ala. 233, 6 South. Rep. 54,) the record showed that Troy, by the deed the marshal gave him, acquired the legal title to the land, without notice, actual or constructive, of the equity which Walter Bros. had in virtue of their purchase from Ferrell. The present record adds strength to the equity of Walter Bros. in this: that, although they had not paid the purchase money, and had received no title when the lien attached under which Troy claims, yet they had placed it out of their power to retire from the purchase without great loss. This, because they had estopped themselves from making defense to the notes held by May. The present record also presents Troy's claim in a changed light. The marshal's deed did not convey to him a legal title, but only an equity of redemption,—an equitable title. So the contest between him and Walter Bros. is a contest between equitable claimants, the claim of each being meritorious, when considered by itself. In 1 Pom. Eq. Jur. § 414, it is said: "As between persons having only equitable interests, if their equities are equal, *qui prior est tempore, potior est juri.*" Section 415. "When several successive and conflicting claims upon or interests in the same subject-matter are wholly equitable, and neither is accompanied by the legal estate which is held by some third person, and neither possesses any spe-

cial feature or incident which would, according to the settled doctrines of equity, give it a precedence over the others, wholly irrespective of the order of time, under these circumstances, the principle applies, and priority of claim is determined by priority of time." In defining the constituent elements of the defense of bona fide purchase without notice, this court, in *Craft v. Russell*, 67 Ala. 9-12, said: "A plea put in by a defendant claiming to be a bona fide purchaser for value without notice, in order to be available as a protection against a prior equity, \* \* \* must aver clearly, distinctly, and without equivocation the following facts: (1) That he is the purchaser of the legal, as distinguishable from an equitable, title." *Hooper v. Strahan*, 71 Ala. 75; *O'Neal v. Seixas*, 85 Ala. 81, 4 South. Rep. 745; *Ledbetter v. Walker*, 81 Ala. 175; *Wells v. Morrow*, 38 Ala. 125; *Buford v. McCormack*, 57 Ala. 428; *Thames v. Rembert*, 63 Ala. 561; *Boon v. Chiles*, 10 Pet. 177; *Tourville v. Nalsh*, 3 P. Wms. 307; *Peabody v. Fenton*, 3 Barb. Ch. 451; *More v. Mayhow*, Freem. Ch. 175. But the direct question presented by this record was decided by this court on a former day of this term. *Overall v. Taylor*, 11 South. Rep. 738. Walter Bros. having the older equity, their claim, as represented by the two notes traded to May, is superior to that conveyed by the marshal's deed to defendant Troy. So, also, Molton's lien, secured by the mortgage made by Ferrell to him, was paramount to all other claims brought to view in this record, and to the extent that debt was unpaid Walter Bros. were fully justified in making payment, when they became purchasers under Molton's foreclosure sale. This they were required to do, because of the mortgage itself, and because one—the first—of their purchase-money notes had been placed with Molton by Ferrell as collateral security for the mortgage debt. They could not obtain an unincumbered title to the lands they had purchased until this mortgage lien was removed. In purchasing at the mortgage sale, Walter Bros. bid and paid a sum in excess of the balance due to Molton, supplemented with the expense of advertising and selling. This they should not have done. The proceedings in the courts, of which proceedings, being parties, they had notice, gave them information that Troy had become the owner, for Ferrell's life, of the equity of redemption, and that, consequently, he had become the owner of all the purchase-money indebtedness which was still the property of Ferrell, after deducting therefrom the balance due on the mortgage. We say, "the balance," because the sum we are considering was that part of the purchase money which was evidenced by the note first due,—the note transferred to Molton,—and the proven age of Mr. Ferrell shows, according to the tables of mortality, the amount of that note was not in excess of the value of his life estate.

His expectation of life was then about 14 years. The sum paid by Walter Bros. in excess of the balance due Molton belongs, and should have been paid by them, to D. S. Troy.

Errors have been assigned severally by Walter Bros. and by D. S. Troy. The former—Walter Bros.—can take nothing by their appeal. The chancellor erred in withholding from appellant, Troy, the relief indicated above. There were no questions raised which require us to go further than this. The decree of the chancellor is reversed, and a decree here rendered ordering that Walter Bros. pay to D. S. Troy the balance of the purchase-money note first due—the note which was placed with Molton—in excess of the sum due on the Molton mortgage at the time of the sale; but they will be allowed a further credit of the expense attending the foreclosure sale, and they will be charged with all proper interest. A lien is declared on the land, secondary to that decreed in favor of May, for the enforcement of this part of the decree. A reference to the register is ordered, that he may state the account on the basis here indicated, and report his finding to the chancellor. The decree of the chancellor, apportioning the costs of this litigation, is modified to the following extent: The chancellor decreed that D. S. Troy pay all the costs created by the interposition of his claim. It is now ordered and decreed that one-half of the costs that have been incurred in the assertion and resistance of Troy's claim be taxed against him, and the other half against Walter Bros. We make this division, because Troy claimed more than he was entitled to, and Walter Bros. contested his right to anything. Let the costs of appeal be paid by Walter Bros. Reversed, rendered in part, and remanded.

(45 La. Ann. 974)

#### STATE v. NASH. (No. 1,276.)

(Supreme Court of Louisiana. June 14, 1893.)

#### CRIMINAL LAW—REVIEWING EVIDENCE ON APPEAL—ADMISSIONS.

There having been no note of evidence taken at the trial, except that which counsel has summarized and incorporated in a bill of exceptions, we feel bound, under repeated decisions, to accept the judge's statement in case of any variance between them; and, the statement of the judge being that the confession of the accused was free and voluntary, it was admissible in evidence.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge.

Sarah Nash was convicted of petit larceny, and appeals. Affirmed.

G. W. Burgess, for appellant. Geo. K. Favrot, Dist. Atty., for the State.

WATKINS, J. The accused, having been convicted of petit larceny, and sentenced to six months' imprisonment in the state peni-

tentiary, prosecutes this appeal, relying for relief upon a single bill of exceptions taken to the ruling of the trial judge, admitting in evidence certain confessions; her objection being that they were not freely and voluntarily made, but "extorted under duress, and threats of criminal prosecution. The defendant's bill of exception states that the pertinent evidence was, in substance, that the prosecuting witness had called her out of his house, and took her in custody, having caught her stealing chickens, stating that he was going to put her in jail, whereupon the said accused made statements admitting the theft, and promising to pay the prosecutor for the stolen property if he (the prosecutor) would keep her from going to jail. But the trial judge appends to the bill of exceptions the following statement of the proven facts of the case, viz.: "It was proven by the state, by Richard Williams, that he had caught the accused in his yard, and in possession of four chickens; that she had fled, but was pursued and caught; and, while in the possession of the prosecuting witness, who was not an officer, she offered to pay for the chickens. All this was voluntary on the part of the accused." The judge's ruling was undoubtedly correct. There was not, in our opinion, the least show of force or coercion used by the prosecutor to superinduce the confession made. The accused was caught in the actual possession of the property that had been recently stolen, and the captor was not an officer of the law. We simply adhere to a general principle announced in many cases,—that we feel bound to accept as our guide the statement of facts that is furnished by the judge, in case of there being any doubt as to the facts proved at the trial; the testimony not having been reduced to writing, and appended to a bill of exceptions. *State v. Joseph*, 45 La. Ann. —, 12 South. Rep. 934. Judgment affirmed.

(45 La. Ann. 979)

**STATE v. COVINGTON. (No. 1,275.)**

(Supreme Court of Louisiana. June 14, 1893.)

**COMPETENCY OF JUROR—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SUFFICIENCY OF MOTION.**

1. A juror who states that he has formed an opinion as to the guilt of the accused, from talking with a witness for the state, but that he can disregard that opinion, and render a verdict in accordance with the law and the testimony adduced on the trial, is a competent juror. *State v. Dugay*, 35 La. Ann. 327, affirmed.

2. In a motion for a new trial the unsworn statement of the accused as to newly-discovered evidence is not sufficient. It must be corroborated. The granting of new trials is largely within the discretion of the trial judge, which will not be disturbed, unless manifestly erroneous. *State v. Washington*, 36 La. Ann. 341, affirmed.

(Syllabus by the Court.)

Appeal from district court, parish of Union.

C. D. Covington was convicted of unlawfully selling intoxicating liquors, and appeals. Affirmed.

Ridd & Vanhook, for appellant. I. D. Avvutt, Dist. Atty., for the State.

McENERY, J. The defendant was indicted for the offense of retailing intoxicating liquors without a license, convicted, and fined the sum of \$310. He has appealed. He complains of the impaneling of an incompetent juror, and the overruling of his motion for a new trial on the ground of newly-discovered evidence.

The juror against whom the objection is urged answered on his voir dire, and stated he had formed an opinion from conversing with one of the witnesses for the state, but that he could lay aside the opinion he had formed, and decide the case on the law and the evidence adduced on the trial. The defendant had exhausted his challenges when he challenged the juror for cause, which was overruled. The answer of the juror disclosed that he was a competent juror; that he was free from bias or prejudice, and his mind in that condition to impartially try the defendant. In the case of *State v. Dugay*, 35 La. Ann. 327, this court said: "Our last researches on this point were suggested in the case of *State v. DeRance*, 34 La. Ann. 186, in which we took occasion to make a thorough review of previous opinions on the subject, and in which we reaffirmed the rule sanctioned in numerous cases, under which jurors who had formed and expressed opinions as to the guilt or innocence of the accused, but who asserted that they felt able to do impartial justice according to the law and evidence in the case, were ruled to be competent jurors. We now distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be clearly understood by the profession." *State v. Dent*, 41 La. Ann. 1083, 7 South. Rep. 694; *State v. Dorsey*, 40 La. Ann. 740, 5 South. Rep. 26; *State v. Ford*, 42 La. Ann. 255, 7 South. Rep. 696; *State v. Garig*, 43 La. Ann. 365, 8 South. Rep. 934. The answers of the juror bring him within the ruling of the cases cited.

The motion for a new trial on the ground of newly-discovered evidence is supported only by the unsworn statement of the defendant. The mere statement of the accused that he did not know of the testimony is insufficient. This statement must be corroborated. The object of the newly-discovered evidence was to show that the defendant had sold the whiskey six months before the filing of the bill. This was a fact within his own knowledge, and therefore no ground for a new trial, as he could have stated the fact as a witness. The granting of new trials is largely within the discretion of the trial judge, which will not

be disturbed unless manifestly erroneous.

The other ground, that the juror Manning was a nephew of the witness upon whose testimony the conviction was had, is without merit. Judgment affirmed.

# **RICHMOND & D. R. CO. v. CHANDLER.**

(Supreme Court of Mississippi. April 3, 1893.)

## **ACTION AGAINST RAILROAD COMPANY — KILLING LIVE STOCK — DAMAGES — EVIDENCE — INSTRUCTIONS.**

1. In an action against a railroad company for the alleged killing of plaintiff's bull, evidence of the blood and excellence of the sire and dam of the animal killed are admissible, but cannot fix its market value.

2. In such action an instruction that if the evidence showed that the bull was worth \$300 the jury must find for plaintiff is erroneous, since it requires defendant to pay the value of the bull, without regard to its agency in killing the same.

3. An instruction which makes the company liable if the conductor made no effort to stop his train, and did not sound his whistle, is erroneous, where there is no evidence that the animal was killed by the train.

Appeal from circuit court, Lowndes county; L. E. Houston, Judge.

Action by Leonidas Chandler against the Richmond & Danville Railroad Company for negligently killing plaintiff's bull. Judgment for plaintiff. Defendant appeals. Reversed.

A. F. Fox, for appellant. L. D. Landrum, for appellee.

**WOODS, J.** The blood and excellence of the sire and dam of the animal alleged to have been killed were circumstances merely for the jury's consideration in passing upon the evidence which was offered to prove the market value of the bull for whose death a recovery was sought. These circumstances were admissible in evidence, but they did not, and could not, fix the market value of the bull. Neither the owner of the animal, nor Archer, his manager, attempted to state his market value. The jury might have inferred his value from the testimony of other witnesses, but no verdict for \$150 could have been entered on the evidence of such other witnesses.

The third instruction for appellee is erroneous. By it the jury is told that if the evidence showed the bull was worth \$300 they must find for the plaintiff. Under this instruction the defendant was to be made to pay the value of the bull, without regard to the agency of the railroad in the manner of his taking off.

The eighth instruction for the appellee is also erroneous. It makes the company liable if the conductor made no effort to stop his train, and did not sound the whistle. It may be the duty of the trainmen to stop trains and sound signals, or it may not be. There is no evidence that the bull was killed by the train. Reversed.

(99 Miss. 315)

# **MARTIN et al. v. MARTIN et al.**

(Supreme Court of Mississippi. Oct. Term, 1891.)

## **WILLS—DEVISE TO WIDOW — RIGHTS OF REMAINDER-MEN.**

A clause in a will provided for the payment within 60 days after testator's decease of \$5,000 in money to his wife, and directed the retention of this amount by the wife for her sole use and benefit during her life, or until she married again, in both of which cases it was to revert to his children. Testator was a man of wealth, and this was the principal provision for his wife. *Held*, that the wife was entitled to a payment of the bequest without giving security for the protection of the children's interest, even though she was insolvent, and her habits were such as to make it certain that the fund would be squandered.

Appeal from chancery court, Copiah county; H. C. Conn, Chancellor.

Bill in equity by C. C. Martin and others against A. G. B. Martin and R. N. A. Martin, executors of the estate of B. F. Martin, deceased, and Eleanor J. Martin. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The bill alleged that complainants are the children and heirs at law of said B. F. Martin. That prior to his death the said B. F. Martin executed his will, in which he appointed said A. G. B. Martin and R. N. A. Martin his executors, who probated said will, and letters testamentary were granted them. That, among other devises and bequests in said will, is the following: "I give, devise, and bequeath to my beloved wife, Eleanor Jane Martin, all my stock cattle, (not including oxen,) cows, calves, etc.; all my stock hogs; my dark iron gray mule, named Jane; a good horse and buggy, to be provided for her by my executors hereinafter named; and also \$5,000 in money, to be paid to her by my executors hereinafter named, within sixty days after my decease; to have and to hold the same to her for life, provided she shall not marry any one else. In case the said Eleanor Jane shall marry any one, then all the property hereby devised to her shall revert to my sons and daughters. Should she remain unmarried, she shall retain the said property to her sole use and benefit during her life, and at her death the same shall revert to my children." That the said B. J. Martin was the widow of the said B. F. Martin, and that under the provisions of the will the said Eleanor J. only took a life estate at most in said property; and that said complainants, as the children of said B. F. Martin, are entitled to the remainder of said property after her decease. Yet complainants are informed and believe, and upon such information and belief charge the fact to be, that said executors are about to pay over said \$5,000 to said Eleanor without requiring of her any security for the preservation of said fund. They further charge that the said Eleanor is insolvent, and that her habits are such that, if said money is paid over to her without

security, it will be squandered, and complainants left without remedy. Complainants pray that said executors, before paying over said money to said Eleanor J., require her to give security for the forthcoming of said fund at her marriage or death. Defendants demurred to this bill on the following grounds: (1) Because there is no equity on the face of the bill. (2) The will of B. F. Martin does not create a trust fund in the \$5,000 devised to Mrs. Martin. The will gives to Mrs. E. J. Martin the exclusive title and interest, possession and enjoyment, of said \$5,000 in money, and requires of her no bond for its enjoyment; and complainants have no such interest in said money, under said will, as authorizes them to demand the relief prayed for in the bill. The demurrer was sustained by the court below, and the bill dismissed, from which decree complainants appealed.

J. S. Sexton and Willing & Ramsey, for appellants. R. N. Miller, for appellees.

WOODS, J. There is no dispute between counsel for the respective parties as to the law governing gifts or bequests of personal property or money with remainder over. It is agreed perfectly that a bequest of money for life to one, with remainder over to another, is a bequest of the interest derivable from the money, and that the legatee for life, upon proper showing made that the bequest will be wasted and lost, may be required to give security for the protection of the remainder-man's interest. But it is further asserted by counsel for appellees that any intention of the testator to pass the bequest itself to the legatee for life, and to require no security from such legatee for the protection of the remainder-man's interest, will make such bequest exceptional, and relieve it from the operation of the general rule agreed upon by counsel, as above stated; and this assertion of the limitation on or modification of the general doctrine is altogether correct. We have, then, a pure question of testamentary construction, stripped of entangling legal controversy. Does the bequest to the testator's wife fall within the exceptional class of cases? Was it the intention of the testator to have the \$5,000 paid over in specie to the widow? Was it his design to permit her to use this bequest without giving security for its absolute preservation? We have no hesitation in answering all these questions affirmatively. First. The executors are directed to pay \$5,000 in money to the widow within 60 days after the death of the testator. Second. The will declares that the widow shall retain the property devised to her, to her sole use and benefit during her life, if she shall remain unmarried. Third. The bequest of \$5,000 in money is the principal provision made for the support and maintenance of the widow by the will of her husband,—a man of for-

tune,—as plainly appears from the will itself. We are clearly of opinion that the bequest of \$5,000 in money is to be paid to the widow without security from her. This view of the case conclusively determines the pending controversy, and we are not required to go further. We are not to be understood as making any intimation of opinion touching any supposed superior estate in the personal property and money bequeathed to the widow. In any aspect, she must receive the \$5,000 without security, and this is the extent of the present determination. The decree of the chancery court is in accordance with these views, and it is therefore affirmed.

(69 Miss. 231)

McLEOD, Collector, et al. v. STATE.  
(Supreme Court of Mississippi. Oct. Term, 1891.)

#### OFFICIAL BONDS—SIGNATURE.

Code 1880, § 19, provides that the word "bond," as used in the Code, shall embrace every written undertaking for the payment of money subscribed and delivered by the party making it, whether sealed or unsealed. Section 994 abolishes private seals, and section 996 declares the bonds of all public officers valid and obligatory on all signers, without a seal. *Held*, that where an officer writes his name in the body of an instrument, which is delivered and accepted as his official bond, the same is valid as such, notwithstanding the omission of a final signature.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by the state against C. H. McLeod and others to recover taxes collected by McLeod as collector. Judgment for plaintiff. Defendants appeal. Affirmed.

C. H. McLeod, one of the appellants, was sheriff and tax collector of Sunflower county for the years 1888 and 1889, and as such was required to give bond, also, as collector of the taxes to accrue to the board of levee commissioners for the Yazoo, Miss., delta. With the intention of executing that bond, he obtained a printed blank form, and filled up the blank spaces in it in his own handwriting, inserting his name in two places in the body of the bond; and it was presented to his co-complainants in that shape, who signed it as sureties, leaving the first line at the end of the bond, and above their signatures, for the signature of said McLeod. Through inadvertence, said McLeod failed to sign the bond, and, without his signature, it was approved and filed in the office of the clerk of the chancery court of said county. McLeod took and subscribed the oath required, and he thereafter acted as collector of the taxes due to said board of levee commissioners. This suit was brought against said McLeod and his sureties on that bond to recover for the failure of said McLeod to pay over certain taxes which he had collected for said levee commissioners for the year 1889. McLeod filed the plea of non est factum, and the sureties filed several pleas, to



which appellee demurred. The court overruled the demurrers, and appellee amended its declaration, to which appellants demurred. The court overruled the demurrer. The appellants, principal and sureties, joined in filing the plea of non est factum, verified by the affidavit of McLeod. Appellee then moved for a judgment against the sureties who joined in the plea, because they had not sworn to it. The appellee then offered the bond in evidence, to which appellants objected because it did not appear to be signed by McLeod. The objection was overruled. It was admitted that all the appellants signed the bond, except McLeod, and for the purpose of enabling said McLeod to qualify as collector of taxes for said board of levee commissioners. The sureties sought to prove that the several sureties signed the bond on condition that said McLeod was to sign it, but the court refused to permit such proof. They then asked permission to file a special plea to that effect, which the court refused to allow. The court gave a peremptory instruction to find for the appellee. The jury returned a verdict in accordance, and judgment was entered against McLeod and his sureties, from which they appeal.

Campbell & Starling and Orrick & Baker, for appellants. Wynn, Thomas & Griffin, for the State.

COOPER, J. It is not intended by section 19<sup>a</sup> of the Code to define what a bond is, but to provide that the word "bond" shall embrace, in all cases where used, such instruments as are named in that section. It does embrace all such instruments by virtue of this section. It may embrace others by reason of the general law or specific provisions of other statutes. The bond sued on is the bond of McLeod, and of those who subscribed it as his sureties, by virtue of sections 994 and 996 of the Code.<sup>3</sup> McLeod wrote the bond, and his name twice appears in the body thereof, written by him.

<sup>1</sup>"Sec. 19. The word 'bond' shall embrace every written undertaking for the payment of money, or acknowledgment of being bound for money, conditioned to be void on the performance of any duty or the occurrence of anything therein expressed and subscribed, and delivered by the party making it, to take effect as his obligation, whether it be sealed or unsealed; and when a bond is required by law an undertaking in writing, without seal, shall be sufficient."

<sup>3</sup>"Sec. 994. Any instrument of writing hereafter made and delivered by any private person, without any seal or scroll, or other semblance or representation of a seal, shall be operative according to the intent of the maker, as expressed in the writing, in the same manner, and to as full an extent, as if the seal of the maker was thereto affixed." "Sec. 996. The bonds of all public officers, and all bonds in any legal proceeding, shall be valid and obligatory on all the signers, without a seal or representation of a seal, in the same manner as if duly sealed."

True, he says that he did not intend his name, as written, to be his final signature or subscription thereto; but he testifies that the bond, as it now appears, was delivered by him as his official bond, and accepted as such by the approving authorities. He intended the bond, as written by him, to be operative; and when this appears, and the name appears in the instrument, written by the party, such signature, adopted by the final delivery, intended as such, is such an authenticating signature as discloses the purpose of the obligor. Affirmed.

(69 Miss. 294)

KINGSLAND & DOUGLAS MANUF'G CO.  
v. MASSEY et al.

(Supreme Court of Mississippi. Oct. Term, 1891.)

LIEN ON MACHINERY SOLD—WHEN ARISES.

Where machinery is sold for a mill on the representation of the buyer that there is no lien on the mill or lot, and with the agreement to give a mortgage to secure the purchase price, the sellers are entitled to a lien, under Code 1880, § 1378, on the mill, machinery, and lot, when the buyer refuses to give them a mortgage, and they discover that the property is incumbered.

Appeal from circuit court, Yalobusha county; James T. Fant, Judge.

This is a proceeding by the Kingsland & Douglas Manufacturing Company against J. O. Massey and Fulmer, Thornton & Co. for the enforcement of a lien on certain property described in their petition. The petition recites that on August 26, 1890, petitioners sold and delivered to J. O. Massey an engine boiler and cotton press, and that Massey represented to appellee's agent, at the time the machinery was sold to him, that there was no lien of any kind upon the mill and outfit and lot upon which it was situated, and owned by Massey, and upon which it was desired to make improvements to the amount of the order herein made; and that it was agreed that Massey should, by mortgage on said mill, lot, and machinery sold, secure the purchase money, and that the machinery was located on said lot; that since the location of said machinery Massey refused to execute the mortgage as agreed, and then for the first time informed petitioner of a prior lien on the mill and lot given to Fulmer, Thornton & Co.; and that Fulmer, Thornton & Co. were about to foreclose their mortgage. Petitioner claimed a lien, under Code 1880, § 1378, on the mill, the machinery, and lot for the price of the machinery furnished, as "material furnished about the erection, construction, alteration, and repair" of the mill, and prayed that the lien be enforced. To this petition defendants demurred upon the ground that the petitioner did not show that it had any lien on the property, or any part of it. The demurrer was overruled, and the defendants declined

to plead further. Judgment was rendered against them, and they appealed. Affirmed.

J. H. Watson, for appellants. Noel & Tackett, for appellee.

WOODS, J. The vice of the argument of counsel for appellants is that it only reaches a part of the question raised by the demurrer to the petition. The legal principle propounded by counsel is indisputably correct. If articles of personal property are sold to a person, just as any other articles would be sold him on his general credit, to be used and treated and further disposed of at the pleasure of the buyer, such articles would not be subject to a mechanic's or material lien in favor of the vendor; but this proposition does not meet, and cannot determine, the question presented by the petition to which appellant's demurrer was interposed. The petition alleges, among other averments, that at the time the machinery was ordered Massey represented to the petitioner that there was no lien of any kind upon the mill and outfit and lot upon which the same was situated, owned by Massey, and upon which he desired to make improvements to the amount of the order herein made and filled by petitioner; and that it was understood and agreed that Massey should execute a mortgage upon the machinery so purchased, and upon the lot upon which the same was located, in order to secure the indebtedness thereby incurred to petitioner. Clearly, these averments of the petition show that the machinery was not sold as mere personalty, on the general credit of Massey, to be used and dealt with at his pleasure. On the contrary, they show a sale of fixed machinery, to be added to a mill already erected and in operation, upon a certain lot, and for a particular purpose; and on this state of facts it must be held the vendor has a lien for the purchase money. And the facts alleged show further that Massey represented the mill and lot as free from incumbrance, and that he agreed to execute a mortgage to secure the payment of the price of this machinery; whereas, in fact, the mill was already under mortgage to the amount of about \$13,000, and whereas Massey refused to execute the mortgage to appellant, as agreed, after he obtained possession of the property so sold him by petitioner. These facts, we say, do not militate against the correctness of the views we entertain; rather, they greatly strengthen them. The mortgage agreed to be given was but security, additional to or in lieu of the lien the petitioner already had, and in no way injuriously affected that lien, seeing Massey, as shown in the petition, was guilty of gross misrepresentation and fraud in obtaining possession of the property, and seeing, too, that he utterly refused to give the mortgage as agreed. On the whole case, the judgment below was right. Affirmed.

(161 Ala. 315)

HAYNES, Sheriff, et al. v. McRAE.

(Supreme Court of Alabama. May 18, 1893.)

WRONGFUL ATTACHMENT—FAILURE TO CALL WITNESSES—CONSIDERATION BY JURY.

In trespass for attaching goods, which plaintiff alleged and testified that he had bought from the attachment debtors, the fact that two members of the debtor firm were present as witnesses, but were not examined, cannot be considered by the jury as an unfavorable circumstance against plaintiff, since the witnesses were subject to the call of either party, and there was nothing to show that their testimony would have been other than cumulative.

Appeal from circuit court, Lowndes county; John Moore, Judge.

Trespass by F. D. McRae against W. E. Haynes, sheriff of Lowndes county, and the sureties on his official bond, to recover damages for the wrongful seizure of a stock of goods. There was judgment for plaintiff, and defendants appeal. Affirmed.

There was only one assignment of error, and the facts having reference thereto are sufficiently stated in the opinion.

Roquemore, White & Dent and Thos. H. Watts, for appellants. Tompkins & Troy, for appellee.

COLEMAN, J. Pollock & Co. sued out an attachment against McRae Bros., which was levied by Haynes (the sheriff) upon a stock of goods claimed by F. D. McRae. The present action was brought by F. D. McRae against the sheriff et al. to recover damages for an unlawful seizure of the goods. On the trial the plaintiff, F. D. McRae, testified as to the purchase of the goods from McRae Bros., the circumstances of the transaction, and the consideration paid by him for the goods. The two members of the firm of McRae Bros. were present in court as witnesses during the trial, but were not examined. In the argument of the facts before the jury the counsel for the defendant insisted that the failure of the plaintiff to introduce and examine the McRae Bros. was a circumstance of itself which the jury was entitled to consider as unfavorable to the plaintiff, etc. After the argument was closed the court, at the request of the plaintiff, charged the jury that "the fact of J. S. McRae and P. C. McRae not being introduced as witnesses cannot be considered against the plaintiff in this case." The giving of this charge is the only error assigned. There is a rule of evidence to the effect that a party who has it in his power to produce the best evidence, which he withholds, or leaves unexplained a material question of fact by an intentional withholding of explanatory evidence, such conduct may give rise to unfavorable inferences against him; but this rule of evidence does not apply when the evidence withheld is of no higher degree than that introduced, is not explanatory of any fact left in uncertainty, but is purely cumu-

lative. So far as is disclosed by the record, the testimony of the witnesses not examined would have been merely cumulative. They were present in court, and subject to the call of either party. The question is not distinguishable in principle from that decided in *Pollak v. Harmon*, 94 Ala. 420, 10 South. Rep. 156; *Bates v. Morris*, (Ala.) 13 South. Rep. 138. Affirmed.

(38 Ala. 532)

**TATNALL et al. v. ROME FOUNDRY & MACH. WORKS.**

(Supreme Court of Alabama. May 19, 1893.)

**ACTION ON NOTE—ACCEPTANCE AND NOTIFICATION—EVIDENCE.**

In an action on a note it appeared that plaintiff shipped defendants certain goods, and sent a draft, with the bill of lading attached, to a bank, for collection; that defendants refused to pay the draft, and wrote plaintiff, "Will accept goods on these terms only: 30 days, or 2% off at ten days, or a 30-day acceptance;" that on April 8th plaintiff replied, "Send us 30 days' acceptance;" that on April 9th defendant forwarded plaintiff the note sued on, and on April 10th defendants received from plaintiff a draft for acceptance at 30 days, dated April 9th; that defendants then wrote plaintiff that it [plaintiff] had not accepted their proposition, and that the goods were subject to its disposal; that after mailing this letter, on the same day, defendants received a telegram from plaintiff that the bank would release the bill of lading, and on the same day defendants received a letter acknowledging the receipt and acceptance of defendants' note. *Held*, that the evidence showed that plaintiff accepted the note, and duly notified defendants.

Appeal from circuit court, Calhoun county; Le Roy F. Box, Judge.

Assumpsit by the Rome Foundry & Machine Works against the partnership of Tatnall, Dorsey & Gould on a note executed by defendants to plaintiff. There was judgment for plaintiff, and defendants appeal. Affirmed.

Cooke & Cooke, for appellants. S. D. G. Brathers and W. J. Brock, for appellee.

COLEMAN, J. The litigation grew out of a shipment of hardware by the Rome Foundry & Machine Works, the plaintiff in the action, to the defendants, now appellants. The goods were shipped from Rome, Ga., to Piedmont, Ala. There is communication twice a day by mail between the two points, and communication by telegraph. The invoice of the goods was sent to appellants, but the bill of lading, with draft attached for the purchase price, was sent to the bank at Piedmont. The defendants could not get possession of the goods without the bill of lading. No question is raised as to the value of the goods, their condition, and arrival in due time at Piedmont. Nothing was said at the time of the purchase of the goods as to the time of payment, and

there is no evidence which establishes a custom or an implied agreement as to the time of payment. If there had been, the subsequent transactions between the parties were of such a character as to remove the transaction without the influence of any such implied understanding. The defendants' pleas were "fraud in obtaining the note sued upon," and "failure of consideration." To arrive at a just conclusion from the evidence it is necessary to observe with particularity the date of the respective transactions between the parties subsequent to the arrival of the goods and draft, with bill of lading, in Piedmont. On the 7th of April, 1891, the draft, with bill of lading, was presented to defendants for payment. Payment was refused, and on the same day the defendants wrote to plaintiff the following proposition: "Will accept goods on these terms only: 30 days, or 2% off at ten days, or a 30-day acceptance." On the 8th of April, plaintiff replied, "Send us 30 days' acceptance," etc. On April 9th the defendants forwarded to plaintiff the note sued on. On April 10th defendants received from plaintiff a draft for acceptance at 30 days, dated April 9th. On the same day, April 10th, after receiving the draft for acceptance, the defendants wrote plaintiff as follows: "Yours of the 9th at hand. You have not accepted our proposition of 7th inst. Therefore, goods are here, subject to your disposal." After mailing this letter, on the same day, defendants received a telegram from plaintiff, as follows: "Will wire bank at once to release bill of lading."—and on the same day (10th of April) a letter in which plaintiff acknowledged the receipt of defendants' note of April 9th, and acceptance of same. On same day defendants replied by letter to plaintiff, acknowledging receipt of telegram and letter, but stated they came "too late." Defendants declined to receive the goods, or pay the note. It will be seen from this statement that the plaintiff did not refuse to accept defendants' proposition of April 7th, but, by its card of April 8th, accepted the proposition of "30 days' acceptance." The defendants not only refused to comply with their own proposition, by sending the "30-days acceptance," but sent their note, dated April 9th, at 30 days. The evidence is entirely satisfactory to show that as soon as this note was received it was accepted, of which, both by telegram and letter received by defendants on April 10th, they were duly notified. We are satisfied that plaintiff was guilty of no laches; that it acceded to defendants' proposition as to the time and mode of payments, as soon as apprised of them. There is not the shadow of merit in the defense offered to plaintiff's demand, and the plaintiff was entitled to the general affirmative charge. It is unnecessary to consider the charges. Affirmed.

(101 Ala. 213)

H. B. CLAFLIN CO. v. RODENBERG et al.  
(Supreme Court of Alabama. May 17, 1893.)

ATTACHMENT — CLAIM OF THIRD PERSON — EVIDENCE — FRAUDULENT SALE — ASSIGNMENTS OF ERROR.

1. On the contest, by an attaching creditor, of a sale of the goods by the debtor to claimant, on the ground of undervaluation, evidence as to what claimant received for the goods on private sales afterwards made by him to third parties is inadmissible.

2. In such case, evidence of declarations of the debtor as to the valuation of the goods, made in the absence of claimant, were properly excluded.

3. An assignment that "the court erred in sustaining claimant's objection to questions showing the fraudulent intent of [the debtor] in disposing of goods. Pages 62 and 63," is too general to require review, where there are a number of questions on those pages to which the court sustained objections.

4. On a contest between an attaching creditor and one claiming the attached property under a bill of sale from the debtor, where it appears that there were more goods delivered to claimant than were mentioned in the bill of sale, the entire sale should be set aside.

Appeal from circuit court, Dallas county; John Moore, Judge.

Action in attachment by the H. B. Claflin Company against F. L. & H. Rosenberg, defendants, and Charles L. Rodenberg, claimant. From a judgment for claimant, plaintiff appeals. Reversed.

The evidence, as shown by the bill of exceptions, tended to show that F. S. & H. Rosenberg, who were doing a mercantile business in Selma, were on January 20, 1891, indebted to the H. B. Claflin Company in the sum of \$6,203.61. On the evening of January 20, 1891, they sold a part of their stock of goods to Charles L. Rodenberg in satisfaction of an indebtedness of \$1,500. These goods were sold and packed in boxes and a trunk between 7 and 9 o'clock that night, and were left in the store. At half past 10 o'clock the same night, F. S. & H. Rosenberg made an assignment for the benefit of their creditors to Rothchild, and at 1 o'clock on the same night plaintiff had levied an attachment on all of the goods in the store of F. S. & H. Rosenberg, including these goods which were packed in boxes and in the trunk, and which had been sold to Rodenberg. On the next morning the claimant demanded of the sheriff the goods which he had bought, and upon his making the necessary affidavit, and giving bond in double the appraised value of the goods, they were delivered to him by the sheriff. The claimant introduced in evidence a bill of sale from F. S. & H. Rosenberg for the goods purchased, to which bill of sale was attached an itemized statement of the goods, which was marked "Schedule A." This itemized statement amounted to \$1,603.45, and at the bottom thereof there was a receipt in full payment of the indebtedness of F. S. & H. Rosenberg to Charles L. Rodenberg. There was evidence for the plaintiff which tended to

show that there was attached to the same bill of sale another statement, called "Schedule A, Continued," amounting to \$605.02, at the bottom of which payment in full was acknowledged. There was also evidence introduced in behalf of the plaintiff that there were articles of embroideries and table napkins, varying in value, according to the testimony, from \$200 to \$600, which were delivered to the claimant, and which were not included in these itemized statements. The claimant himself testified that in the trunk there were some articles that were not included in the itemized statements, and at the same time there were not some articles that were included therein. The evidence of the claimant was that all of the goods he received from F. S. & H. Rosenberg were sold by him to one Jack Holtzman and Oberndorf & Ullman; that Oberndorf & Ullman paid the claimant \$1,250 for the goods they bought, which amount was 60 per cent. of the New York cost of the goods at the time of the purchase, on March 1, 1891; that Holtzman paid something over \$100 for the goods he purchased. Upon redirect examination of the claimant he was asked what was the amount received by him for all the goods sold to Jack Holtzman, and, "What amount did you receive for all the goods you sold to Oberndorf & Ullman?" The plaintiff objected to each of these questions, and separately excepted to the court's overruling its objection to each of them. On the examination of Robert Kennedy after he testified that he was the deputy sheriff who levied the attachment, at the suit of the H. B. Claflin Company against F. S. & H. Rosenberg, and that he delivered the goods claimed by the claimant to him, he was asked, on cross-examination, "What was the amount of the H. B. Claflin Company's debt claimed, when levy was made?" The plaintiff objected to this question, and duly excepted to the court's overruling its objection. Upon the introduction by the plaintiff of J. I. Blizzell, he testified that he was in the employ of the defendants in attachment, and assisted in packing the goods sold to Charles L. Rodenberg, in the boxes and trunk, and that, when he commenced to put up the goods, F. S. Rosenberg told him to value them, but that, after valuing a few, F. S. Rosenberg stopped him, saying he put too high a valuation on them. This witness was asked by the plaintiff if Fred. S. Rosenberg, while they were selecting and packing the goods, told him (witness) that claimant had agreed to receive goods for him. The court sustained the claimant's objection to this question, and the defendant duly excepted. The plaintiff then asked the witness if he knew of Fred. S. Rosenberg trying to get the claimant to receive goods for him, the said F. S. Rosenberg. The claimant objected to this question. The court sustained the objection, and

plaintiff duly excepted. The plaintiff then offered to prove by said witness "that, after the packing of the boxes, F. S. Rosenberg put in his pockets a number of billheads," but claimant objected to this evidence. The court sustained the objection, and the plaintiff excepted. There were several other exceptions reserved by the plaintiff to the court's sustaining the claimant's objections to the evidence sought to be introduced by this witness, but the assignments of error to these rulings render it unnecessary to notice them in detail. The assignment of error as to the sixth is in the following language: "The court erred in sustaining claimant's objection to questions showing the fraudulent intent of F. S. Rosenberg in disposing of goods. Pages 62 and 63." Upon the introduction of all the evidence the court, at the request of the claimant, gave the following written charges to the jury, to the giving of each of which the plaintiff separately excepted: (1) "The court never strives to force conclusions of fraud, and if all the facts in evidence in this case are susceptible of an honest intent, and without fraud, so far as Rodenberg (the claimant) is concerned, and that there was no reservation of benefit to F. S. & H. Rosenberg in the purchase of said goods, and that his was a bona fide debt, and that he received no more goods than were sufficient to pay his debt, then you will find a verdict for claimant." (2) "If the jury believe from the evidence that Rodenberg received other goods than those named in his bill of sale from F. S. & H. Rosenberg, yet that would not invalidate the sale to him, if the jury believe the purchase by him was fair and honest, and a reasonably fair sum paid for the goods." The plaintiff made a motion for a new trial, but it was overruled by the court, and the plaintiff duly excepted.

Pettus & Pettus and Dawson & Pitts, for appellant. G. A. Robbins and Craig & Craig, for appellees.

**HEAD, J.** The first and second assignments of error must be sustained. The sale of the goods by F. S. & H. Rosenberg to claimant was being assailed by the plaintiff on the ground of undervaluation. What claimant received for the goods on private sales made by him afterwards to third parties cannot be legal evidence, against the plaintiff, of their value. Such sales afford no test of value. To allow such evidence would be to allow a party to make evidence for himself.

The question asked Kennedy, "What was the amount of the H. B. Claflin Company's debt, claimed when the levy was made?" seems entirely immaterial and useless, and no doubt will not be asked again on another trial.

The matters proposed to be proved by  
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the witness Bizzell, covered by the fourth and seventh assignments of error, were not competent evidence against the claimant. They are declarations of Fred. S. Rosenberg against the interest of claimant, when the latter was not present to deny or explain them. It is the duty of a party excepting to make clear to this court the error insisted on. The question to witness Bizzell—if he knew of Fred. S. Rosenberg trying to get claimant to receive goods for him, the said Fred. S. Rosenberg—is too indefinite to enable us to determine whether it sought to elicit legal evidence or not.

The sixth assignment of error is too general and indefinite. There are a number of questions covered by pages 62 and 63 of the record, to which the court sustained objections. We are asked by this assignment to consider those "showing the fraudulent intent of F. S. Rosenberg in disposing of goods." The appellant should have pointed out to us the questions supposed to show such intent.

The first charge given at the instance of claimant is free from error. It but asserts the oft-repeated doctrine of this court in reference to sales of goods in payment of existing debts.

There is evidence tending to show that there were goods in the boxes and trunk delivered to claimant which were not mentioned in the bill of sale which was executed by the Rosenbergs to claimant at the time of the purchase, on the 20th day of January, 1891. The title to those goods, however, is not involved in the issue tried in this cause. The only goods claimed by the claimant, and for which he gave bond to try the right of property in, are those mentioned and described in the schedule to the bill of sale. But this feature of the transaction, nevertheless, raises an important inquiry touching the bona fides and validity of the sale. The bill of sale, which is set out in the record, has its well-defined legal effect, which could not be altered or varied by any other agreement, express or implied, made at the time, and resting in parol. Its effect is that the Rosenbergs sold to claimant the goods mentioned therein, and no other, in full payment and discharge of the entire indebtedness owing him by them; so that the moment the bill of sale was executed and delivered that indebtedness was discharged by the transfer of the goods therein conveyed. It matters not that those goods may have been worth less than the indebtedness, for by the contract of the parties the transfer of them was accepted in full payment. The debt was canceled as completely as if it had been paid in cash. That contract, the moment it was executed, resulting, as we have seen, in the cancellation of the indebtedness, became irrevocable and unalterable, as against the other creditors of the Rosenbergs. They could not then or thereafter lawfully deliver other goods to

the claimant in payment of that indebtedness; and if they did add to the goods mentioned in the bill of sale other goods, of material value, and deliver the same to the claimant, as and for payment of the said indebtedness, and if the claimant knew of such unlawful delivery, or afterwards ratified it by disposing of the goods so unlawfully delivered, as his own, the transaction was a fraud upon the other creditors, which authorized them to set aside the sale as to all the goods. Such a transaction is nothing less than a demonstration that the parties applied more of a debtor's goods in alleged payment of his debt than by law they were entitled to do, as against the rights of other creditors. It was, in effect, an attempt to change the terms of the written contract, revive the debt, and apply more goods to its payment; and all occurred at one and the same time, and as parts of one transaction. This they could not lawfully do. If done, its effect was to hinder, delay, and defraud the other creditors, and the title of the claimant cannot be sustained. The second charge, therefore, given at the request of the claimant, ought to have been refused. For the errors mentioned the judgment is reversed, and the cause remanded.

(98 Ala. 63)

#### BLACKBURN v. STATE.

(Supreme Court of Alabama. June 7, 1893.)  
HOMICIDE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH.

On an issue as to the admissibility of statements by deceased as dying declarations, the physician who attended deceased testified that he saw that the wound was fatal, and said to a third person, in the hearing of deceased, that "all the shot had gone to the hollow," on which remark deceased made no comment. Another witness testified to a conversation with deceased on the day of his death, in which the latter did not state who shot him, or what he expected to be the result of the injuries, and made no statement as to how he felt, except that "he was not suffering so much." *Held*, that it did not appear that the statements of deceased were made under a sense of impending death.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

John Blackburn was convicted of murder, and appeals. Reversed.

James S. Fuller, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. Two witnesses—Dr. Hill and J. B. Scott—were examined by the state preliminary to the admission of what are termed the "dying declarations" of the deceased. The substance of the doctor's evidence was that he was called to see the deceased, and in the presence of another party, who aided him, examined the wound, and came to the conclusion that it was fatal; that he said to the party assisting him, in the presence and hearing of deceased, that "all the shot had gone to the hollow;" that de-

ceased made no reply to this remark; that he did not ask witness what he thought would be the result of the injury, and made no statement about what he thought of his own condition. The witness Scott testified that he visited the deceased in the morning of the day the evening of which he died, (as he supposed, for they buried him the next day,) and had a conversation with him, in which he told him of an angry altercation which occurred between him and the defendant on the day he was shot, and when and how he was shot, about a half or three quarters of an hour afterwards; that in that conversation the deceased did not state who shot him, or what he thought would be the result of his injuries; that he did not say that he thought he would die or that he would get well, and made no statement to the witness how he felt, except, when asked by him, before he made the statement referred to, how he felt, he stated "that he was freer from pain, and was not suffering so much." It was also shown that deceased was much prostrated from the shock of the wound, and suffered greatly; so much so, that the physician when he visited him, and Scott afterwards, gave each a dose of morphine. On the foregoing preliminary proofs the court admitted in evidence, against the objection and exception of defendant, the statements of deceased to said Scott as dying declarations. The law in respect to the admissibility of such declarations has been so repeatedly discussed, and is so well settled by this court, as to require no necessity for an attempt to further elucidate it. We simply refer to some of the well-understood rules on that subject as applicable to this case. Such declarations are not admissible unless they appear to have been made under a sense of certain and impending death. It is not what the court which passes upon their admissibility may believe the character of the deceased was, for, although it may appear to the court, or to any one capable of thinking rationally, that there was no possible hope of recovery, yet the question aside from that is, what was the state of the declarant's mind when the declarations were made? Did he appreciate the fatal character of his injury, and were his declarations uttered under the sense and solemnities of impending dissolution? If so, then, "when the death of the deceased is the subject of the charge, and the circumstances the subject of the dying declarations," they may be admitted in evidence; otherwise not. *Walker v. State*, 52 Ala. 192; *Kilgore v. State*, 74 Ala. 7; *Ward v. State*, 78 Ala. 441; *Hussey v. State*, 87 Ala. 121, 6 South. Rep. 420. It will appear from the evidence of the physician that he said nothing to the deceased in respect to the character of his wound, nor did deceased say anything to him about it, or ask him any questions. The only thing that was said by the doctor that tended to show any intimation by him to deceased as to the character

of the injury was that he said in his presence to another party that the shot had all entered the hollow; but we are not sure deceased heard this remark, and, if he did, that it conveyed the impression to him that his injury was, on that account, fatal. When the witness Scott had the conversation with him, deceased said he was feeling freer from pain, and made no intimations at all as to whether he thought he would or would not recover. If he had supposed he was certainly going to die, he would very likely have said something about it. The very facts he detailed, his reticence on the subject of his condition, and that he expressed himself as feeling better, would seem to indicate that deceased was not yet in despair of recovery, especially when we remember that a party in his condition, incapable of reasoning and reflecting well on his own condition, is often hopeful until unconsciousness and death ensue. In the face of the scrutinizing caution with which the authorities admonish trial judges in the admission of such evidence, we are persuaded that the primary proofs in this case did not justify the admission of the conversation had between the deceased and the witness Scott as dying declarations.

Reversed and remanded.

(101 Ala. 247)

BAKER v. GRAVES et al.

(Supreme Court of Alabama. May 19, 1893.)

FORECLOSURE OF CHATTEL MORTGAGE — AMENDMENT TO BILL — NEW CAUSE OF ACTION — DEMURRER.

1. Where the assignee of a chattel mortgage brings an action to foreclose it, and to compel parties in possession of part of the mortgaged property to account for same, he cannot amend his bill by making his assignors parties, and alleging that they procured him to accept the assignment by fraudulent representations, and praying that it be declared void, and that they be required to refund to him the money paid therefor, since such amendment is variant from and repugnant to the bill.

2. Where a decree sustaining a demurrer is general, it will not be reversed because some of the grounds of demurrer are too general, since the decree will be referred to the ground of demurrer which is well assigned.

Appeal from chancery court, Lowndes county; John O. Foster, Chancellor.

Action by N. C. Baker against Willis Graves and R. E. Brinson to foreclose a chattel mortgage, which had been assigned to him by Pritchett & Merriwether. Plaintiff filed an amendment to his bill, making his assignors and one Graves defendants, in which he alleged his purchase of the mortgage was procured by the fraud of the latter and his assignors, and prayed that the assignment be held void, and the assignors be required to refund the purchase money. From a decree sustaining a demurrer to such amendment, plaintiff appeals. Affirmed.

J. C. Richardson, for appellant. Girard & Cook, for appellees.

STONE, C. J. As the assignee of the mortgage, the appellant filed the original bill for a foreclosure of the mortgage, and to compel the parties who had received, or who were in possession of parts of, the mortgage property, to account for the same. The amended bill avers that at the time of the assignment of the mortgage the assignors made to the appellant the representation that the landlord of the mortgagor had waived his lien for rent on the crops conveyed by the mortgage, and also introduces a senior mortgage, of which the appellant claims to be assignee, and avers that it is entitled to priority of payment. The only prayer for special relief in the amended bill is expressed in these words: "That the said Pritchett and Merriwether and McGrath be held and required to make good their representations hereinbefore stated, and that the transfer to this complainant of said mortgage be held fraudulent and void, and the said Pritchett and McGrath and Merriwether be required to refund to the complainant the amount of money paid by him to them for said mortgage, together with the interest thereon, and the damages which he has sustained thereunder." There were demurrers to the amended bill, and a decree rendered by the chancellor sustaining them, from which this appeal is taken.

1. The grounds of demurrer necessary to be considered are that the amended bill makes an entirely new case, and is a radical departure from the matter and cause of action stated in the original bill. Liberal as is the statute of amendments, and liberal as has been the judicial construction it has uniformly received, the right it confers is not without limit. Under the guise of an amendment there cannot be an entirely new case made, or a radical departure from the cause of action stated in the original bill. The purpose of the original bill was clear and well defined,—the foreclosure of the mortgage assigned to the appellant, and, in aid of it, an account of parts of the mortgage property which had passed into the possession of persons taking with notice of the mortgage. From this purpose the amended bill proposes to depart, and to make a new case, variant from and repugnant to that made by the original bill. The foreclosure of the mortgage is abandoned; the validity of the assignment to the appellant is assailed; and compensation from the assignors is sought to be recovered, because of representations which it is supposed convict the assignors of fraud. If the amended bill presented matter of equitable relief, it is apparent that it is repugnant to, and variant from, the matter of the original bill, introducing a wholly different cause of action and ground of relief. 3 Brick. Dig. p. 380, §§ 208, 209, 219.

2. A demurrer to a bill in equity "must set forth the ground of demurrer specially, and otherwise must not be heard." Code, § 3443.

Some of the causes of demurrer assigned, it may be, are too general, and could not be heard. The second, third, and fourth causes of demurrer assigned by the appellee Brinson specify with sufficient distinctness the objection to the amended bill we have considered. The decree of the chancellor is general, not stating the particular causes of demurrer which were sustained, and, if necessary, we would refer it to such causes as were well, and not to such as may be illy, assigned. The decree is affirmed.

(99 Ala. 639)

**CAPITAL CITY WATER CO. v. CAREY.**  
(Supreme Court of Alabama. May 19, 1893.)  
**MONEY HAD AND RECEIVED—ACTION TO RECOVER**  
**—SUFFICIENCY OF EVIDENCE.**

Where, in an action to recover of a water company the amount involuntarily paid by plaintiff in settlement of a bill for water consumed, it appears by the undisputed evidence that plaintiff permitted by leakage in her water pipes an unnecessary waste of much more water than she paid for, at the usual and customary rates, she is not entitled to recover.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Action by Jennie A. Carey against the Capital City Water Company for money had and received. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

J. M. Falkner, for appellant. Gordon McDonald, for appellee.

**HEAD, J.** Action to recover \$14.50 money had and received, brought by appellee against appellant. Tried by the court below without a jury, and judgment for the plaintiff. On April 1, 1892, defendant presented to plaintiff its bill for water rent, amounting to \$21.50. The bill consisted of an advance charge of \$2.50 for the privilege of using 20,000 gallons of water during the quarter ending April 1st, \$1.50 for meter rent, and \$17.50 for excess of water consumed over 20,000 gallons, being 70,461 gallons, at 25 cents per 1,000. Plaintiff objected to the bill, and placed the matter in the hands of her attorney, Gordon McDonald, to adjust and settle with the defendant on the best terms he could obtain. After several interviews, the company agreed to reduce the bill to \$14.50, and McDonald paid it for plaintiff at that sum; but he claims he paid it under protest, and plaintiff insists upon a state of facts to show the payment was, in law, involuntary. The defendant's version is that the reduction and payment were expressly agreed on as a compromise and settlement of the whole dispute and threatened litigation. We do not find it necessary, however to decide this question, since it is most manifest the plaintiff was not

entitled to recover, for other reasons. It appears the defendant was under a contract with the city of Montgomery touching its duties in reference to furnishing water to the inhabitants of the city. The fifteenth section of that contract is as follows: "That the domestic rates for water furnished under this contract to citizens of Montgomery shall never exceed the average rates paid in other cities of similar size. The present basis of rates shall be six dollars per annum for building of five rooms and less, and one dollar per annum for each additional room; other rates to be proportionate to these, as above ordained. Said rates shall be such as to allow for the use of meters by consumers if they so elect." Plaintiff's house had eight rooms. Much of argument is addressed to us upon the proper construction of the several provisions of this clause of the contract touching the right of defendants to charge for water at "meter rates" or "fixture rates," and what uses of water are comprehended within the term "domestic" or "domestic use," which, under the practically undisputed evidence, we do not think it necessary to consider. It is clear, under the most favorable construction of the contract to the plaintiff, the payment of the prescribed charges only entitled her to consume so much water as was reasonable and necessary to all her domestic uses; and beyond that she could not suffer water to go to waste on her premises without incurring liability to defendant to pay its reasonable value. The evidence shows that from December 31, 1891, to February 12, 1892, she suffered her pipes on her premises to leak to such an extent that a waste resulted of 80,000 gallons or more over and above her ordinary and necessary consumption. The defendant, upon discovering or suspecting the leakage in December, put in a meter; and on February 12, 1892, it was thereby disclosed that the average use of water during the preceding 40 days was 2,080 gallons per day. The meter was read three days later, which was manifestly after the leaks had been repaired, and the consumption was found to be 19 gallons per day; the next day it was 24 gallons; 30 days later it showed an average of 30 gallons per day, and on May 2d the average had been 57 gallons per day. Thus we have, as actually detected, an unnecessary waste of over 80,000 gallons within 40 days. The plaintiff was charged with only 70,461 gallons as excess, amounting, at the usual and customary charges, as shown by the evidence, to \$17.50. The plaintiff paid only \$14.50 in settlement of the whole bill, and now brings the equitable action of money had and received to recover that. There is no equity in the case for the plaintiff, and judgment will be here rendered in favor of the defendant.

Reversed and rendered.



(191 Ala. 205)

## GREEN v. SNEAD.

(Supreme Court of Alabama. May 25, 1893.)

## CHATTEL MORTGAGE — VALIDITY — INSERTION BY MORTGAGEE OF EXCESSIVE AMOUNT.

Where a mortgagor and mortgagee agree that the latter may insert in the mortgage the true aggregate amount of several specified items, the respective amounts of which are fixed, but not known to them at the time, and the latter inserts a greater amount than such aggregate, such mortgage is void, though the mortgagee acts in good faith.

Appeal from circuit court, Marshall county; John B. Tally, Judge.

Action of detinue by John H. Snead against Andrew H. Green to recover possession of certain personal property claimed by plaintiff by virtue of a chattel mortgage executed to him by defendant, in which there was a verdict for defendant. From an order setting aside the verdict and granting a new trial, defendant appeals. Reversed and rendered.

Brown & Street, for appellant. Lusk & Bell, for appellee.

**McCLELLAN, J.** The evidence is free from conflict that Green was authorized to fill the blank left in the mortgage executed by Snead to him by inserting therein the amount of the former's debt against the latter after deducting therefrom the proceeds of certain two bales of cotton, and adding thereto the costs of a former suit between the parties. There is conflict in the testimony as to whether the mortgagee also had authority to add to the debt and costs attorneys' fees incurred by him in the former suit, and insert the aggregate of all these items in the blank space left in the instrument. For the purposes of this appeal, however, it will be conceded that the mortgagee was authorized to include and insert as a part of the amount intended to be secured the sum paid his attorney for services in the previous litigation. A satisfying preponderance of the evidence fixes the amount of the debt balance at \$125. It was shown without conflict that the attorney's fee in question was \$18, and the costs of the former suit amounted to \$8.65. The total of these sums is \$141.65. The balance of the debt which the mortgagee claimed to be due was \$138.24. Adding to this the attorney's fee and court costs, the total is \$164.89. No phase or tendency of the evidence shows a greater total than this, and this sum \$164.89, on the aspects of the testimony most favorable to the plaintiff, marks the extremest limit of the amount he was authorized to insert in the instrument. The amount actually inserted by or for him was \$167.10,—\$2.21 in excess of his authority, if the evidence in his own behalf is to be taken as true, and \$25.45 in excess of the amount which, according to a preponderance of the testimony, he was authorized to insert in the blank.

The general proposition that any material

alteration of an instrument, after its execution, without the maker's consent, avoids it, and discharges him from all obligations depending upon it, is not controverted in this case. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 South. Rep. 498; *Anderson v. Bellenger*, 87 Ala. 334, 6 South. Rep. 82. Nor can it be doubted in principle or upon authority that a material, and, as between the original parties to the instrument, vitiating, alteration may consist in the filling of a blank, which the promisee is authorized to fill in a certain way, by the insertion therein of matter not covered by the authorization. 1 Amer. & Eng. Enc. Law, p. 518; *Toomer v. Rutland*, 57 Ala. 379. And as any change of the amount intended to be evidenced by a writing, whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed is a material, and therefore vitiating, alteration, (1 Amer. & Eng. Enc. Law, p. 508,) so, in principle, where the amount is left blank, and the promisee is authorized to insert a given sum, or the true aggregate of several specified items, the respective amounts of which are fixed, but not at the time known to the parties, and he inserts a different amount, as here, in excess of the true aggregate of all the items intended to be embraced, the like vitiating consequences must ensue. The court below confined the application of these principles to cases in which the alteration is made with a fraudulent intent, and, finding no such intent to have actuated the plaintiff in this instance, held that the mortgage was a valid security for the amount really due, notwithstanding a different and excessive amount had been inserted in it. The distinction is not well taken. The question of intent is not involved. As is well said by counsel: "The motive with which the change is made, or the unauthorized filling of the blank is done, is not material. It is not because the thing done is actual fraud, but because a contrary rule would open too great a door for fraud;" and because, we may add, that the alteration changes the legal identity of the paper, and causes it to speak a language differing in legal effect from that which it originally spoke,—a result which would ensue however pure the intent with which the alteration was made, that the law holds the instrument, as between the original parties and those nominally acquiring rights under it with notice of the alteration, to be null and void for all purposes. 1 Amer. & Eng. Enc. Law, pp. 518, 520; *Glover v. Robbins*, 49 Ala. 219; *Toomer v. Rutland*, 57 Ala. 379; *Montgomery v. Crossthwait*, 90 Ala. 573, 8 South. Rep. 498. Where the alteration or unauthorized filling of blanks is free from all covinous intent, the result of an honest mistake or miscalculation, it may be that the promisee can recover on the original consideration. He certainly could not do even this if he made or consented to the change for any fraudulent purpose. 1 Amer. & Eng. Enc. Law, p. 526;

*White v. Hass*, 32 Ala. 430. But here the action is not on the original consideration for which the mortgage was executed, but the right of recovery—the title asserted by the plaintiff in this action of detinue—depends upon the validity of the paper itself, which, in legal contemplation, ceased to be the instrument which the defendant executed the moment it was altered as shown by the uncontroverted evidence; and its emasculation is none the less complete because of the absence of evil intent on the part of the plaintiff in committing the act which destroyed it. The evidence not only authorized the jury to find for the defendant, but it showed without conflict or room for adverse inference that the muniment of title upon which the plaintiff relied for recovery was utterly infirm and invalid, and hence the jury could not have found other than they did under the law of the case. It is clear that the trial court erred in setting aside the verdict and granting a new trial. The judgment to that effect is reversed and annulled, the motion for new trial is overruled and denied, and the verdict and judgment for defendant as returned and rendered in the court below is left in full force. Reversed and rendered.

(101 Ala. 297)

**KEYLAND et al. v. KEYLAND et al.**  
(Supreme Court of Alabama. May 19, 1893.)  
CLAIMS AGAINST DECEDENT'S ESTATE—EVIDENCE.

On exceptions to the payment of certain notes by the executors of deceased, an affidavit purporting to have been signed by him, and acknowledging his liability, is not self-proving though containing a certificate of a notary to its subscription and verification, and, in the absence of proof that it was signed by deceased, is inadmissible in evidence.

Appeal from probate court, Mobile county; Price Williams, Jr., Judge.

Elizabeth Keyland and others excepted to the allowance by the probate court of the payment of certain notes by William Keyland and others as executors of the last will and testament of William Keyland, deceased. The exceptions were overruled, and they appeal. Reversed and remanded.

On June 1, 1876, William Keyland executed and delivered to his mother, Sarah McStraffick, the following note: "\$1,000.00. Mobile, Ala., June 1st, 1876. On demand, we promise to pay to the order of Sarah McStraffick one thousand dollars. Negotiable and payable at Mobile Savings Bank. Value received. Wm. Keyland & Co." On February 8, 1877, said William Keyland also executed and delivered to his mother another note, in words and figures as follows: "Mobile, Ala., Feby. 3rd, 1877. One day after date we promise to pay to the order of Sarah McStraffick two hundred and fifty dollars, at 8 per cent per annum until paid. Value received. Negotiable and payable at Mobile Savings Bank. Wm. Keyland & Co." Mrs. Sarah McStraffick, the mother of Wil-

liam Keyland, died, leaving her last will and testament, which was duly probated in the probate court of Mobile county on November 7, 1879. The second clause of her said will was as follows: "Second. I give and devise to my son, William Keyland, during his natural life, the sum of twelve hundred and fifty (\$1,250) dollars, for which I now hold his promissory notes for the above amount of money already paid him, and at his death to be paid to his three oldest children by his first wife, Mary Sarah Keyland, now deceased, namely, William Henry Keyland, Thaddeus Romer Keyland, and Clara Mary Keyland, equally, share and share alike." On March 23, 1890, William Keyland died, leaving his last will and testament, which was duly probated in the probate court of Mobile county on May 1, 1890. By his last will and testament William Keyland bequeathed all of his property, after the payment of his debts, to his widow, Elizabeth Keyland, and his children, Reuben Keyland, William H. Keyland, Thaddeus R. Keyland, and Clara M. Bowen, nee Keyland, share and share alike. Under this will, William H. Keyland and Thaddeus R. Keyland were appointed the executors. William H. Keyland and Thaddeus R. Keyland, deceased, filed their account for a final settlement on November 10, 1891. In this account they were credited with three credits of \$416.66 each, being the amount alleged to have been paid to William H. Keyland and Thaddeus R. Keyland and Clara M. Bowen, respectively, in payment of the above two notes, amounting to \$1,250, claimed by them as legatees under the will of Sarah McStraffick, deceased. Mrs. Elizabeth Keyland, the widow of William H. Keyland, and Reuben Keyland, the minor child of William Keyland, deceased, filed their exceptions to the allowance of these three credits by the executors, on the ground that they were barred by the statute of limitations. On the hearing of the contest which arose by virtue of these exceptions the executors introduced in evidence the two notes above copied, and also introduced in evidence the following affidavit: "I, William Keyland, do now state that the note for \$1,000 dated June 1st, 1876, payable on demand to Sarah McStraffick at Mobile Savings Bank, and signed 'Wm. Keyland & Co.,' and also the note for \$250, dated Feby. 3rd, 1877, payable one day after date to Sarah McStraffick, payable at Mobile Savings Bank, and signed 'Wm. Keyland & Co.,' are the notes referred to by my mother, Sarah McStraffick, in the second clause of her will, and which money she loaned and advanced to me in her lifetime. The notes are in fact my individual notes, though signed 'Wm. Keyland & Co.' I had in fact no partner, and I only am liable upon said notes. Wm. Keyland. Subscribed and sworn to before me this 9th day of May, A. D.

1881. W. E. Richardson, Notary Public M. C." Elizabeth Keyland and Reuben Keyland objected to the introduction of said affidavit, on the ground that it was not self-proving, and also that it was no deposition or affidavit taken in this cause, and that it was irrelevant and illegal. The court overruled said objections, and allowed the said affidavit to be introduced in evidence without any further proof in regard to its execution. To this ruling of the court Elizabeth Keyland and Reuben Keyland duly excepted. The will of Mrs. Sarah McStraffick was introduced in evidence, together with an order of the probate court admitting it to probate; and it was also admitted by all of the parties that William H. Keyland, Thaddeus R. Keyland, Clara M. Bowen, Elizabeth Keyland, and Reuben Keyland were devisees under the will of William Keyland, deceased, and that each of them had a one-fifth interest in his said estate. This being all of the evidence, the court overruled the objections and exceptions of the said Elizabeth Keyland and Reuben Keyland to the payment of said notes referred to, and decreed that said notes, and each of them, were valid claims against the estate of William Keyland, deceased, and were proper credits on the executors' accounts. Elizabeth Keyland and Reuben Keyland separately and severally excepted to each of these rulings of the court.

Overall, Bestor & Gray, for appellants.

McCLELLAN, J. The probate court, in our opinion, erred in admitting in evidence the paper purporting to be the affidavit of William Keyland, deceased, without proof that he made the same. The facts set forth in the paper were, of course, competent for the purpose of showing that William Keyland accepted the legacy under the will of Mrs. Sarah McStraffick on the terms therein specified; that is, that he accepted the bequest, of the money he owed the testatrix, for life, and thereby charged his estate with the payment of the amount thereof to the children of his marriage with his first wife, and the contents of the affidavit for this purpose stand upon the footing of admissions made by him. But it was necessary to prove in some way that he made these admissions. The paper without the jurat of the notary public would be as efficacious as it is with it. The facts that it is in form an affidavit purporting to be signed by him, and to bear the certificate of a notary of subscription and verification, do not, in other words, change its character as a mere written admission, nor add to its dignity or inherent probative force. The paper is not the foundation of a suit, and hence not within the influence of section 2770 of the Code. As admissions of Keyland, its statements must be proved to have

been made by him before they are admissible in evidence. Being written, it was necessary to prove that he signed the writing as a predicate for its admission for any purpose. The court should have excluded it, there being no evidence that he signed the paper or admitted the facts it contains. With it out of the case the judgment of the probate court cannot be sustained. There was no testimony in the case, except this, which was improperly in it, going to show that William Keyland accepted the legacy under Mrs. McStraffick's will, and hence no evidence that the debt evidenced by the notes ceased to be a debt simply against which statutes of limitations have operated a bar, and that the amount thereof became a trust fund in the hands of Keyland during his life, with remainder over on his death to certain of his children, thus constituting a charge on his estate in their favor. The judgment of the probate court must therefore be reversed, and the cause will be remanded.

(30 Ala. 571)

#### OXANNA BLDG. ASS'N v. AGEE.

(Supreme Court of Alabama. May 23, 1893.)

JUDGMENT AGAINST CORPORATION BY DEFAULT — SUFFICIENCY OF SERVICE — FAILURE OF RECORD TO SHOW.

A simple recital, in the entry of a judgment against a corporation by default, that service on it, as secretary and treasurer of defendant, was proved, fails to show that proof was made to the court that the person on whom the process was served was, at the time of service, authorized to receive it on behalf of defendant.

Appeal from city court of Anniston; B. F. Cassody, Judge.

Action by A. P. Agee, as receiver of the Anniston Savings & Deposit Company, against the Oxanna Building Association, on several promissory notes. The transcript contains no bill of exceptions, and the judgment entry, so far as it bears upon the decision rendered in this court, is sufficiently stated in the opinion. The appellant assigns as error, among other grounds, that the record does not show that proof was made to the court that W. S. Larned, at the time of service upon him as the secretary and treasurer, was such secretary and treasurer of the defendant company. Reversed and remanded.

Savage & Coleman, for appellant. Blackwell & Keith, for appellee.

HEAD, J. This is a suit against the Oxanna Building Association, alleged to be a private corporation. The sheriff's return of the summons and complaint shows execution by leaving a copy thereof with "W. S. Larned, sec'y and treas'r of defendant, the Oxanna Building Association." The court rendered judgment by default against the defendant. The only proof taken by the court in reference to the service is shown by the following

recital in the judgment entry: "Came the plaintiff, by attorney, and the service having been proven on W. S. Larned, as secretary and treasurer of the defendant." To authorize the rendition of judgment by default against a corporation the record must show that proof was made to the court that the person on whom the process was served was, at the time of the service, such an officer or agent of the defendant as by law was authorized to receive service of process for and on behalf of the defendant. *Insurance Co. v. Fowler*, 76 Ala. 372, and authorities there cited. The proof made in this case falls far short of this requirement. It proves nothing but the fact of the service itself, which was already shown by the sheriff's return. The judgment was therefore unauthorized.

Reversed and remanded.

(99 Ala. 591)

**OXANNA BLDG. ASS'N v. AGEE.**

(Supreme Court of Alabama. May 23, 1893.)

Appeal from city court of Anniston; B. F. Cassody, Judge.

Bill by A. P. Agee, as the receiver of the Anniston Savings & Deposit Company, against the Oxanna Building Association and H. S. Jewell, to have a lien enforced upon a certain lot for the payment of the purchase money of the same. The return of the sheriff upon the summons showed that it was "executed by handing the defendant H. S. Jewell a copy of the within on the 20th day of November, 1891, and by handing a copy to W. S. Larned, secretary and treasurer of the Oxanna Building Association." A decree pro confesso was rendered, which recited that "in this cause it appears to the clerk that a summons requiring the defendants, H. S. Jewell and the Oxanna Building Association, to plead to or answer the bill of complaint in this cause within thirty days from the service upon them was served upon H. S. Jewell, by the sheriff of Calhoun county, on the 20th day of November, 1891, and upon W. S. Larned, secretary and treasurer of the Oxanna Building Association, on the 28th day of December, 1891, and that said defendants having failed to plead," etc. Final decree was rendered, in which the chancellor held that the complainant was entitled to the relief prayed for, and the defendant the Oxanna Building Association brings this appeal. Reversed and remanded.

Savage & Coleman, for appellant. Blackwell & Keith, for appellee.

**HEAD, J.** A decree pro confesso and final decree were rendered against appellant, a corporation, on service of the summons upon "W. S. Larned, sec'y and treas'r of defendant," without proof being made to the court that Larned was such officer at the time of the service. The decree is reversed, and cause remanded. See *Association v. Agee*, 13 South. Rep. 279, (at present term.)

Reversed and remanded.

(98 Ala. 79)

**ROLLINS et al. v. STATE.**

(Supreme Court of Alabama. May 25, 1893.)

**INDICTMENT FOR LARCENY—OWNERSHIP OF PROPERTY—HUSBAND AND WIFE.**

Since Act Feb. 28, 1887, (Code, § 2341,) gives a wife separate ownership of property,

an indictment for larceny of a wife's property must allege ownership in her, rather than in her husband.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Eugene Rollins and another were convicted of larceny, and they appeal. Reversed.

B. O. Tarver and Gordon McDonald, for appellants. Wm. L. Martin, Atty. Gen., for the State.

**COLEMAN, J.** The defendants were indicted and convicted of grand larceny. The ownership of the property stolen was laid in Richard Barrett. The proof showed "that the property alleged to have been stolen was the personal property of Georgia Barrett, wife of Richard Barrett, and there was no testimony tending to show the husband to be the bailee or agent of the wife." We have quoted all the evidence on the question, as it appears in the bill of exceptions. The court charged the jury "that although the proof showed that the property alleged to have been stolen was the property of Georgia Barrett, wife of Richard Barrett, the ownership was properly laid in the husband." It has been frequently decided that in an indictment for larceny the ownership of the property, though constituting the separate estate of the wife, could be properly laid, either in the husband or wife. *Robinson v. State*, 84 Ala. 434, 4 South. Rep. 774; *Ellis v. State*, 76 Ala. 90; *Lavender v. State*, 60 Ala. 60; *Davis v. State*, 17 Ala. 416. All these decisions were rendered under the law as it existed prior to the adoption of the act of February 28, 1887, (Code 1886, § 2341;) and the decisions were rested upon the fact that, under the law as it then existed, the husband, as trustee, had some property interest in, or right of possession to, the property stolen. Under the present law the ownership of the wife is as complete and independent of the husband as that of the husband is of the wife. She cannot convey or contract, ordinarily, without his assent, but this limitation in no way affects her complete ownership of the property. She may sue the husband, and recover from him. *Bruce v. Bruce*, (Ala.) 11 South. Rep. 197; *Railroad Co. v. Bynum*, 92 Ala. 335, 9 South. Rep. 185. Ownership of property belonging to the husband could be laid in the wife with equal propriety as the ownership of property belonging to the wife could be averred to be in the husband, under the present law. The bill of exceptions expressly precludes the claim that, as to the particular property, the husband was either bailee or agent of his wife. Difficulties of this character may be easily obviated by having the counts so as to charge the ownership in the wife in one count, and in the husband in the other count. *Butler v. State*, 91 Ala. 87, 9 South. Rep. 191; *Hornsby v. State*, 94 Ala. 55, 10 South. Rep. 522. Reversed and remanded.

(32 Fla. 289)

**FLORIDA ORANGE HEDGE FENCE CO.  
v. BRANHAM et al.**

(Supreme Court of Florida. June 16, 1893.)

**SUFFICIENCY OF SUPERSEDEAS BOND—INSOLVENCY  
OF SURETIES AFTER EXECUTION—MOTION TO VA-  
CATE.**

Where the sureties on a supersedeas bond become insolvent after the approval of the bond, the plaintiff in error will be required to file a new bond, with good and sufficient sureties, within a time to be limited by the appellate court; and, in default of his doing so, the supersedeas will be vacated.

(Syllabus by the Court.)

Error to circuit court, Orange county;  
John D. Broome, Judge.

Action between the Florida Orange Hedge Fence Company and A. G. Branham & Co. From the judgment rendered, the fence company brought error, and defendants in error now move to vacate the supersedeas. New bond ordered.

William H. Jewell, for the motion. Beggs & Palmer, opposed.

RANEY, C. J. Defendants in error move to vacate the supersedeas on the ground that the sureties, J. H. Smith and C. A. Boone, on the supersedeas bond filed herein, have become insolvent since the approval of such bond. The affidavits filed in support of the motion establish the alleged change in the condition of the sureties, and, under the circumstances, the defendants in error are entitled to have the protection of new and solvent sureties, and, unless the plaintiff in error shall within 15 days file another bond, properly conditioned, with good and sufficient sureties, according to law, an order will be made vacating the supersedeas. Williams v. Claffin, 103 U. S. 753; Jerome v. McCarter, 21 Wall. 17. It will be ordered accordingly.

(45 La. Ann. 280)

**STATE v. CLIFFORD. (No. 1271.)**

(Supreme Court of Louisiana. June 14, 1893.)

**CRIMINAL LAW—FORMER JEOPARDY—WHAT IS—  
VENUE—REVIEWING EVIDENCE OF ON APPEAL.**

1. Where a party has been prosecuted by the municipal authority of the city for fighting and disturbing the peace, this is no bar to a prosecution for the same offense by the state.

2. The statement of the judge, copied in the bill of exceptions, is not questioned. If it were, it would not avail the defendant in his defense, for this court will not review the evidence in the record to determine whether the venue of the crime was proved.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans.

John Clifford was convicted of assault and battery, and appeals. Affirmed.

John C. and C. A. Wickliff, for appellant.  
L. P. Madison, Dist. Atty., for the State.

BREAUX, J. The defendant was found guilty of assaulting and beating one Lilly Jane Clifford, and condemned to suffer imprisonment for the term of one year, or to pay a fine of \$350. From the sentence and judgment he appeals. In the lower court he waived trial by jury, and was tried by the judges. His grounds of appeal are (1) that the court a quo erred in overruling his plea of *autrefois acquit*; (2) that there was a total failure on the part of the state to prove the venue as laid in the indictment.

For the purpose of sustaining the plea of *autrefois acquit* the defendant proved that prior to the filing of the information against him he was prosecuted in the first recorder's court for violating ordinance No. 3,121, C. S., of the city of New Orleans, for fighting and disturbing the peace; that he was found not guilty, and discharged; that the assault and battery for which he was found guilty in the district court is that of which he was found not guilty in the recorder's court. Though the decisions are not uniform the clear weight of authority sustains the proposition that an act may be a penal offense under the laws of the state, and may be also subject to a penalty by the municipal authority. Certain trustworthy authorities hold that there is more safety to the community in two conservators of the peace than in one, and that the same act may be an offense both against the state and the municipal corporation, and that both may be punished without any violation of constitutional principle. Others make a distinction between the judiciary power and the police power. The same state of facts may constitute separate offenses,—one punishable under the grants of power to the municipal corporation, the other punishable under the laws of the state. It is a matter within the control of the legislature, and may be regulated, under constitutional limitations, according to the exigencies of the various municipalities of the state. In view of the necessity of maintaining peace and good order within the limits of the municipalities, acts of incorporation are adopted, granting needful powers. The recorders have the right to arrest and punish offenses against the corporation. The offense referred to above is deemed an offense against the right of the corporation, for which fine and imprisonment may be imposed, and in thus punishing it is the particular offense against the corporation that is punished, and not the act of assault and battery denounced throughout the state. The article of the constitution ordaining that no person shall be twice put in jeopardy of life or liberty for the same offense, was not intended to apply to trial under corporate proceedings for wrongs done, and the violation of ordinances adopted with the view of maintaining peace and security under corporate authority, so as to operate a bar to a prosecution on the part of the state. The purpose of the ordinance was not to pun-

ish for any offense against the criminal justice of the country, but to maintain due regulation, as an incident of the existence of the corporate organization. The distinction between the judiciary power and the police power is retained, in certain respects, both in the constitution and under the charter of the city. The police power delegated to the corporation is distinguished from the regular judiciary power of the state. The general assembly may provide police courts with authority to enforce municipal ordinances, and the city of New Orleans has the right to appoint the several officers necessary for the administration of the police of the city. Articles 136, 253. In legislating under the authority of these articles the general assembly delegated the power to the city council, and made it their duty to pass, "such ordinances," and to see to their faithful execution, as may be necessary and proper to preserve the peace and good order of the city. Section 7 of act No. 20 of 1882. But the control of the municipality is not exclusive. The control of the state law upon the subject is not in any respect superseded. Not being inconsistent, each stands, and is to be enforced. This point received careful consideration in the case of *State v. Fourcade*, 13 South. Rep. 187, (recently decided,) and was overruled. We are confirmed in the correctness of the views expressed in that decision.

**Proof of venue.** The judge, in his recital of the facts in the second bill of exceptions, states that the venue was proven. The defendant does not seriously question the correctness of the judge's recital of the facts. Moreover, this court will not review the evidence in the record to determine whether the venue of the crime was proven or not. *State v. Tanner*, 38 La. Ann. 307; *State v. Starks*, 42 La. Ann. 316, 7 South. Rep. 540; *State v. Nettles*, 41 La. Ann. 323, 6 South. Rep. 562.

The judgment is affirmed.

**KING v. LEVY et al.** (No. 6,928.)  
(Supreme Court of Mississippi. March 7, 1892.)

**PRINCIPAL AND AGENT—POWER OF AGENT—PARTNERSHIP—CONTRACTS—POWER OF PARTIES TO BIND FIRM.**

1. Defendant's son, employed as clerk in the store, has no authority to bind defendant by consenting to a contract made by her copartner, which neither member of the firm could legally make without the consent of the other.

2. The fact that one member of a firm was allowed "to draw drafts, sign contracts, buy cotton, and otherwise generally supervise the business," did not authorize him to borrow money in the firm name, where, by the articles of copartnership, such an agreement required the concurrence of both parties.

3. The fact that an agent was authorized to act for the principal in relation to a certain

matter does not bind the principal to perform any agreement made by the agent in relation thereto, whether within the scope of his authority or not.

4. Where the articles of copartnership expressly deny the right of each partner, without the consent of the other, to bind the firm for borrowed money, a contract in violation of such agreement would not be valid, though it was made in furtherance of the interests of the firm.

Appeal from circuit court, Copiah county;  
W. P. Cassidy, Judge.

Action by M. Levy & Sons against Evelyn King and another, as Biggs & King. Plaintiffs had judgment, and defendant King appeals. Reversed.

This is a suit by M. Levy & Sons to recover of the firm of Biggs & King the sum of \$250 for the breach of the following contract: "In consideration of \$2,000 advanced us by M. Levy & Sons, \* \* \* as evidenced by our promissory note \* \* \* for \$2,000, to be discounted at 8 per cent., net proceeds to be placed to our credit, \* \* \* we hereby obligate and bind ourselves to ship to them, for sale on the usual terms, \* \* \* two hundred bales of cotton, of usual weight and quality, or, in the event of our shipments during the period not reaching that quantity, they are authorized to charge us in account at the rate of \$1.25 per bale on the deficit." The declaration alleges the compliance of Levy & Sons with their part of the contract, and that Biggs & King had failed to ship any part of the cotton, and that Biggs & King thereby became debtors to the said Levy & Sons in the sum of \$250. It appears from the evidence that Ben King, the son of Mrs. E. King, was employed by Mrs. King as clerk in the store of Biggs & King. It also appears that the contract was agreed to between appellees and Biggs without the knowledge or consent of Mrs. King; that it was signed by Biggs, or their bookkeeper, without Mrs. King's knowledge, but Ben King was present, and knew of it, and what it contained. But both Mrs. King and Ben King deny that he had any authority to bind her. Plaintiffs attempted to show at the trial that Ben King was the agent of Mrs. King. W. J. Biggs testified for plaintiffs that Mrs. King stayed in the store a great deal of the time; that Mrs. King had her son employed as clerk; and that the agreement was that she should put her son's labor against his labor in the store; and that "Ben King represented her in the business," as he supposed, but he did not know of any circumstance which warranted the inference that he was her agent, with authority to bind her in any business transaction. McIntosh, their bookkeeper, in regard to Ben King's agency, testified substantially as did Biggs. Mrs. King and Ben King both testified that Ben King was not her agent, and that he had no authority to bind her in the firm's business, and that Mrs.

King was innocent of any notice of the fact that Biggs had executed the contract sued on. Ben King testified that he corresponded with plaintiffs purposely to inform them that he was simply his mother's adviser.

R. N. Miller, for appellant. J. S. Sexton, for appellees.

CAMPBELL, C. J. The question to be determined in order to dispose of this controversy is as to the authority of Ben King to bind his mother by the arrangement made with the appellees. She could be bound only by her consent, given in person or through another, under the contract of partnership, and the facts in evidence. The third instruction for the plaintiffs is wrong. It assumes that Biggs & King owed the plaintiffs, and asserts the right of Biggs to bind the firm by procuring an extension of the time for payment because he conceived it to be the interest of the firm to do so, in view of his custom, known to Mrs. King, "to draw drafts, sign contracts, buy cotton, and otherwise generally supervise the business," with her approval. Mrs. King's knowledge and approval of many acts of Biggs in the business which he was authorized to perform under their contract did not so enlarge his authority as to embrace acts prohibited to either partner by the articles of partnership, as obtaining a loan of money was. It was erroneous to assume that the firm of Biggs & King owed the plaintiffs. That was a matter of dispute, as to which both law and facts were with the defendant, for Biggs & King did not legally become debtor to Levy & Sons by reason of the drafts drawn on them to pay individual debts of Biggs.

The fifth instruction for the plaintiffs is erroneous, in containing the proposition that, because Ben King was sent to New Orleans by his mother to see the plaintiffs on this business, she was bound by any agreement made by him, although not within the scope of his authority.

We have failed to find any evidence in the record to apply the sixth instruction to, and for that reason disapprove it.

The seventh instruction for the plaintiffs is incorrect in announcing that an arrangement made by Ben King, acting as the agent of his mother, was obligatory on her. That depends on whether he was acting by her authority, and within its scope.

The eighth instruction for plaintiffs is not correct as an interpretation of the articles of partnership. The power to obtain a loan of money is expressly denied to each partner, without the consent of the other; and Biggs did not have the power to bind the firm for loaned money without the assent of Mrs. King, however much in furtherance of the interest of the firm it may have been.

There was no error in the refusal of instructions asked by the defendant. Reversed and remanded.

# KING v. LEVY et al.

(Supreme Court of Mississippi. Jan. 23, 1893.)

Appeal from circuit court, Copiah county; J. B. Chrisman, Judge.

Action on a contract by M. Levy & Sons against Evelyn King and another, as Biggs & King. Plaintiffs had judgment, and defendant King appeals. Reversed, following decision on former appeal. 13 South. Rep. 282.

H. M. Miller, for appellant. J. S. Sexton, for appellees.

WOODS, J. The eighth instruction in the former record of this cause was distinctly declared to be an incorrect interpretation of the articles of partnership between Biggs and King; and yet this condemned instruction appears in the record of the present appeal, as given again to the jury, and is here marked 5. The instruction given on the last trial below, and marked 4 in the present record, falls squarely under the condemnation of this court, in that paragraph of our former opinion which declares: "The fifth instruction for the plaintiff is erroneous, in containing the proposition that, because Ben King was sent to New Orleans by his mother to see the plaintiff on this business, she was bound by any agreement made by him, although not within the scope of his authority." It is true that attention was only called by us to the instruction numbered 5 in the former record, but we were not condemning numbers, but erroneous legal propositions; and the erroneous proposition found in instruction 5 in the former appeal is found also in instruction 4 in same appeal. Both 4 and 5 fell plainly under the same condemnation, for the essential vice pervades both.

Reversed and remanded.

(101 Ala. 1)

# TENNESSEE RIVER TRANSP. CO. v. KAVANAUGH et al.

(Supreme Court of Alabama. May 23, 1893.)

PRINCIPAL AND AGENT — CONTRACTS BY AGENT — EVIDENCE OF AGENT — POWER OF AGENT — HARMLESS ERROR.

1. Defendant transportation company adopted a resolution that F. "is hereby authorized to take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest." Held, that F. was authorized to appoint a local agent with power to hire a barge for defendant, and agree that, if not returned in as good condition as when hired, defendant would pay the agreed value of the barge, as upon a purchase.

2. Where defendant's general agent introduced to plaintiffs its local agent, saying that any transactions had with him would be approved by defendant, defendant cannot relieve itself from liability on a contract made by such agent with plaintiffs by showing that it was in excess of his powers.

3. In an action on a contract alleged to have been made with defendant's agent, on the question of agency, evidence that the alleged agent had made contracts with other persons as such agent, which were ratified by defendant, is admissible.

4. Where evidence which has been excluded is afterwards fully disclosed on renewed inquiry, the error of its exclusion is cured.

5. On the question whether the person who dealt with plaintiffs as defendant's agent at a certain place was in fact such agent, evidence that he acted for defendant at any other place is inadmissible.

Appeal from city court of Decatur; W. H. Simpson, Judge.

Action by L. T. Kavanaugh and another, as Kavanaugh Bros., against the Tennessee River Transportation Company, for the value of a barge alleged to have been hired by defendant under a contract that, if not returned in as good condition as when received, defendant would pay for the same, as upon a purchase. Plaintiffs had judgment for \$675, and defendant appeals. Affirmed.

For former report, see 9 South. Rep. 395.

On the examination of one Lewis as a witness for plaintiffs, he testified that he had several business transactions with C. H. Hobbs, as agent for the Tennessee River Transportation Company, and that the company had ratified the said transactions. The plaintiffs introduced in evidence an agreement made between the Tennessee River Transportation Company, by C. H. Hobbs, as agent, with the American Oak Extract Company, of which the witness Lewis was agent. The defendant objected to the introduction of this paper because it was irrelevant and immaterial. The court overruled said objection, and the defendant duly excepted. Upon the examination of said C. H. Hobbs, and after he had testified that when away from Decatur he was at work on the river between Gunter'sville and Decatur, he was asked, "What were you doing during the time you were up the river?" Plaintiffs objected to this question. The court sustained the objection, and defendant duly excepted. The witness was then asked by defendant this question: "State whether or not you transacted any business for the transportation company, away from Decatur, except clerical work done on the boat." The plaintiffs objected to this question, and, their objection being sustained, the defendant duly excepted. On the cross-examination of the witness Hobbs, and after denying that he had an agreement with the plaintiffs to buy the barge in question, the plaintiffs asked the said witness the following question: "State if on or about the 25th of March, 1889, at the foot of Bank street, near the river, you did not have a conversation with Kavanaugh Bros., in which you said the Tennessee River Transportation Company ought to pay Kavanaugh Bros. for the barge, and that you were going to Chattanooga soon to see that they did pay them for it, and, at the same time, did you not get from Kavanaugh Bros. a check that they had given to the transportation company in payment of the bill for towing, saying that you wanted to use the check to show them that you had turned it in all right, and that you would take it up there, and give them hell on that check business? And did you not threaten to sue them?" Defendant objected to this question because it was irrelevant and immaterial, and that it was a narrative of a past transaction, and called for a declaration of an agent after the agency had ceased. Plaintiffs' counsel stated to the court that their object in ask-

ing this question was for the purpose of impeaching the witness. The court overruled the objection, and the defendant duly excepted. Upon the further cross-examination of said witness he was asked the following question: "Did you not ask Kavanaugh Bros. to submit you a statement as to what they would take from the Tennessee River Transportation Company in settlement of the barge matter, about April 14th, soon after the commencement of this suit; and did you not make of Louis T. Kavanaugh a verbal request for a statement in writing, saying that you thought you could get a settlement for this barge from Tennessee River Transportation Company?" The defendant objected to this question upon the same grounds interposed to the question just above. The counsel for plaintiffs "stated that he did not ask this question to call forth independent evidence, but solely for the purpose of impeaching the witness. Upon the cross-examination of one T. V. Meyer, who testified that he was secretary and treasurer of the defendant company, he was asked this question by the defendant: "State whether or not you, as secretary of this company, ever signed a certificate, and filed it in the office of secretary of state, at Montgomery, designating a known place of business, and an authorized agent thereat." Plaintiffs objected to this question. Objection was sustained, and defendant duly excepted. On the cross-examination of one L. M. Meyer, a witness for the defendant, he stated: "I know Hobbs did not have authority to buy a barge, because the board of directors never empowered him to do so." The plaintiffs objected to this statement, and moved to exclude it, which motion the court sustained, and the defendant duly excepted. In rebuttal the plaintiffs introduced L. T. Kavanaugh, one of the plaintiffs, as a witness, and asked him this question: "State if on or about the 25th of March, 1889, at the foot of Bank street, in Decatur, near the Tennessee river, you had a conversation with C. H. Hobbs about the purchase of the barge in this suit." Defendant objected to this question on the ground that it was irrelevant and immaterial, and that it evoked a declaration of an alleged agent after the agency had ceased. Plaintiffs' counsel stated that he asked this question solely to impeach Hobbs. The court overruled the question, and the defendant duly excepted. There were many charges asked, and many exceptions reserved to the giving and refusal of the same by the court, but the opinion renders it unnecessary to notice them in detail.

Harris & Eyster, for appellant. E. W. Godbey, for appellees.

STONE, C. J. This is the second appeal in this case. 93 Ala. 332, 9 South. Rep. 395. Most of the facts are stated in the report of



the former decision. The testimony tended to prove the following facts, and to this extent there was little or no conflict: The defendant company was a foreign corporation, owning steamboats, and plying them between Decatur, Ala., and points on the river above. It transported passengers and freight for hire, and, in connection with its freight business, it was in the habit of employing barges. It owned some barges. The barge which gave rise to the present suit was the property of Kavanaugh Bros., and it was lying in the river at Decatur. Hobbs made a contract with Kavanaugh Bros. for the hire of the barge, and agreed to pay for its use a fixed compensation for every day he might retain it, and to return it in good repair. Failing to so return it, he agreed to pay for it as upon a purchase. The barge was taken in tow by one of the steamboats of the defendant corporation, was carried up the river, and was not returned to Decatur until a month afterwards. When returned it was very materially damaged, if not ruined, and Kavanaugh Bros. refused to accept it. They then brought the present suit to recover its alleged value. To this extent, as we have said, there was a substantial agreement in the testimony.

It was contended for plaintiffs—and their testimony tended to prove the contention—that they did not contract with Hobbs in his individual capacity, or on his credit; that Hobbs was the agent of the Tennessee River Transportation Company, and made the contract in its name, and for its use. Their testimony tended to show that Hobbs, as such agent, had authority to make such contract for, and in the name of, the transportation company. It went further, and tended to show that one Farnum, at and before the hiring of the barge by Hobbs, was the general manager of the transportation company, having large powers and control, and that he had introduced Hobbs to Kavanaugh Bros. and others as the transportation company's agent at Decatur, having power to contract in the name of the corporation. There was also testimony for plaintiffs tending to show that Hobbs had made contracts—one or more—in the name of the transportation company, which that company had ratified and compelled with; purchasing property, and the company paying for it. The testimony for defendant was in conflict with that last stated. It denied the agency, denied that the contract was made in the name or for the use of the transportation company, but claimed that it was the individual contract of Hobbs himself. It gave testimony tending to rebut, explain, and parry the alleged acts of ratification. We think we are in safe bounds when we affirm that Mr. Farnum, when he was the managing agent of the corporation, was clothed with very large powers, and there is nothing in the transcript before us to controvert or impair the force of that conclusion. We take a further step: It is shown without conflict that the transportation com-

pany employed barges in its business. They were used as lighters when the river was low. The tendency of the testimony is strong that in some lines of their business—particularly in transporting timber—barges would be, and were, a convenience, if not a necessity; and there is testimony tending to show that in certain emergencies, such as a sudden rise of the waters in the rivers, it might become necessary to bring them into immediate service. Are not all these contingencies within the reasonable purview of the business the transportation company was engaged in? No unbending rule can be declared, which defines and fixes the extent of incidental powers a corporation may exercise, nor the agencies and means through which it can and may exercise its functions. In the nature of things, much must depend on the line of business the corporation is engaged in. Those whose powers and functions may be characterized as ambulatory have need of much more flexible rules than those whose entire business is transacted at a fixed, defined place.

In our former opinion we stated the main issue in this case to be one of fact. We said: "Whether Hobbs was the agent of the company; whether the barge was used in its business; whether it was leased by him for the company, or for his own private purposes,—were questions of fact, for the jury, and not of law, for the court. \* \* \* Whether the use of a barge fell within the scope of the business operations, and its mode of conducting them, was a question of fact, for the jury, and not of law, for the court. If the jury find that such was its custom, and further find that Hobbs was the company's agent, and as such made the alleged contract with Kavanaugh Bros., and that the transportation company took charge of the barge, and used and destroyed it in its own business, then the transportation company is liable." Plaintiffs rested their right of recovery in this case on the following grounds, which they undertook to establish by proof, and which they claim they did establish, namely: That the transportation company being a foreign corporation incorporated in Tennessee, and its business calls and duties extending many miles up and down the river in Tennessee and Alabama, it must needs do much of its business away from the home office, and through its agents; that it constituted A. M. Farnum its general manager, with very large powers; that he (Farnum) appointed Hobbs to be agent at Decatur, and clothed him with large powers, or, at all events, held him out to the public as being so clothed, and that Hobbs, contracting in the name of the corporation, and professedly for its use, made the contract with plaintiffs which is declared on in the present suit. Plaintiffs introduced in evidence a resolution or motion adopted by the transportation company's board of directors by which it was declared "that A. M. Farnum is hereby authorized to take full

charge of the company's business, and enter into such negotiations and contracts as he thinks best for the company's interest." This resolution was adopted in April, 1888, and under it Farnum continued in the company's employment until after the making of the alleged contract between Hobbs and Kavanaugh Bros. Each of the Kavanaugh brothers testified that Farnum introduced Hobbs to them "as agent of the Tennessee River Transportation Company at Decatur, and said he was going to make his headquarters at Decatur, and attend to their business, and that any transaction we [Kavanaugh Bros.] might have with Hobbs would be entirely satisfactory, and approved by the company; that he was the authorized agent, and we could deal with him as such." Another witness, engaged in business at Decatur, testified that Farnum introduced Hobbs to him, with substantially the same declaration as to his agency and powers as that testified to by the Kavanaugh brothers. The Kavanaugh brothers testified to the making of the contract with Hobbs as agent of the transportation company; but Hobbs denied this, denied his agency, and disclaimed all authority to make a contract binding the company. There was other testimony, in conflict with that of Kavanaugh brothers, on the question of Hobbs' agency for the company.

Formerly, corporations were very much hampered by rules and forms in making lawful and binding contracts. The wants of commerce have caused liberal relaxations in that regard. We spoke of this in our former opinion. 93 Ala. 324, 9 South. Rep. 395. In 1 Mor. Priv. Corp. § 504, it is said: "The agents of a corporation may be appointed in the same manner as the agents of an individual. No formalities are required, nor is the use of the corporate seal necessary, unless the contrary be expressly provided by the company's charter. \* \* \* If a person is allowed to act as agent for a corporation, with the knowledge and acquiescence of the superior agent, or authority who would have authority to appoint him, the corporation will be bound by such acquiescence, and cannot repudiate the agency." In 1 Amer. & Eng. Enc. Law, 338, 339, the principle is thus expressed: "It is now generally held that a corporation may appoint agents by a written vote of its directors, or by implication, unless the charter makes a different appointment obligatory." And in 2 Mor. Priv. Corp. § 585, is this language: "A principal who employs an agent in a particular transaction or course of business thereby impliedly invites persons dealing with the agent in that particular transaction or course of business to rely upon the agent's apparent powers, so far as this is essential to render safe dealing with the agent possible; and the principal will be liable to the person so dealing with the agent in good faith, within the scope of his apparent powers, although the agent may have transgressed the authority which the

principal intended he should exercise." We do not hesitate to declare that, under the resolution adopted by the board of directors, Farnum was clothed with power to appoint Hobbs agent of the corporation, and to invest him with large powers. Neither can it be affirmed, as matter of law, that the alleged power which the testimony of plaintiffs tends to show was conferred on Hobbs was in excess of the authority the board of directors had vested in Farnum. Nor will we say that the contract which plaintiffs testify Hobbs made with them was outside of the powers which Farnum could himself exercise, or authorize Hobbs to exercise. So the real points of contention in this case were—First, whether Farnum appointed Hobbs agent of the corporation, or informed plaintiffs he had so appointed him; and, second, whether, in making the contract for the use of the barge, he contracted in the name of the transportation company, or in his own individual name. It may be added that if Farnum, in introducing Hobbs to Kavanaugh Bros., employed the language they testified he did employ, this authorized them to trust and trade with him as such agent, and the corporation cannot relieve itself of liability even by proving that in fact his powers did not extend so far. Apparent power, in such conditions, if authorized or sanctioned by the corporation, is the equivalent of actual authority.

We hold that all the testimony introduced, tending to prove Hobbs' agency for the transportation company, to which an exception was reserved, was free from objection. Agency may be proved in many ways. Acts ratified or acquiesced in by the principal, or holding one out as agent, are among the methods and instrumentalities by which the relation is proved; and it is frequently implied from circumstances, and the conduct of the parties towards each other. This lets in proof of acts and conduct of the parties in relation to each other which have no direct reference to the issue on trial, if they tend to prove that the relation exists, or was acted on as existing. 2 Greenl. Ev. §§ 60, 62, 65, 67; 1 Amer. & Eng. Enc. Law, 338-340; Railroad Co. v. Henlein, 52 Ala. 606; 3 Brick. Dig. p. 20, § 10; Railway Co. v. Jay, 61 Ala. 247; Clark v. Taylor, 68 Ala. 453. But a single act of ratification is not necessarily sufficient proof of the agency.

Proof that the witness Hobbs had previously made a statement different from what he testified to on this trial was not competent, save as a means of impeaching him; and when offered for that purpose it was necessary to interrogate him as to such previous statement, fixing time and place, or otherwise directing his attention to the conversation by identifying circumstances. 3 Brick. Dig. 828. The rule was strictly conformed to in this case.

The testimony of one of the Kavanaughs that Farnum had made an admission imply-

ing the liability and duty of the transportation company to pay for the barge, being at most only an admission of a past transaction, was not legal evidence. An objection had been filed to the interrogatory which called it out, but the transcript fails to show that the city court was required to rule upon it. To justify the action of this court upon the admissibility of evidence in the trial court the record must show affirmatively that that court made a ruling which was excepted to at the time, or that counsel called attention to the question, and requested a ruling upon it, which the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make the ruling. This question is not before us.

The right of plaintiffs to recover of the transportation company the alleged stipulated price and value of the barge was rested on the following postulated facts, which they attempted to prove: That Hobbs was the authorized agent of the transportation company; that as such agent, in its name, and for its use, he hired the barge, at an agreed rent per day, with a further agreement to return it in good condition, or pay an agreed price for it, as upon a purchase; that when the barge was returned it was in a ruined condition, and plaintiffs refused to receive it, and brought this action for its alleged agreed value, as upon a sale and delivery. Each of the plaintiffs testified that these were the terms on which they let the barge to the transportation company. Of course it was essential to the maintenance of their suit in this form—that is, for the price and value of the barge sold and delivered—that they should not have asserted any ownership or control of the barge after its return. If they had sold it, it was no longer their property, and any subsequent dominion or control over it by them would have tended to disprove the alleged sale. Kavanaugh had testified, in his direct examination, that when the barge was returned to Decatur, in its damaged condition, he refused to receive it, or to have anything to do with it. On cross-examination he was asked, "Did you not employ one Mr. Mayhan and some others to take it over the shoals for you, and take it to Memphis?" This question was objected to by plaintiffs, the objection sustained, and the defendant excepted. In this ruling the city court clearly erred. This ruling of the court, if it had remained unredressed, would require us to reverse this case, even if there be no other error. But the question was not left in that condition. Soon afterwards, as the bill of exceptions informs us, defendant's counsel renewed the inquiry, and the witness then answered it very fully, without further interference from either counsel or the court. This rendered the ruling harmless.

The issue in this case raised the inquiry whether Hobbs was the duly-appointed agent of the transportation company at De-

catur, with authority to represent the company at that place, or had been so held out by one having authority to bind the company. Whether he had transacted any business for the corporation at any other place could shed no possible light on that inquiry. The city court did not err in disallowing that question to the witness Hobbs. Even if Hobbs was proven to have been agent of the corporation when the alleged contract with Kavanaugh Bros. was entered into, this would not authorize an admission made by him to be given in evidence against his principal, unless that admission was made in company with, and at the time of, the act of agency it was intended to explain. But the question was clearly admissible for the purpose of laying a predicate for the introduction of impeaching testimony. There was no error in this ruling. All the rulings on the introduction of testimony are free from error.

A by-law of defendant corporation was put in evidence, in the following language: "The directors shall appoint a general manager, whose duty it shall be to look after the general interest of the company, and all business transactions pertaining to the general management of the business, under the direction of the board of directors." It was proved, and not denied, that from the fall of 1888, and until after the barge was returned to Decatur in a damaged condition, Farnum was the general manager of the defendant corporation. Each of the plaintiffs, giving their testimony separately, testified that Farnum, while so acting as general manager, and before the agreement affecting the barge was entered into, personally introduced Hobbs to them, informing them that the latter was "agent of the Tennessee River Transportation Company at Decatur, and said he was going to make his headquarters at Decatur, and attend to their business; that any transaction we might have with Hobbs would be entirely satisfactory, and approved by the company; that he was the authorized agent, and that we could deal with him as such." Another witness, a business man at Decatur, testified that Farnum introduced Hobbs to him as agent of the company at Decatur, using almost the identical language testified to by the Kavanaugh brothers. But there was testimony in conflict with this, some of which denied that Hobbs was agent, while other witnesses only disputed the extent of his authority. Of course, so far as material, this presented a question for the jury. It was proved, and not denied, that defendant employed barges, in connection with its boats, in transporting freight on the Tennessee river, and it owned several barges.

We do not understand the contract on which the present suit is sought to be maintained as strictly a contract of sale and purchase. It was a hiring of the barge at so much per day, to be returned in good order.

True, if the barge was not so returned it was, if the testimony of plaintiffs be believed, to be paid for at an agreed price. But this was nothing more than a previous agreement of the amount of damages to be paid in the event the contract to return was broken. This presents a different question from that of an absolute bargain and purchase, and also from what is known as a "conditional sale." Pressing, present need might justify the hiring, while a promise to return in good condition, or pay an agreed forfeit, might be the most favorable terms on which the use of the barge could be obtained. Peril, and the necessity for immediate action, may, in some conditions, supply the place of express authority. The undisputed testimony in this case is that the defendant corporation made free use of barges in the conduct of its regular business, and we can conceive of many emergencies in which the want of them might be so pressing as not to admit of delay. We think we are in safe bounds when we declare that in such emergency any agent, not in communication with the constituted governing board, may, in the interest of conservation, exercise powers not expressly conferred. This power must be prudently exercised, and must not be carried beyond the real or apparent necessity. 2 Mor. Priv. Corp. §§ 585-588. We have indulged in the foregoing remarks as introductory to what we have to say of charge 17, given at the instance of plaintiffs, and excepted to by defendant. We hold that, under the by-law copied above, Farnum, the general manager, had authority to appoint an agent "to make contracts to bind the company;" and if he did appoint Hobbs such agent, and so informed plaintiffs, or if he represented to plaintiffs that he had appointed him with the powers set forth in their testimony, and if Hobbs made the contract as set forth in the complaint, and the defendant, or its agents, injured and ruined the barge, and if the use of a barge was within the scope of defendant's business operations, then plaintiffs were entitled to a verdict. In announcing this principle we take into the account the nature of the business the defendant corporation was engaged in, covering, as that business did, a large extent of country, and necessarily calling for action in emergencies, when a consultation with the governing board would be impracticable. Such intendment might not be indulged if the corporation had a defined, fixed, stationary place, in which its business operations were performed.

Many charges were given at the instance of plaintiffs, and many refused which were requested by defendant. These several charges were asked in writing, and the rulings were severally excepted to. We consider it unnecessary to comment separately

on these many rulings. They are all covered and justified by our decision on the former appeal, (93 Ala. 324, 9 South. Rep. 395,) and by what is said above.

The judgment of the city court is affirmed.

(93 La. 69)

#### FLEMING v. STATE.

(Supreme Court of Alabama. May 25, 1893.)

##### PERJURY—INSTRUCTIONS—EVIDENCE.

1. Defendant, on a prosecution for falsely swearing that he did not make a payment on account to A., and did not promise to pay A., is not entitled to an instruction that he should be acquitted if, when he so swore, he "believed that he owed A. nothing."

2. Evidence, on a prosecution for perjury, that defendant declared soon after the trial of an action against him, in which it was alleged he had testified falsely, that, if "that was the way they were going to do him, he would claim his exemptions," was irrelevant and inadmissible.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Alfred Fleming was convicted of perjury, and he appeals. Reversed.

John W. A. Sanford, Jr., for appellant.  
Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. Each of the charges asked by defendant and refused confines the inquiry to too narrow a limit. Each claims an acquittal of defendant, if the latter, when he testified, "believed that he owed W. B. Adams nothing." Of course, whether or not he owed Adams was the controlling question in the trial of Adams v. Fleming, which gave rise to the present prosecution for perjury; but it was not the sole, material inquiry of fact. Witnesses had testified on the trial of the civil cause that defendant had made a partial payment on the account, and promised to pay the balance. Defendant, in his testimony on that trial, denied that he made a partial payment, denied that he made any promise to pay, and denied he had had such conversation. These were certainly material questions on the inquiry whether defendant owed Adams; and if, in testifying in regard to them, he willfully made statements which he knew to be false, this would be perjury. The city court did not err in refusing the charges asked.

The state was permitted to prove, against the objection and exception of the defendant, that soon after the trial was had before the justice of the peace, in which he had testified, he, the defendant, stated "that, if that was the way they were going to do him, he would claim his exemptions." This testimony was wholly irrelevant to the issue pending, and could shed no light whatever on the guilt or innocence of the accused. The city court erred in receiving this evidence. Reversed and remanded.

(35 Ala. 118)

WEBB et al. v. CITY OF DEMOPOLIS.

(Supreme Court of Alabama. June 21, 1892.)

DEDICATION OF STREET IN PROSPECTIVE CITY — RIPARIAN RIGHTS — CONSTRUCTION OF WHARVES ON RIVER — TITLE BY PRESCRIPTION AS AGAINST CITY.

1. *Held*, as matter of fact, on consideration of the evidence in this case, that the original proprietors, under grant from the United States, of the land on which the town of Demopolis was laid off in 1819, dedicated to the public use as a highway the strip of land lying on the margin of the river, marked on the first map or plat of the town as "Arch Street," intending to afford to the purchasers of lots and citizens of the embryo town the advantages of free and uninterrupted access to the river, a highway of commerce. *Held*, also, as matter of law, that lots having been sold abutting on the street, and the map having been adopted as showing the limits of the town by the legislative act incorporating it, this dedication became accepted and perfect; and the validity of the dedication was not affected by the fact that said street, in its condition at that time, following the bends of the river, was in several places not susceptible of use as a highway, but required the expenditure of labor and money to make it passable.

2. How far the title of a proprietor of land on the margin of a navigable river extends—whether to high-water mark, low-water mark, or the middle of the stream—is not a federal question, though he may claim under a grant from the United States, but is to be determined by the laws of the state in which the land is situated, as declared by its statutes and judicial decisions; and the established law in Alabama is that it extends to low-water mark, ending only where the right to the use of the water as a navigable stream begins.

3. A city or incorporated town, situated on a navigable river, cannot, it seems, engage in the business of wharfing, erecting wharves, providing keepers thereof, and charging the public for their use in going or carrying property to and from the river, unless that power is conferred by special legislative act; but, when one of its streets, as laid off and dedicated to the public by the original proprietors of the land, extends along the margin of the river through its limits, the city necessarily has the implied right to construct suitable and convenient approaches to the water line, and to make structures or excavations even beyond the water line, such as are reasonably necessary and proper to enable the public to avail themselves of the rights of commerce and transportation afforded by the river, but having regard to the superior rights of navigation.

4. A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction.

(Syllabus by the Court.)

Appeal from chancery court, Marengo county; I. K. M. Spadden, Chancellor.

Bill by the city of Demopolis against John C. Webb and others, to restrain an obstruction of a street and river landing. Complainant had decree, and defendants appeal. Affirmed.

For report of former appeal, see 6 South. Rep. 408.

The bill in this case was filed on the 11th v.1890.no.8—19

June, 1888, by the city of Demopolis against John C. Webb and wife and W. H. Creagh, and sought (1) an injunction against the continuance of a fence which said Webb had erected across a part of Arch street, near the river, and (2) to prevent the collection of wharfage by the defendants at their landing on the river at or near the foot of said street. At the first hearing, on demurrer, Hon. Thomas W. Coleman presiding as chancellor, it was held (1) that the bill contained equity so far, and only so far, as it sought relief against the obstruction of the street, and (2) that John C. Webb was the only proper defendant, as he alone was charged with the erection and continuance of the fence. On appeal to this court, each party assigning errors, the decree of the chancellor was in all things affirmed. 87 Ala. 659-672, 6 South. Rep. 408. Afterwards, in the court below, the bill was amended to meet the objections pointed out in the opinion of this court. The amendments were these: (1) By striking out the name of W. H. Creagh as a defendant; (2) by adding an averment that the landing, with the right to collect wharfage, was dedicated to the public with the street; (3) that the original proprietors of the land, in dedicating Arch street to the public, did not reserve any right to construct a wharf and charge wharfage, nor have the defendants acquired any such right by privity of contract with them; (4) that the river landing, and the right to collect wharfage as incident to it, were dedicated to the public with the street. As shown by the former report of the case, the complainant claimed the right to the uninterrupted use of the street under dedication by the proprietors of the land in 1819, and further claimed that the street extended in width beyond high-water mark, and embraced the "lower warehouse property." The defendants denied the alleged dedication as a matter of fact, and claimed that the street, if dedicated at all, did not extend beyond high-water mark on the bank; and they further claimed, by way of plea and answer, that the city had relinquished and forfeited her rights by nonuser for more than 40 years, and pleaded laches, lapse of time, the statute of limitations, prescription, and equitable estoppel. Other questions were raised by demurrer to the bill as amended, but they are not decided by this court. On final hearing, on pleadings and proof, the court below rendered a decree as follows: "On due consideration of the pleadings and proof, as well as the arguments of counsel on each side, the court is of the opinion that the complainant is entitled to the relief prayed for in the bill as amended; and it is therefore ordered, adjudged, and decreed (1) that defendants' demurrers to the bill be, and they are hereby, overruled; (2) that the street in the city of Demopolis commonly called 'Arch Street,' as described in the bill and laid off in the original plan of the said

town of Demopolis, along the bank of the river, extending from the river at low-water mark to the nearest lots surveyed and numbered in the plan of said town as shown by the maps thereof, was dedicated in the year 1819, by the then owners of the soil, to the free use of the public as a street, and as a landing, and the same should forever remain open to the free use of the public as a street and as a landing; (3) that the fence or fences erected and maintained by the defendants, or either of them, across said street, above and below the said lower landing, are public nuisances, and should be abated; (4) that the said defendants, by demanding and collecting wharfage from the people for the use of its said lower landing, or otherwise, and by obstructing the free use of said lower landing in Arch street, as averred in the bill and sustained by the evidence, have created and maintained a public nuisance, which should be abated, it being the usurpation of a franchise contrary to law. (5) It is further ordered and decreed that the defendants shall, within thirty days after notice of this decree, which notice the register is hereby ordered to have given, remove the said fences erected and maintained by them, or by their consent, both above and below said landing and near thereto, from and out of said street, and, failing to do so, and notice thereof and complaint to the register, he will report such failure to the next term of the court. (6) It is further ordered and decreed that the said defendants are hereby enjoined and restrained from obstructing the free use of said lower landing by the public in any manner, and from demanding or receiving wharfage or other pay for the mere use of said lower landing; and they are also enjoined and restrained from obstructing in any way the free use of said street by the public as a street or landing, they having no other or greater rights therein than other citizens. (7) It is further ordered and decreed that the defendants pay the costs of this suit." The defendants appeal from this decree, and assign each part of it as error.

Geo. W. Taylor and Jas. T. Jones, for appellants. Geo. G. Lyon and Pettus & Pettus, for appellee.

MCLELLAN, J. Other questions will be discussed and decided in the progress of this opinion, but, in the view we take of the case, the inquiries of paramount and determining importance are three only: First, did the original proprietors of the land on which the city of Demopolis was subsequently built dedicate to the uses of the public as a street that part of said land which lies between certain numbered lots in the plat or plan of said city and the Tombigbee river, now known as "Arch Street?" And, second, did such dedication, assuming it to have been efficaciously made, extend to

the water line at all stages of the river in such sort as to invest the inhabitants of Demopolis and the public generally with the right to pass, in their persons and property, from said street onto the river and from the river onto the street, without toll, charge, or hindrance? And, third, has this public right, assuming its original existence, been lost, so far as it pertained to that part of said street which has been appropriated by the respondents, by reason of the character, extent, and duration of their possession, occupancy, and use thereof? The land in question, and which now constitutes the city of Demopolis, was purchased by George S. Gaines, acting for himself and certain associates, in the year 1819, from the United States, and he received patents therefor which were "intended by him and recognized by him as being issued to him" for a company consisting of himself, William A. Cobb, and others. This company had been formed for the purpose of purchasing said land at the government sales, soon thereafter to be made, with a view to, and for the purpose of, laying off and establishing a town thereon, and selling lots therein. The land was exceptionally well located for the establishment and upbuilding of a town under the existing conditions of commerce and transportation, being at a high point on the Tombigbee river, a navigable stream, emptying into the Bay of Mobile, just below its confluence with the Black Warrior river, another navigable stream; and it was doubtless these considerations which not only led to the selection of this site, but which also gave birth to the great expectations, indicated by the handsome prices at which lots in the embryo city were sold, which were indulged as to its future,—expectations which probably only failed of full realization in consequence of the application of steam as a motive power to inland transportation, whereby the importance of water ways was greatly lessened. Be that as it may, it is certain the chief inducement to the location of Demopolis at this point lay in the facilities for commerce and transportation which the river afforded, and doubtless this consideration was put prominently forward in the efforts made by the company to sell its lots in the town. The river thus being a leading inducement to the location of the town, and to the purchase of lots therein, it would have been singular, indeed, if the proprietors of the site had not made provision looking to the utilization of this water way by those who had been induced in great part to settle there because of the facilities for transportation offered by it, and the public at large, by so laying out the town as to afford easy access to the river from the town, and vice versa. They did not fail to make such provision, but left the whole river front of the city open, unobstructed, and free of access. It is not controverted at all that on every plan, plat,

or map of the town, from the first one, made by Stone soon after the purchase of the land, and by reference to which the original sales of lots were made, down to the last one, made only a few years ago,—all later maps being more or less accurate copies of the one made by Stone,—on every map now extant, or that has ever existed, there appears an open space along the river front entirely through the town, varying in width from perhaps 100 to 200 feet, with the irregular course of the stream, and extending, throughout its course, to the water's edge. The physical characteristics of this space, so far as they appear from the maps, are the same, except as to the irregularity in width, just referred to, and as to variance of direction incident to the tortuous course of the river, as are incident to the many other vacant spaces shown by the maps; and these other spaces are admitted to be streets of the town. In other words, one looking at any map of the town which has been brought to light on this trial, with a view to ascertaining the location of the streets, would inevitably conclude that this unplatted margin along the river was one of those streets; and such, we have no doubt, it was intended to be by the Demopolis Town Company when the site was laid off into public squares, streets, and lots for the purposes of sales then contemplated and afterwards made by the company. This, we think, the evidence demonstrates; and not only this,—not only that this margin was laid off as and intended to be a street,—but also that this street was in the outset named and called "Arch Street." Mr. George G. Lyon testified that he had seen the original plan or map made by C. C. Stone, and adopted by the commissioners of the Demopolis Town Company in 1819, by reference to which the first sales were made, and from which all other maps of the town were taken, more or less directly, and that on this original map the margin or unplatted space along the river front was designated as "Arch Street;" and that he lived on this street for the 10 years from 1841 to 1851, and always heard it called "Arch Street." Mr. A. M. McDowell appends to his deposition a map made by C. C. Stone, and which the witness believes to be the original map above referred to,—as to which, however, there is, at least, grave doubt; and this old map shows, as do all other maps, an open margin along the entire river front, which presents the appearance of a street; and this margin at one place is marked "Water Street," and at another place, in a handwriting differing from that elsewhere shown on the map and from the inscription "Water Street," it is marked "Demo Street." This inscription appears to have been made at a later date than any other on the map. This witness testifies also that the initial point of the survey of the town of Demopolis was originally

marked by an oak tree which stood in this street; that this tree had been removed, and he himself had placed an iron shaft where it stood, for the purpose of preserving a memorial of the starting point of the survey. And the location of this tree is marked and identified on the map which he exhibits by a star placed near the intersection of Fulton street with this street on the bank of the river, and referred to in the notes written on the margin of the map thus: "*\*Post Oak, bears S., 12 E., 8 links (+.)*" But the most satisfactory evidence that the proprietors of the town site laid this margin off as a street, intended it to be a street, and named it "Arch Street," is found in the record of the proceeding of the commissioners who constituted the managing and governing board of the Demopolis Town Company. It appears from these records that said commissioners, at a meeting held on Tuesday, June 18, 1819, "resolved, that the plan of the town of Demopolis be as follows: The streets to run due north and south on a true meridian variation, seven degrees and forty-five minutes east, and to be crossed by streets running due east and west at right angles. The squares to contain two acres of land, exclusive of an alley of twelve feet wide, running from north to south. The streets of the town to be sixty feet, excepting Fulton street, running from east to west, one hundred feet; Capital street, from east to west, likewise one hundred feet; Market street, running from north to south, one hundred feet. Resolved, that one square or block of lots containing eight in number, bounded north by Capital street and west by Market street, be reserved for the erection of such buildings as the commissioners may hereafter determine on. The plan of said town is herewith filed, which is made a part of this record, *signed by the commissioners* as the true plan of the town of Demopolis, by which plan the town commences at that point *where Fulton street intersects Arch street*, which said point is designated *by a post oak tree* in or about twenty inches in diameter, which said tree stands south of said point of intersection or corner, twelve degrees east, and distant eight links from said corner, marked with the following letters and characters: "*\*Labeled S., 12 E., 8 Lk.*",—which said point is on the original survey of the United States government of fractional section No. twenty-four and is opposite the crevice in the bank of the Tombigbee river." The italicization in the foregoing excerpt is ours. It has been employed for the purpose of giving emphasis to the facts that the plan or map adopted by the commissioners was signed by them, while the map exhibited by McDowell is not so signed; that the margin of the river was laid off on the original plan as a street and called and named thereon "Arch Street," and not "Water Street," or "Demo Street," as appears from McDowell's map;

and that the tree which marked the initial point of the survey was located on "Arch Street," and opposite "the crevice in the bank of the river," which latter fact is shown also by McDowell's map; all of which leads to the conclusion that the map exhibited by McDowell is not the original plan or map adopted by the commissioners, but a copy thereof, and accurate in so far as it shows that the land between the numbered lots and the river was intended to be, and in fact was, laid off as a street, but inaccurate in so far as it gives the name "Water" or "Demo" to this street. We attach no importance to the fact that the commissioners, in the resolutions quoted, did not state either the direction or width of Arch street. It ran neither north and south nor east and west, but arched with the bend of the river, and hence, doubtless, its name. Its width likewise varied with the meanderings of the stream, and hence it could not be said to be any particular number of feet wide. But, however irregular its course, and however variant its width, this record demonstrates beyond all doubt, to our minds, that it was laid off as a street in the original plan of the town; that as such it extended along the entire river front of the town, and that throughout its length it was named, known, and called "Arch Street." So far, then, as that could be accomplished by laying off an area in the plan or map of a town having the appearance of a street on such map, intended by the proprietors of the town site to be a street, and marked on said plan as a street, with a name appropriate thereto, this Arch street in the town of Demopolis was dedicated to the public as a street by that name on June 18, 1819, when said plan was adopted and promulgated "as the true plan of the town of Demopolis." One thing more, and only one thing, was necessary to complete the dedication so as to make it forever irrevocable. That one thing was the sale and conveyance of lots, or even the sale and conveyance of a single lot, in the town of Demopolis, by reference to and according to the survey lines of the plan or map which had this street marked upon it. By such sales, or one such sale, every line of the survey which served to mark those parts of the site which were intended to be reserved from sale for the use of the public became unalterably fixed, dedicated to the public for all time. *City of Demopolis v. Webb*, 87 Ala. 659, 6 South. Rep. 409; *Evans v. Railway Co.*, 90 Ala. 54, 7 South. Rep. 758; *Reed v. City of Birmingham*, 92 Ala. 339, 9 South. Rep. 161; *Elliott, Roads & S.* p. 89. It is uncontroverted that lots were sold and conveyed according and by reference to this plan soon after its adoption, and from time to time since then. Not only so, but the dedication of the streets of Demopolis, and, among the rest, Arch street, was accepted in the most formal manner by an act of the

legislature of Alabama incorporating the town of Demopolis, approved December 15, 1821, in which it is provided "that all the tract of land included in the plan of said town [the plan adopted by the commissioners in 1819] be, and the same is, declared to be the limits of said town in conformity to said plan." *Elliott, Roads & S.* p. 85. So that there can be no doubt that there was both a common-law and a statutory acceptance of the dedication of this street.

As to the extent of the dedication, or rather as to the limits of the street as dedicated, with reference to the river, there cannot, we think, be two opinions, so far as the question depends upon the intention of the proprietors of the soil. In view of the considerations which led to the establishment of a town at that point, the advantages expected to accrue to the inhabitants thereof from the facilities for transportation and commerce, which the juxtaposition of this water way offered, and the necessity to utilize and conserve these advantages by affording the public ready and unobstructed access to the river,—considerations to which we have before adverted,—and in view of the fact that, as appears from all the maps, no disposition of any part of the river front to private uses was contemplated by the founders of Demopolis and the dedicators of this street, the conclusion cannot be resisted that they intended that this street should embrace all that part of the site of the town which lay between the numbered lots and the water's edge at all stages of the river. In no other way could their manifest purpose of providing a common highway, not only along, but to and on the river, be effectuated; and this purpose must be held to have been effectuated if they, the proprietors of the soil, had the right to dedicate the land to low-water mark, or, in other words, if their proprietorship extended to the low-water line.

We cannot concur in the argument of counsel to the effect that whether a grant of the United States to land lying on a navigable stream within the limits of a state extends to high or to low water mark, or to the middle thread of the stream, is a federal question upon which the supreme court of the United States is the final arbiter. This is not the law. On the contrary, no proposition of law is more firmly settled than that this is a matter purely within the control of the several states, and determinable in all instances according to the rule in respect thereto which has been established by statute, or by adjudications of courts of last resort, or otherwise, by the states themselves. And whatever rule has been so established is said to be the common law of the state where the land is situated, and as such will be enforced in all jurisdictions. This doctrine proceeds on the theory that, inasmuch as the state owns in its sovereign capacity the soil under



the waters of navigable streams, it is within the state's competency to determine to what extent its prerogative to lands so submerged shall be exercised, and to what extent such prerogative shall be abated or not asserted and exercised in the sense of admitting individual proprietorship in such lands, subject only to those rights of eminent domain over the waters and the lands covered thereby which are inseparable from sovereignty. And upon this theory it is universally held that a grant by the United States of land lying in a state and abutting on a navigable stream will extend to high-water mark or low-water mark or to the middle of the stream, according to the rule which the particular state had adopted as to the construction and extent of such grants. The late Justice Bradley, in a recent case, after stating the doctrine of the state's proprietorship in the banks and shores of navigable streams and waters, proceeds: "This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324, we held that it is for the several states themselves to determine this question, and that, if they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the state of Iowa in regard to land on the banks of the Mississippi, in the city of Keokuk, and, it appearing to be the settled law of that state that the title of riparian proprietors on the banks of the Mississippi extend only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state, this court accepted the local law as that which was to govern the case. The same view was taken in quite a recent case with regard to titles on the Sacramento river under the law of California. *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210. On the east side of the Mississippi, in the states of Illinois and Mississippi, a different doctrine prevails, and in those states it is held that the title of the riparian proprietor extends to the middle of the current, in conformity to the rule of the common law that the beds of all streams above the flow of the tide, whether actually navigable or not, belong to the proprietors of the adjoining

lands. *Middleton v. Pritchard*, 3 Scam. 510; *Morgan v. Reading*, 3 Smedes & M. 366; *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337. In the one case—that of Iowa—the government grant was held to extend only to high-water mark; and in the other cases—of Illinois and Mississippi—it was held to extend to the center of the stream; being governed in both cases by the respective laws of the states affecting the grants of land bordering on the river. In the one case, the state, by its general law, does not allow the grant to inure to the individual further than to the water's edge, reserving to itself the ownership and control of the river bed; in the other cases, the states allow the full common-law effect of the grant to inure to the grantee." *Hardin v. Jordan*, 140 U. S. 371, 382, 383, 11 Sup. Ct. Rep. 808, 838. There was in this case a dissenting opinion by Brewer, J., concurred in by Gray and Brown, JJ. The dissent, however, was not on the point we have been considering, but from the conclusion of the majority of the court as to what was the rule of law in this connection in Illinois, respecting lands under the waters of lakes and ponds; a different rule, these judges conceived, being established in that state as to such lands from that which obtained there as to lands under running water. And on the point we have here Mr. Justice Brewer said: "Beyond all dispute the settled law of this court, established by repeated decisions, is that the question of how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority." *Hardin v. Jordan*, 140 U. S. 402, 11 Sup. Ct. Rep. 838. And the same doctrine is clearly announced in the still later case of *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 255, 12 Sup. Ct. Rep. 173, and there can be no question of its soundness in principle and thorough establishment by the authorities.

Whether the grant made by the United States to George S. Gaines for the Demopolis Town Company, and which inured to its benefit, of the land upon which the city of Demopolis now stands, extended to ordinary high-water mark, or to the line of the low water, or to the middle thread of the Tombigbee, depends, therefore, upon the rule of property in this respect which Alabama has adopted. The rule which this state has adopted and declared through this court is that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low water. *Williams v. Glover*, 66 Ala. 189; *City of Demopolis v. Webb*, 87 Ala. 670, 6 South. Rep. 408. And this doctrine was long ago applied in a case like the one at bar, this court holding that the dedication of a street border-

ing on navigable water extends to low-water mark. *Doe v. Jones*, 11 Ala. 63. Applying this rule of property to the grant of the United States to George S. Gaines and associates, constituting the Demopolis Town Company, of the land upon which the town was subsequently built, the result is to invest said purchasers with title to said land down to the low-water line of the river; and they, having, as we have seen, the animus dedicandi coextensive with their proprietorship of the land between the line of the adjacent numbered lots and the river, must be held to have efficiently, and, when taken in connection with the acceptance by the public, which the record shows, irrevocably, dedicated the whole space from said lots to low-water mark to the public as a street under the name of "Arch Street." Our conviction that this result is enforced by the evidence is in no degree weakened by the testimony of some of the witnesses to the effect that they never knew there was a street in Demopolis along the margin of the river; or of some others that they never heard of a street along there until comparatively recent times; or of yet some others, who say they never heard of Arch Street prior to the inception of this litigation. It is not unusual, we feel safe in saying, for the names of streets in towns of the size of Demopolis to fall into disuse and oblivion, or for streets laid off in town maps and dedicated to remain unopened, or, being once opened, to be closed to the public, and occupied for private purposes; and that this is true of Demopolis abundantly, appears from the evidence here, going, as it does, to show that not a few of the other streets, as to the dedication of which there is no controversy, had remained or become closed, in whole or in part, and that many of the citizens of the town, long resident there, were ignorant of the names of various streets which had been all along open, used and recognized as streets. Nor is it a matter of any moment that the ground constituting Arch street could not in its natural state be used throughout its length as a street. It would not, we apprehend, be controverted—it is not, in fact, controverted—that it was feasible to overcome all obstructions to the use of this street which the character of the surface over which it was laid out presented. Nor can it be controverted that it had to be, and has all the time been, used at one point or others for the purposes of access to and regress from the river. It is to be doubted whether a single street in the town of Demopolis as laid down on the virgin soil in the year 1819 could, in its then natural state, have been used for the purposes of its dedication. Possibly others of them than Arch street required great labor and expense to adapt them to the uses of highways; and, if Arch street was more rugged, and required greater exertion to make it practicable for the passage of persons and the transporta-

tion of property along its course, or across it to the river, the necessity for such exertion was the more imperative in that it alone of all the streets of the town afforded an outlet to the river, commerce on which constituted so important a factor in the life and prosperity of the town. But, aside from all this, a dedication of land as a street can in no case, in our opinion, be defeated by considerations going to the relative adaptability of the land to that end, or to difficulties of subjecting it to such uses in point of fact, or to the extent of the use to which it will be subjected when its natural obstructions have been removed, or even to the necessity to so use it at all. *City of Duquesne v. Maloney*, 74 Amer. Dec. 358; *Hanson v. Eastman*, 21 Minn. 509; *Regina v. Spence*, 11 U. C. Q. B. 31.

The Tombigbee river opposite the city of Demopolis is a navigable stream, on which the public have the right of transportation of persons and property free of all charges or imposts whatever, subject to such regulations as government may deem just and expedient in conservation of the public easement. In juxtaposition to this easement is that other which the public have in Arch street, and this latter extends to and ends only at the point where the former begins. There is, and in the nature of things can be, no particle or scintilla of space between that side of Arch street furthest from the river and the water line of the river furthest from the town of Demopolis which is not covered by one or the other of these easements, and over which the public would not have the same right to pass and transport property as they would have along the course of Arch street, or up and down the current of the stream; and it follows as a necessary consequence that an obstruction to the use of this street for the purpose of going onto the river would be as violative of public right and as unlawful as an obstruction to its use for the purpose of going along it from one part to another of the town. These propositions are, to our minds, self-establishing results from the existence, side by side, and extending to the touch with each other, of these two public easements, and they are abundantly supported by authority. *Godfrey v. City of Alton*, 12 Ill. 36; *Haught v. City of Keokuk*, 4 Iowa, 190; *Barney v. Keokuk*, 94 U. S. 340; *New Orleans v. U. S.*, 10 Pet. 717.

Nor do we question the right and power of the city of Demopolis to provide facilities looking to the use of this street as a means for the passage of persons and property back and forth from the town to the river. The right to so use it free of charge being in the public, it may be—indeed we are inclined to that view—that the city could not, without special statutory authority, engage in the business of wharfing in the sense of erecting wharves, providing keepers thereof, and charging the public for the privilege of using

them in going onto or off from the river, or in lading or unlading property from or on them. But we do not doubt that the city, in the absence of legislative delegation of it, has the power and authority which is implied from the location of this street and the manifest purposes of its dedication not only to make suitable and convenient approaches from the town to the water line, but also to make such structures or excavations at and even beyond the water line, having regard to the rights of navigation, as are reasonably necessary and proper to enable the public to conveniently avail themselves of the rights of commerce and transportation which the river offers. The existence and exercise of the right to do this is essential to the enjoyment of that other right which the inhabitants of the town and the public incontrovertibly have to pass in their persons and effects from the town to the river, and vice versa, and hence is a right implied from its necessary connection with a right which is expressly granted. It is based on the same principle of necessity as that under which a municipality would rest to adjust the grade of a street with the grade of a public road leading up to its corporate line, and which, we apprehend, might, when necessary, be done by depressing or elevating the latter, though dissociated from the street the municipal authorities would have no power to build or change a highway beyond the lines of the town. So, too, we should say that, where the corporate line is on the near bank of a stream, ravine, or ditch which could only be passed by means of a bridge, the municipality, though without express power to build bridges beyond its own territory, would be authorized to gain access to the outside world by bridging such stream, ravine, or ditch, wherever it should be intersected by streets; and a fortiori would this be true where, as in this case, the chief, if not the only, purpose of the particular dedication was to afford egress from such barrier. It was upon considerations of this sort that it has been held in several well-reasoned cases that a town has the implied power to erect wharves for the convenience of the public under circumstances such as are found in the present case. *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232; *City of Newport v. Taylor's Ex'rs*, 16 B. Mon. 699, 804; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 686, 687, 3 Sup. Ct. Rep. 445, and 4 Sup. Ct. Rep. 15. This view disposes of the argument for appellant which proceeds on the supposed want of authority in the city of Demopolis to erect wharves and the like, and the consequent necessity for this to be done by private enterprise, to the conclusion that appellants had the right they exercised to erect wharves at the "Lower Landing," and charge the public for the use thereof.

Having thus reached the conclusion that the whole of Arch street extending to low-

water mark was dedicated to the public, it is next to be considered whether the easement vested in the public has been lost. It is strenuously insisted for appellants that it has been lost so far as respects that part of the street now occupied by them, including what is known as the "Lower Landing" on the river front of Demopolis, through the possession of themselves and their predecessors in ownership of the lower warehouse property for a great period of time, under an exclusive claim of right, and the application to these facts of the doctrine of prescription. On this question of possession of the part by appellants, and those under whom they claim, of the street and landing in question, the character of that possession, its duration, etc., a great mass of testimony has been taken by each side. We have read it carefully, more for the purpose of finding evidence of relevant and material facts than with a view to determining whether a possession of the character set up in the pleadings had existed, and, if so, for what length of time. These inquiries we deem entirely immaterial to any issue in the cause. Without going at all into them, or intending by what we say to indicate what our conclusion in respect to them would have been had they been deemed relevant inquiries, we will conclude for the argument that the appellants and their predecessors in ownership of the lower warehouse property have, without interruption, since 1844, had actual possession of said street, said lower landing, and the immediate approaches thereto; that this actual possession has all along been exclusive of the whole world; that continuously during all that time they have claimed title to said landing and the approaches, and so much of said street as has been occupied by them, and have claimed in all cases, and exercised at pleasure, the right to charge all persons for the privilege of using said landing as a wharf; and, further, that they have greatly improved the landing and approaches thereto,—have, if you please, created the landing in the sense of building the approaches to it and providing all the facilities which now exist, or have ever existed, for reaching and going on the river at that point; or, in other words, we will concede everything which appellants claim as to the facts of their relation to this landing. But all this will not help them. The law applied to these facts does not enforce any result of benefit to them. No statute of limitation or principle of repose obtains here. Neither the statute of limitation, nor the rule which carries title to adverse possession, nor the doctrines of staleness, equitable estoppel, or prescription, can be invoked or applied against the right of the city of Demopolis and of the public to have this street opened from end to end, and from side to side, from the municipal line on the north to the municipal line on the southeast, and from the numbered lots of the town to low-water mark of the stream,

and devoted to the uses to which it was dedicated by the original proprietors in 1819. The city never had any alienable title or right in the street. It could never have granted it, or any part of it, away for any purpose whatever. Having no power of direct alienation, it could not pass title indirectly by submitting for the statutory period to private possession, claim, and use. Having no power to grant it, no grant can be presumed from the lapse of time, however great, during which it has allowed respondents to deal with a part of it as belonging to them. Respondents, being held to know—a rule the propriety of which is emphasized here by the muniments of their title to the warehouse property, which show the fact—that all the space between their lots and the low-water line of the river was in and constituted Arch street, expended money and labor in putting improvements thereon at their own peril, and in recognition of the right of the city to deprive them of all private benefit therefrom by throwing the entire street open to the free use of the public whenever the municipal authorities deemed it expedient so to do; and hence no element of equitable estoppel against the public enters into their claim. These positions are well grounded in text and adjudged cases, including recent adjudications of this court. Judge Dillon, after stating the views of several courts of last resort on this subject, sums up what he considers the true doctrine as follows: "Municipal corporations, as we have seen, have in some respects a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts of a private nature, there is no reason why such corporation should not fall within limitation statutes, and be affected by them. \* \* \* But such corporation does not own and cannot alien public streets or places, and no mere laches on its part or that of its officers can defeat the right of the public thereto." 2 Dill. Mun. Corp. § 675. And the author incorporates in the text the views of the supreme court of Pennsylvania to this effect: "Streets and public squares are dedicated or acquired for the public use, not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons on property thus dedicated or acquired cannot be authorized by the original proprietor, or by the city corporation, and can be authorized only by the legislature; that unauthorized erections or obstructions thereupon are public nuisances; \* \* \* and that, in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a public nuisance which is an encroachment on a public right." And he quotes with approval from an opinion of Mr. Justice Sergeant the following language: "These principles of law, as well as our own Code, are

essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right." 2 Dill. Mun. Corp. § 669; *Com. v. Alburger*, 1 Whart. 469, 488; *Sims v. Chattanooga*, 2 Lea, 694; *Mayor, etc., of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 557, 561. And this doctrine has been fully adopted by this court in more than one case, the last being that of *Reed v. City of Birmingham*, 92 Ala. 339, 348, 349, 9 South. Rep. 161, citing *Olive v. State*, 86 Ala. 88, 5 South. Rep. 653, where the same principle is "broadly asserted," quoting as above from Dillon on Municipal Corporations, and as follows from Elliott, Roads & S. p. 490: "There can be no rightful permanent possession of a public highway for private purposes; and, although a right to maintain a private nuisance may in some cases be acquired by prescription, no length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it to the detriment of the public," (see, also, Elliott, Roads & S. p. 667 et seq.) and may now be said to be the established law of Alabama.

That the private use of a public highway of a character which is subversive of its use by the public as a thoroughfare may be perpetuated in any case by the invocation of the doctrine of estoppel in pais against the municipality in which the highway lies, we very much doubt. It would seem, on principle, that, inasmuch as the municipality has no alienable right in such highway, none which could be lost through its laches, or through actual private possession under a claim of exclusive right, but holds the locus in quo not only for itself and for its own citizens, but in trust for the public at large, whose rights therein are in no wise dependent upon anything the municipality may do or omit to do, nothing done or omitted by a city in the way of allowing, or even inducing, persons to make erections on a street which obstruct or interfere with its use could or ought to estop the public to have such obstructions removed, or to have them removed at the suit of their trustee and agent, the municipal corporation. Yet Judge Dillon says there may possibly be instances of such estoppel, but he adds that "such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle." 2 Dill. Mun. Corp. § 667. And the Messrs. Elliott, in their valuable work on Roads and Streets, say that, while some courts, "influenced, per-

haps, by the hardship that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements," etc., yet it is doubtful, they say, "if the doctrine of these cases can be sustained upon principle," except perhaps where the city has by affirmative action misled the claimant. And the text proceeds: "It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public; that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. In addition to this consideration may be noticed another influential one, already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning, and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel, and a wide departure from the rules laid down by the earlier decisions, and confirmed by the modern authorities." Elliott, Roads & S. pp. 669, 670. We adopt the principle thus declared, and it leads inevitably to the conclusion that on the facts of this case there was no estoppel resting on the city of Demopolis to assert the rights advanced by this bill; and if it were necessary to pass on the point in the present case we should be much inclined to hold that no act or omission to act on the part of the municipality with reference to obstructions in public streets could in any case raise up an estoppel against it to proceed in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street. This brings us to the final conclusion that the respondents had originally no right to obstruct any part of Arch street, or to use any part of it as a private landing or roadway to a private landing, or as a public landing not free of charge for the right to use it, and that no element of right has been injected into their claim by the efflux of time or the duration and character of their occupation and use of a part of the street as their private property.

Several other questions are presented by the assignments of error. They are either not insisted on in the argument, or are fully

covered by the exhaustive opinion delivered by this court through Mr. Justice Somerville when the cause was here on demurrer to the bill; and, seeing no reason to depart from what was then said, we reaffirm that decision throughout. *City of Demopolis v. Webb*, 87 Ala. 659, 6 South. Rep. 408. That and the foregoing opinion embrace all the points of this controversy, and determine them all adversely to the appellants, entitling the complainant below to the relief prayed in its amended bill, and granted by the chancellor; and the decree to that end is in all things affirmed.

(101 Ala. 165)

#### MARK et al. v. HASTINGS.

(Supreme Court of Alabama. May 23, 1893.)

MALICIOUS PROSECUTION—POWER OF PARTNER TO BIND FIRM—ADVICE OF MAGISTRATE—EVIDENCE—INSTRUCTIONS.

1. There was evidence that after an arrest had been made the sheriff inclosed the affidavit and warrant in an envelope, and mailed it; but to whom the envelope was addressed was not shown. The magistrate before whom the affidavit was made and who issued the warrant testified that he made diligent search for the affidavit and warrant, without finding them, and that he had never received them from the sheriff. *Held*, that it would be presumed that the sheriff mailed them to the magistrate, and that secondary evidence of their contents was admissible.

2. In an action for malicious prosecution, telegrams sent by plaintiff's employer to defendant, to induce him to abandon the prosecution, and declarations of defendant on being shown the telegram that he would not dismiss the prosecution, that plaintiff was guilty, were admissible to show defendant's zeal in the prosecution.

3. In an action for malicious prosecution, evidence as to the number of persons present when the officer went to arrest plaintiff is irrelevant, defendant not being responsible for any abuse in the manner of making the arrest which was not directed, participated in, or subsequently approved by him.

4. It is immaterial that defendant, in instituting the prosecution, acted under the advice of the magistrate issuing the warrant, although the magistrate was a practicing attorney, the advice being given not as an attorney, but as a magistrate. *Coleman, J., dissenting.*

5. An instruction that, if a prosecution was conducted maliciously and without probable cause, the jury may assess damages in such amount as they determine plaintiff is entitled to, without direction as to the elements of damages or the principles by which the jury's discretion should be governed, is erroneous.

6. In an action for malicious prosecution against two defendants, the evidence being conflicting as to the liability of one of them, an affirmative charge for defendants should have been refused, though a similar charge, applicable to the other defendant, might have been correct.

7. It was not error, in an action for malicious prosecution, to refuse an instruction that defendant had no authority to dismiss the prosecution, as he could have dismissed it by leave of court, and it appeared that he refused to allow its dismissal.

8. A partner is not liable for a malicious prosecution instituted by his copartner on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and then only in his individual capacity.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Action by Effie Hastings against H. C. Mark and another. From a judgment for plaintiff, defendants appeal. Reversed.

Kelly & Smith and J. J. Willett, for appellants. Knox & Bowie, for appellee.

**HARALSON, J.** This is a suit by appellee against appellants, as individuals and as partners, under the firm name of H. C. Mark & Co., to recover damages for maliciously and without probable cause causing her to be arrested on a charge of larceny. It is shown that the article alleged to have been stolen belonged to the partnership, and that the complaint was made, and the issue of the warrant procured, by Sol. Edel, one of the partners; also that the prosecution was terminated, and plaintiff discharged. Exclusive of the participation of H. C. Mark, the other partner, in the prosecution, the only controverted issues involved the existence of malice and of probable cause.

The first exception is to the admission of secondary evidence of the contents of the affidavit and warrant, the ground of objection being that the loss was not sufficiently shown. The preliminary proof is that the affidavit and warrant were sent to the sheriff of Jefferson county. The deputy who made the arrest turned over to the sheriff the affidavit, warrant, and bail bond made by plaintiff, asking him to return them to the magistrate before whom the case was to be tried, and that the sheriff inclosed the affidavit, warrant, and bond in an envelope, which he sealed and addressed, and which was mailed; but to whom addressed was not shown. The magistrate before whom the affidavit was made and who issued the warrant made diligent search in his office, and was unable to find the papers. He further testified that he never received them from the sheriff. The only defect in the proof is the failure to show to whom the sheriff addressed the envelope. It being his duty, under the statute, to deliver the warrant to the magistrate issuing it, and before whom it was returnable, the presumption should be indulged, in the absence of proof to the contrary, that in discharging his duty he addressed the envelope to the proper officer. There being no ground to suspect that the papers were withheld for an improper purpose, we think the preliminary proof is *prima facie* sufficient to allow secondary evidence of the contents of the affidavit and warrant.

Exceptions were also taken to the admissibility of two telegrams, one sent by Hirsch to Edel, and the other by Hirsch to Ullman. Also the declarations of Edel, to the effect that he would not withdraw the criminal proceeding; he wanted the warrant executed; that plaintiff was a thief; and he would not dismiss the prosecution. Plain-

tiff was, at the time the telegrams were sent, in the employment of Hirsch, and their object was to induce Edel to abandon the prosecution. No objection was made to the introduction of copies of the telegrams. The only specified objection is that the one sent to Edel was not shown to have been received by him. This objection is not founded in fact, for the magistrate testifies that Edel showed him the telegram, at which time he made the first two declarations referred to. The other was made on being shown the telegram received by Ullman. The declarations tended to show the determination of Edel to continue the prosecution, and, with the telegrams, were relevant, and admissible on the question of malice. Any acts or declarations of the defendant tending to show zeal or persistency in the prosecution, or a purpose to vex or oppress the plaintiff, are competent evidence. The motive which influenced the prosecution may be inferred from subsequent conduct.

The exception to the testimony as to the number of persons present when the officer went to arrest plaintiff is well taken. Defendants are not responsible for any wrong or abuse in the manner of making the arrest, which was not directed by them, or in which they did not participate, or subsequently approve. Such evidence is not relevant to the issues, having no bearing on the question of malice or probable cause, and only tends to increase the amount of the recovery by exciting the sympathy of the jury; and this by proof of facts which form no basis of recoverable damages.

There being evidence tending to show that Green, the magistrate who issued the warrant, but who is also a practicing attorney, advised Edel, upon a statement of the facts, there were sufficient grounds for a prosecution, defendants asked the court to charge: "If the jury believe from the evidence that Edel acted in good faith in making said affidavit, after a full and fair statement of the facts to Mr. Green, and that Mr. Green advised such course, then they must find for defendants." It may be regarded as elementary that to maintain an action for malicious prosecution it must be affirmatively shown that the criminal proceeding was instituted or continued, not only through malicious motives, but also without probable cause. These essentials must coexist. The existence of probable cause does not depend upon the actual guilt of the accused. It may exist though no offense in fact has been committed. The rule that the advice of counsel, sought and acted on in good faith, will exempt from liability, is founded on the doctrine that the question of probable cause rests on an honest and reasonable belief on the part of the prosecutor of the guilt of the accused, based on such facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, reasonably, and without prejudice, to believe

that the person accused is guilty; and such advice, if acted on in good faith, repels all imputation of malice which is inferred from mere want of probable cause. It is definitely and comprehensively stated in *Jordan v. Railroad Co.*, 81 Ala. 227, 8 South. Rep. 191, by Stone, C. J., in the following language: "Where a prosecutor has fully and fairly submitted to learned counsel all the facts which he knows, or by proper diligence could know, to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and, acting in good faith upon such opinion, he does institute criminal proceeding, he cannot be held liable in an action for malicious prosecution, although the legal opinion given be erroneous. Such advice, honestly sought and acted on, supplies the indispensable element of probable cause." This rule originated in the policy of the law to encourage prosecutions when there is probable cause, actual or constructive, and is founded on the theory that persons who have made the law their study, and followed it as a profession, are well-recognized advisers on questions of law, and that the citizen is justified in relying and acting on their advice. The protecting power of the rule is limited to the advice of licensed attorneys in good standing and of reputed learning and competency. It should not be extended beyond these limitations.

The charge under consideration, when referred to the evidence, raises the question whether the advice of a justice of the peace, when he is also a practicing attorney, after a full and fair statement of the facts to him, advises that the prosecution can be maintained, should be allowed the same place in the defense to an action of this character as is given to the advice of learned counsel. The general rule is that the advice of a magistrate cannot justify a prosecution. 14 Amer. & Eng. Enc. Law, 57. Does the fact that the magistrate is also a practicing attorney have a different effect? We think not. The policy of the law forbids a justice of the peace to act as an attorney, or to advise in regard to a prosecution intended to be instituted before him. The evidence tends to show that the facts were not stated to Green, nor his advice asked as an attorney, but only as a justice of the peace. A magistrate, acting as such, is not a professional adviser. Upon complaint being made that a public offense has been committed, it becomes the duty of a justice of the peace, under the statutes, to examine the complaint, and such witnesses as he may propose, then determine whether there is reasonable ground to believe that the accused is guilty thereof, and, if he so finds, to issue a warrant of arrest. Code, §§ 4256-4258. It would be highly improper for him to prejudge the case. Green, not being charged in his official capacity with the duty of advising defendants to commence a criminal proceeding before him, his advice cannot justify their

conduct. However learned in the law, it would be an impolitic and unwarranted extension of the rule to allow the advice or opinion of a justice of the peace in regard to the sufficiency of the grounds for the institution of a prosecution before him. It is proper to remark that Green testifies he has no recollection of giving such advice. There is no error in refusing the charge. *Bobst v. Ruff*, 100 Pa. St. 91.

At the request of plaintiff the court instructed the jury upon the hypothesis that there was no probable cause for believing the plaintiff was guilty of larceny, and that the prosecution was instituted and conducted maliciously, they may find for the plaintiff, and assess her damages in such an amount as they determine she is entitled to. The charge in respect to the assessment of damages left the jury to assess damages according to their judgment, caprice, or sympathy, without direction or instruction as to the elements of damages, or the principles by which their discretion should be governed, or the grounds on which they were authorized to award damages, "to be a law unto themselves, freed from all legal restraints, to assess damages at their own will and pleasure," unrestrained even by the limitations of the complaint. *True v. Plumley*, 36 Me. 466. Under the broad and unlimited terms of the charge the jury could assess remote or speculative or exemplary damages, though no actual damages, the natural and proximate result of the wrong, was shown. *Howard v. Taylor*, 90 Ala. 241, 8 South. Rep. 36; *Hamilton v. Smith*, 39 Mich. 222.

There being a conflict in the evidence so far as concerns Edel, the court did not err in refusing to give the affirmative charge for defendants, though a similar charge, applicable to Mark alone, might have been correct. Neither was there error in refusing to charge that Edel had no authority to dismiss the prosecution after it had been commenced. The charge was misleading. The prosecutor could have dismissed the prosecution by permission of the court. Had the evidence shown that application was made, and the court refused to allow its dismissal, the charge would have been correct; but the evidence showing, on the contrary, that Edel refused to withdraw the prosecution, it was abstract.

The remaining questions arise on the refusal of the court to grant a new trial. Two motions were made for this purpose, one by the defendants jointly, and the other by Mark separately. As the judgment must be reversed on other grounds, and another trial had, we shall, in consideration that injustice might thereby be done to one or the other parties, refrain from discussing the evidence so far as regards Edel; and would pursue the same course in respect to the separate motion by Mark were it not that the complaint proceeds on the theory that the defendants are jointly and severally liable as partners.

Though a partnership is responsible for the wrongful act of one of its members, committed in the course and for the purpose of transacting the partnership business, the willful tort of one partner, when not so committed, is not imputable to the firm. A prosecution for larceny for goods stolen from the firm is not within the scope of a mercantile partnership. From this principle results the settled rule that one partner cannot be made liable for the arrest or prosecution of a person by a copartner on a charge of larceny of partnership property, unless he advises, directs, or participates therein, and then only in his individual capacity. Mere knowledge of the prosecution and mere passiveness are not sufficient to render him liable. *Gilbert v. Emmons*, 42 Ill. 147; 1 Lindl. Partn. 149. The evidence shows that Mark was in South Carolina when the prosecution was commenced; and he testifies that he had nothing to do with it, and knew nothing of it until he was summoned as a witness on the preliminary trial. The only testimony, other than the fact of his being a partner, by which it is attempted to connect him with the prosecution, is that he was seen conversing with Edel during the progress of the trial. The preponderance of the evidence is so decided as to clearly convince us that the verdict is wrong and unjust as to Mark.

This opinion was prepared by the late Associate Justice CLOPTON, and adopted by the court. Reversed and remanded.

COLEMAN, J. I incline to the view that the opinion in this case should be explained or qualified. To sustain the action it must be shown that the prosecutor was actuated by malice, and without probable cause. When a person goes before a magistrate, and makes affidavit that an offense has been committed, and that he has reasonable grounds for believing that A. B. is guilty, without more, and the magistrate issues a warrant upon such affidavit, the fact that the magistrate issued a warrant cannot be given in evidence by the defendant, either upon the question of malice or probable cause. Section 4256 of the Criminal Code makes it the duty of the magistrate before whom complaint is made "to examine the complainant, and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the person making them." Section 4257: "The depositions must set forth the facts stated by the complainant and his witnesses tending to establish the commission of the offense and the guilt of the defendant." Section 4258: "If the magistrate is reasonably satisfied from such depositions that the offense complained of has been committed, and there is reasonable ground to believe that the defendant is guilty thereof, he must issue a warrant of arrest." My understanding of the law is that, if the party complaining pursues the above provisions of

the statute, and makes a full and fair statement of the facts, as he has reasonable grounds to believe they exist, after a fair investigation, and the magistrate, in the discharge of his judicial duty, being reasonably satisfied from the statement that the offense has been committed, and issues a warrant of arrest, under which the accused is prosecuted, the party complaining before the magistrate, if afterwards sued for a malicious prosecution, is entitled, on the question of malice, to the benefit of the proceedings and complaint before the magistrate, as evidence tending to rebut malice. It is well settled "that a prosecutor, who fully and fairly submits to counsel, learned in the law, all the facts which he knows, and by proper diligence could know, to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and, acting in good faith upon such opinion, he does institute criminal proceedings, he cannot be held liable in an action for malicious prosecution, although the legal opinion given be erroneous. Such advice, honestly sought and honestly acted on, supplies the indispensable element of probable cause; and such advice, conscientiously sought and obtained, tends to rebut malice." *Jordan v. Railroad Co.*, 81 Ala. 227, 8 South. Rep. 191; *McLeod v. McLeod*, 73 Ala. 42; *Leaird v. Davis*, 17 Ala. 27. Such advice, thus acted upon, as a matter of law furnishes a complete defense to the whole action. The weight of authority, in my opinion, holds that such advice given by a justice of the peace, though acted upon, will not afford the prosecutor a complete defense. Without proof of malice, a suit for malicious prosecution cannot be maintained. Whatever legally rebuts proof of malice should be admitted in evidence. In the case at bar the defendant testified that he "called to see J. F. Creen, and related to him what I had heard, as above stated. \* \* \* I then told him to talk with Regina; and she told him, in my presence," etc. "After this conference, I asked Mr. Creen if he thought I had sufficient ground to have Miss Hastings arrested for the larceny? Mr. Creen replied he thought I did have sufficient grounds, and I then made the affidavit for her arrest." Mr. Creen, as the evidence shows, was a practicing attorney of 10 years. He was also a magistrate, and the affidavit for the arrest was made before him. It is evident that, if the prosecutor had left Mr. Creen, and gone before some other magistrate, and made the affidavit, these circumstances, if the facts were fully and fairly stated, and his advice acted upon in good faith, would have furnished a complete defense. The evidence was certainly competent, in my opinion, upon the question of malice. The reason given why the advice of a justice of the peace will not justify the institution of a prosecution is that they are persons not learned in the law, and therefore the party is not justified in rely-



ing upon such advice; but when the proof shows that the magistrate is a person learned in the law the reason falls, and the rule ought not to apply. It may have been improper for the justice of the peace to have issued the warrant in a case in which, as an attorney, he had given the advice. The fact that the warrant, "after the conference with him," was sued out before him, "may have been a question for the jury in determining whether the advice" was honestly sought and honestly acted on,—whether the prosecution was bona fide. It was certainly competent to show these facts, and, if bona fide acted upon, their tendency was to repel malice. The following cases are authority upon this question, though I do not go to the extent of the proposition declared in some of the cases. *Ball v. Rawles*, 93 Cal. 222, 28 Pac. Rep. 937; *Ross v. Hixon*, 48 Kan. 550, 26 Pac. Rep. 955. This case is reported in 26 Amer. St. Rep. 123, and a full discussion of the question may be found in the notes, with many citations. See, also, *Newell*, Mal. Pros. p. 323, §§ 9, 10, and citations. *Newman v. Davis*, 55 Iowa, 447, 10 N. W. Rep. 852. This very question was decided in a recent Massachusetts case, which upholds the position here taken. *Monaghan v. Cox*, 155 Mass. 487, 38 N. E. Rep. 467.

I concur that the case should be reversed.

(98 Ala. 539)

#### DULIN v. HUNTER.

(Supreme Court of Alabama. May 25, 1893.)

ASSIGNMENT OF MORTGAGE — BONA FIDE PURCHASER—NOTICE OF EXISTING INCUMBRANCE.

1. The assignee for value of a mortgage securing a debt not evidenced by negotiable paper is not affected by a prior unrecorded mortgage, of which he had no notice at the time of the assignment.

2. The onus of proving that the assignee had notice of the prior mortgage is not discharged by evidence that his assignor had such notice at the time of taking the mortgage.

Appeal from circuit court, Chambers county; James R. Dowdell, Judge.

Trover by E. W. Hunter against W. M. Dulin for the conversion of a mare. Judgment for plaintiff, and defendant appeals. Reversed.

The evidence, as shown by the bill of exceptions, tended to prove that on January 19, 1891, J. L. McCain executed to Mrs. Hunter, the plaintiff, a mortgage on the mare involved in this suit. The evidence showed that this mortgage was filed for record in the probate office on March 14, 1891. The plaintiff proved the execution of the mortgage, and that the debt secured by it was not paid, and that the mare, the subject-matter of this suit, was the one described in said mortgage, and that the defendant took possession of said mare after plaintiff's mortgage was due. The defendant testified in his own behalf that on February 7, 1891, he purchased from one M. W. Carlisle & Bro. a certain mortgage, which was executed by said J. L. McCain and one J. L. Peed to said Carlisle & Bro.

on January 21, 1891, and which conveyed the mare which is involved in the present controversy, but that he did not know of the Hunter mortgage when this assignment was made, and did not know of it until it was filed for record. This mortgage was introduced in evidence, and it was indorsed as having been assigned to the defendant. The defendant then proved the execution of said mortgage, and that a part of the debt secured thereby was unpaid. M. W. Carlisle, one of the members of the firm of Carlisle & Bro., testified that, at the time of the execution of said mortgage to them by McCain and Peed, he had no notice of Mrs. E. W. Hunter's mortgage. McCain and J. L. Peed, as witnesses for the plaintiff, testified that at the time they conveyed the mortgage to M. W. Carlisle & Bro. they told M. W. Carlisle that Mrs. Hunter had a mortgage on one of the mares conveyed therein, which is the one involved in this suit. The court, among other things, instructed the jury as follows: "That, if they believed from the evidence that Carlisle had no [?] notice of the existence of Hunter's mortgage at the time he took the mortgage to Carlisle Bros., his notice would be chargeable to Dulin, though the latter had no notice, either actual or constructive, and they must find for the plaintiff." The defendant duly excepted to this portion of the court's general charge, and also separately excepted to the court's refusal to give each of the following charges requested by him: (1) "If the jury believe from the evidence that Dulin had notice of Hunter's mortgage, then they must find for the defendant." (2) "If the jury believe all the evidence, they must find for the defendant."

J. M. & E. M. Oliver, for appellant. N. D. Denson, for appellee.

MCLELLAN, J. In respect of the rights of an assignee of a mortgage securing indebtedness not evidenced by negotiable paper, there are two distinct lines of authority, establishing different doctrines in their respective jurisdictions. In New York, and perhaps in one or two other states, the rule is that the purchaser of such a mortgage succeeds only to the rights of the mortgagee, and is chargeable with notice of, and takes subject to, the equities existing, not only between the mortgagor and mortgagee, but also between the latter and third persons, at the time of the transfer. *Bush v. Lathrop*, 22 N. Y. 535. In other states—Pennsylvania, New Jersey, and Michigan among them—the assignee of such a mortgage is chargeable only with notice of equities existing between the mortgagor and mortgagee; and this limitation is based on the consideration that an assignee can readily inquire of the mortgagor what claims he may have against the debt and mortgage which the assignee is about to purchase, but he may not be able, by the utmost dili-

gence, to acquire knowledge of the latent equity of some third person. 15 Amer. & Eng. Enc. Law, pp. 860, 861. And this is the view taken by Chancellor Kent in *Murray v. Lylburn*, 2 Johns. Ch. 441, and declared in a dissenting opinion delivered by him, as chief justice, in the case of *Beebe v. Bank*, 1 Johns. 529. This court is committed to the doctrine last stated. In the case of *Tison v. Association*, 57 Ala. 323, 331, the rule is thus declared by Brickell, C. J.: "The assignee of a mortgage intended as security for a debt which is not negotiable stands in the light of an assignee of a mere chose in action. The general and well-settled principle is that the assignee of a chose in action takes it subject to all the defenses and equities existing against it at the time of the assignment. The rule is generally supposed to extend only to the equities and defenses of the mortgagor, and not an equity residing in some third person against the assignor, of which the assignee has no notice;" citing, among other cases, that of *Murray v. Lylburn*, supra, and quoting from the opinion of Chancellor Kent therein as follows: "The assignee can always go to the debtor, and ascertain what claims he may have against the bond or other chose in action which he is about to purchase from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason the claim of the assignee without notice of a chose in action was preferred, in the late case of *Redfean v. Ferrier*, 1 Dow, 50, to that of a third party setting up a select equity against the assignor. Lord Eldon observed in that case that 'if it were not to be so no assignment could ever be taken, with safety.'" And this doctrine was reaffirmed in the later case of *Goldthwaite v. Bank*, 67 Ala. 549, 554, where it is said by Clopton, J., for the court: "While it is true that the assignee of a paper not negotiable takes it subject to all the equities to which it was subject in the hands of the assignor, this is here understood to mean the equities existing between the original parties, and not equities which may arise as to other parties in the course of the transfer;" citing *Tison v. Association*, supra. We conceive these cases to have established in this state the rule that defenses and equities existing between a mortgagee and third persons will not affect the rights of an assignee of the mortgage, unless he had notice thereof at the time of the assignment, and that an assignee for value of a subsequent mortgage, without actual notice of a prior unrecorded mortgage, is not prejudiced by the fact that his assignor, the second mortgagee, took with notice of the first mortgage. The evidence was without conflict that the mortgage un-

der which plaintiff claims title to the property in suit was not recorded until after the defendant became a purchaser for value of the mortgage under which he claims title thereto. This state of case imposed on plaintiff the onus of proving that the defendant purchased with notice of the prior incumbrance. The onus was not discharged by proof that defendant's assignors had such notice when the second mortgage was executed. There was no evidence that defendant himself had such notice. The plaintiff, therefore, failed to make out her case; and the court erred in refusing to give the affirmative charge and charge 2 requested by defendant, as also in that part of the general charge to which an exception was reserved. Reversed and remanded.

(99 Ala. 209.)

FARGERSON et al. v. HALL et al.

(Supreme Court of Alabama. May 23, 1893.)

FRAUDULENT CONVEYANCES — WHAT CONSTITUTE — SUFFICIENCY OF CONSIDERATION.

1. In a suit to set aside as fraudulent a sale by an insolvent merchant of his stock of goods, notes, and accounts to certain creditors for the amount of his indebtedness to them, and an amount in cash, it appeared that the cash amount was the amount the merchant owed to certain other creditors for borrowed money, that he demanded the amount in order to pay such creditors, that the sale was made with the understanding that the amount should be so used, and that it was so used. *Held*, that a fraudulent intent could not be imputed to the purchasing creditors, in paying such amount as part of the purchase price of the goods.

2. The goods were sold for \$3,000. The receiver appointed to close out the stock realized \$3,164.52. *Held*, that the amount paid was not so materially less than the value of the goods as to make the sale fraudulent.

Appeal from chancery court, Colbert county; Thomas Cobbs, Chancellor.

Bill by J. T. Fargerson & Co. against A. M. Hall and others to set aside a sale of personal property as fraudulent. Decree for defendants. Complainants appeal. Affirmed.

The appellants filed their bill against the appellees, the object of which was to set aside, as fraudulent against his creditors, a sale of a stock of goods and his notes and accounts, made by A. M. Hall to Throne, Franklin, Nance & Adams and J. S. Reeves & Co., the two defendant firms, to which he was indebted. The material allegations of the bill are that prior to the 25th of October, 1889, the defendant A. M. Hall was a merchant at Cherokee, Ala., carrying on a general merchandise business, and had been so engaged for several years; that on that date said Hall was indebted to complainants in a large sum of money, — \$2,640.62; that he was insolvent, and on that date he sold all his stock of goods, notes, and accounts to said defendant firms, the consideration being the debts he was then owing said defendants, which are alleged to have been less than \$3,000, and \$800 in cash, then and there paid

to him; that the consideration for the alleged sale was inadequate, not being more than one-half of the value of the property transferred; that defendants knew that said Hall was insolvent, and that the property attempted to be transferred to them was worth more than twice the amount of their debts; that said attempted sale was made to hinder, delay, and defraud the complainants and the other creditors of said Hall, and was fraudulent and void; and the prayer is to have it so declared. On the application of the complainants a receiver was appointed, who took charge of the property transferred to defendants, sold the goods, collected the notes and accounts, as far as practicable, and has the proceeds in hand. A separate answer was filed by A. M. Hall. The other defendants answered, admitting the insolvency of Hall, and their belief of that fact, at the time they made said purchase. They allege that the property they bought was worth less than they paid for it, and deny the allegation that it was worth more. They also allege that in their transaction with Hall they gave up their claims against him, aggregating the sum of \$2,825, and paid to him \$853 in money, for the purpose, and with the understanding and requirement, on their part, that he should pay the same to certain creditors of his for borrowed money, whose names he gave; that Hall himself required them to pay this sum in cash as a condition to his making the sale, so that he might pay off these debts; and that he did, accordingly, pay out the whole sum thus received for that purpose. They state the amounts of their respective debts, which they allege to be due, owing, and bona fide; deny that any benefit was reserved to the said Hall, or that there was any fraud, or purpose to hinder and delay the other creditors of said Hall, but that the transaction was fair and honest. The chancellor, on final hearing, denied the relief prayed for by complainants.

R. W. Walker and Humes, Sheffey & Speake, for appellants. Kirk & Almon, for appellees.

HARALSON, J. There is no dispute between the parties as to the legal principles by which this case is to be decided. They have been so repeatedly declared by this court as to require but little repetition of them here. There are three inquiries, and only three, to which consideration need be devoted in a case of this kind, viz. the bona fides of the consideration paid, its sufficiency, and whether or not there was a reservation of benefits to the debtor. *Pollock v. Meyer*, (Ala.) 11 South. Rep. 385; *Dawson v. Flash*, (Ala.) 12 South. Rep. 69.

1. There is no controversy as to the bona fides of the debts which respondents held against said Hall. It is clearly shown, and is not denied, that he owed the defendants Throne, Franklin, Nance & Adams, the sum

of \$1,304, and to defendants J. S. Reeves & Co., \$1,521.39, aggregating \$2,825.39. Nor is it denied—for it is fully established by the proof—that the defendants, together, paid to Hall, as a part of the consideration of the trade, the sum of about \$853 in cash,—an amount of money which Hall was owing to other creditors for sums borrowed of them, which he felt especial concern to pay. The proof tends to show, and is satisfactory to that end, that the representatives of the defendants, Nance and Neely, who conducted the negotiation, did not desire to purchase the notes and accounts, but simply the stock of goods, but that Hall would not make the sale unless these were included, and, yielding to his terms, they furnished him the amount of money he required to pay this indebtedness for borrowed money, the larger part of which was owing to his father and brother. Hall, who was examined by the complainants, swears to this fact, and also that he paid every cent of the amount thus paid to him to these creditors, and produced on the trial their receipts to corroborate this statement. He says the respondents made no demand of him to pay these debts, but that he did require from them the money for the purpose; but Nance and Neely both swear he gave them the names of these creditors, and they paid the sum required with the understanding that it should be paid over to them, which Hall informed them afterwards he had done, and produced the receipts to show. Their version of the transaction is to be credited as the correct one, since it is natural, and what we might expect of them, under the circumstances, having been advised by their counsel how to act. Hall had the right to pay these creditors, in preference to others, out of the proceeds of the sale of his property; and the purchasers will not be held to a fraudulent intent in having paid to him this sum of money as a part of the purchase price of the goods, if they paid it, and had a reasonable expectation at the time that it would be used for the purposes specified, and it was in fact so used. *Chipman v. Stern*, 89 Ala. 207, 7 South. Rep. 409; *Levy v. Williams*, 79 Ala. 179; *Rankin v. Vandiver*, 78 Ala. 562; *Hodges v. Coleman*, 76 Ala. 203. It thus appears that the debts of the respondents, which were satisfied in the sale of the goods, notes, and accounts, were bona fide, and that the money paid as the balance of the consideration for the purchase was honestly and fairly paid.

2. As to the value of the goods sold, and the notes and accounts transferred, there is conflict in the evidence. It would extend this opinion at too great length, and would be unnecessary, to review in detail the evidence of the witnesses as to these values. Referring first to the goods, the complainants, to prove their value, examined four witnesses, including the defendant A. M. Hall, neither of whom, except Hall, showed a knowledge of the stock, from an examina-

tion of it, or had experience which would entitle them to be considered as very competent to speak in reference to such matters. But, with such experience and knowledge as they had, they gave it as their opinion that the goods were worth 75 cents on the dollar of their original cost. Hall says they were worth that price. On the cross-examination he admitted that he had sold the stock for \$3,000; that the transaction was fair and honest; that the times were hard, people poor, and money very scarce; that he was about a week negotiating the trade with defendants' representatives; that he had been in business since 1881, and the stock in store was composed partly of accumulations of goods since that time, but there were not a great many old goods; that he had on hand \$500 or \$600 worth of new goods, and had many that had been carried from the winter before, and most of the summer goods had been brought over from the past summer; that there was a difference between him and the representatives of the defendants as to the value of the goods, notes, and accounts; that they did not propose to pay exceeding \$500 over and above the amount he owed them, but he demanded \$800. Finally the sale was consummated, and the goods were valued in the transaction at \$3,000, and the notes and accounts at \$679. On the other side, Nance and Neely, who made the negotiation with Hall, both depose that they paid more for the goods than they believed they were worth; that they had been selling to him for the past eight or nine years, and had sold him the greater part of the goods he had bought; that they had seen his stock several times a year, and had kept up with it; that the stock was old, for the greater part, and was not worth exceeding \$2,600, but that they offered him the amount of their debts, \$2,825, and \$300 for the goods, notes and accounts, but he declined the offer, and required \$300 more, and the trade was finally concluded, valuing the stock at \$3,000, and the notes and accounts at \$679. Defendants examined seven other witnesses as to values, three of whom testified to many years' experience in mercantile business, and to having examined this stock of goods; two of them giving it as their opinion that it was not worth more than 50, and one that it was worth 60, per cent. on the cost price. The other four, who had had some experience with secondhand stocks of goods, testified that 50 per cent. on the cost price was a fair valuation of them. The stock, as inventoried by the receiver, at net cost, amounted to \$4,276. If valued at 75 cents on the dollar, as estimated by complainants' witnesses, it was worth \$3,200, and if at 50 cents, as estimated by other witnesses, then \$2,100, making a difference in their estimates of \$1,100. In proving the consideration of a sale of this character the law allows room for the ordinary difference of opinion, and will not weigh the estimates of

values in too exacting a balance. *Bank v. McDonnell*, 89 Ala. 447, 8 South. Rep. 137. But we have other evidence to aid us in the approximate value of the goods. The court appointed Amos L. Moody, the register in chancery, as the receiver in this suit, who took possession of the property transferred, and proceeded to sell the goods and collect the claims. The receiver's sales amounted to \$3,617.75. He was about 10 months in closing out the stock,—a part of it at private sale, and some at auction. His expenses, which he swears were curtailed to what was absolutely necessary, amounted to \$008.85, leaving as a balance, on that account, of \$2,708.90. But before the receiver took charge the defendants had sold \$625.70 worth of goods at a cost of \$115.08, and had added \$55 worth of new goods, which the receiver got, together amounting to \$170.03, to be deducted from the gross sales, leaving a balance of \$455.62 to be added to the \$2,708.90, making \$3,164.52 as the approximate value of the goods at the time they were sold to the defendants, being \$164.52 more than defendants paid for them. Under the circumstances we cannot regard \$3,000, paid for \$3,164.52 worth of goods, as so materially less than their value as to make the sale fraudulent, especially when it is remembered that for the 10 months between the sale by the defendants and the closing out of the receivership the interest on the amount the defendants paid for the goods exceeded this difference of \$164.52, and that the interest is still running against them, and none in their favor, on the sum remaining in the hands of the register. But in addition to this it is clearly shown that Hall transferred everything he owned, without the reservation of any exemptions; and, if the amount paid in cash was less than the exemptions to which he was entitled, the other creditors cannot complain of the transaction, since they are not injured by it. *Brinson v. Edwards*, 94 Ala. 448, 10 South. Rep. 219.

3. For convenience we consider the transaction of the notes and accounts separate from the sale of the goods, although they were one and the same. These were estimated and included at \$679. After an effort extending over nearly two years, the receiver collected on these claims \$519.75, and James Nance collected, before the receiver was appointed, \$284.62; making total collections, \$768.37. Deducting 15 per cent., the reasonable expense, as shown, of collecting, and we have remaining \$25.87 less than was paid for them. Green Turner, who was employed by the receiver to collect these claims, or to aid in so doing, who was acquainted with the financial standing of the parties, gives his opinion that the batch was not worth over \$650 when sold; and Amos L. Moody, who was also well acquainted with the parties owing the notes and accounts, agrees with said Turner that not more than

\$40 or \$50 more can be collected; that the parties are poor, and, for the most part, nothing can be made out of them. The evidence is satisfying, without reviewing it, that the defendants paid fair value for these claims.

4. It is not insisted that there was any reservation of benefit to Hall in making the sale. Hall himself swears: "In this transaction I did not receive any personal benefit, other than the payment of my indebtedness. I did not retain a nickel. \* \* \* I honestly owed the amounts I paid. \* \* \* These payments were made according to my design at the time I made the demand for the \$800." Speaking of the entire transaction, he says: "The sale of the goods, notes, and accounts was not made to hinder, delay, or defraud any of my creditors. Neither was it made to hinder, delay, or defraud J. T. Fargerson & Co. I honestly owed the parties the amounts I have stated,—\$1,521.39 to J. S. Reeves & Co., and \$1,304 to Throne, Franklin, Nance & Adams." We find no error in the record, and the decree of the chancellor is affirmed.

(99 Ala. 292)

**BAMBERGER et al. v. VOORHEES et al.**  
(Supreme Court of Alabama. May 23, 1893.)

**FRAUDULENT ATTACHMENT—BILL TO SET ASIDE—SUFFICIENCY—LACHES.**

1. A bill to set aside as fraudulent an attachment and sale by the confidential clerk of an insolvent merchant of the entire property of such merchant, and to subject such property to the payment of complainants' demand, alleged that after such attachment, complainants, to collect their demand, attached the same property seized under the alleged fraudulent attachment, and obtained judgment; that, after their attachment, other creditors levied on the same property, and filed separate bills to set aside the alleged fraudulent attachment, and enjoined the sheriff from paying over the money realized from the sale under the alleged fraudulent attachment. The bill made the merchant, clerk, sheriff, and each of the attaching creditors parties. *Held*, that the bill was not multifarious.

2. Nor does such bill show a misjoinder of defendants.

3. Complainants will not be held guilty of laches in not filing their bill until after the other attaching creditors had filed bills to set aside the alleged fraudulent attachment, where it is not shown that defendants have been injured or prejudiced by their delay.

4. The bill is not defective because it fails to allege that the suits between the other attaching creditors against the merchant and clerk have been determined.

Appeal from city court of Decatur; William H. Simpson, Judge.

Bill by Voorhees, Miller & Rupel against Bamberger, Bloom & Co. to set aside a fraudulent attachment. A demurrer to the bill was overruled, and defendants appeal. Affirmed.

The bill in this case was filed by complainants on the 4th day of March, 1891, and its averments are that I. Pinkus, a merchant in Decatur, Ala., doing business under the name of I. Pinkus & Co., had been buying goods

from them during the years 1889 and 1890, and on the 1st of March, 1890, owed complainants a balance on their purchases of \$975.30, as evidenced by their three promissory notes for \$314.95 each, of date 20th February, 1890, payable in 30, 60, and 90 days, respectively, and a verified account of \$30.50; that prior to March 1, 1890, said Pinkus was heavily indebted to others besides complainants, and was, in fact, at that time, insolvent; that long prior to that date Herbert Cartwright had been a trusted employe and confidential clerk of said Pinkus, and knew his financial condition, and that he was insolvent; that during the latter part of February, and early in March, 1890, said Pinkus secretly removed from his store a considerable portion of his then stock of goods, with the intent to hinder and delay his creditors in the collection of their obligations against him, and with the intent to defraud them; that, in pursuance of this fraudulent intent, he entered into a conspiracy with his said clerk, Cartwright, the result of which was that said Cartwright sued out an attachment against said Pinkus & Co. from the city court of Decatur for a pretended debt from said Pinkus & Co. to him of \$9,500, and caused said attachment writ to be placed in the hands of the sheriff of Morgan county, and to be levied on the merchandise, goods, chattels, and estate of said I. Pinkus & Co., and, taking the same into his possession, proceeded to sell the same, and converted them into money; that said pretended indebtedness of said Pinkus & Co. to said Cartwright, except as to a small part thereof, the exact amount of which the complainants were unable to state, was simulated, fictitious, and not a bona fide, honest debt, but was conceived for the purpose of fraud, and with the intent to defraud the creditors of said I. Pinkus & Co.; that on the 4th March, 1890, subsequent to the attachment of said Cartwright, complainants also sued out a writ of attachment from said city court of Decatur against said Pinkus & Co., to collect their said debt against said Pinkus, and, placing it in the hands of the sheriff, caused the same to be levied that day on the same property on which the attachment of said Cartwright had been levied, and subsequently they obtained a judgment in said city court in said attachment suit against said Pinkus & Co. for \$1,005.50, besides \$20.75 costs of suit; that said Pinkus & Co. had no other property besides that levied on which was liable to execution, and that was not sufficient to pay the amount of said pretended claim of said Cartwright; that, subsequent to complainants' said attachment and to the levy of the same, other creditors—Bamberger, Bloom & Co., Lowenheim, Seinsheimer & Kahn, and Marks Bros. & Marks—sued out attachments, also out of said city court, against said Pinkus & Co., and caused them to be placed in the hands of the sheriff, and levied

on the same property that the attachments of said Cartwright and of complainants had been, before that time, respectively, levied, which were all levied subsequent, and subject to complainants' said attachment; that said parties, each, also filed a bill in equity, in said city court, for the purpose of setting aside said attachment of Cartwright, and its levy on said property, as being fraudulent and void as to the creditors of said Pinkus & Co., and in these suits the sheriff was enjoined from paying over the money realized from the sale of the goods under the attachment of said Cartwright, and it is now in the custody of the sheriff, subject to the orders of the court. The complainants do not appear to have been made parties defendant to said suits. Each of said creditor firms whose names are given above, the said Herbert Cartwright, said I. Pinkus, and the sheriff, Silas P. Ryan, are made parties to the bill. The prayer of the bill is that the attachment of said Herbert Cartwright be declared fraudulent and void; that complainants' said claim against defendant Pinkus be first paid out of the proceeds of said sale; that the sheriff be enjoined and restrained from paying out any of said money until complainants' said payment and costs are first paid, and for general relief. The bill was demurred to by Bamberger, Bloom & Co., Marks Bros. & Marks, and Lowenheim, Seinsheimer & Kahn, and on its submission on said demurrers the court overruled them, and the cause is here to reverse the decree of the chancellor in overruling said demurrers.

Humes, Sheffey & Speake and W. R. Francis, for appellants. E. W. Godbey and D. D. Shelby, for appellees.

**HARALSON, J.** It is provided by statute in this state that the levy of an attachment creates a lien in favor of the plaintiff. Code, § 2957. This lien is inchoate until judgment is obtained in the attachment suit, when it becomes specific and fixed, and dates from the levy of the attachment. The levy places the property in the custody of the law, and the lien it creates cannot be divested or overridden by any subsequent lien. When there are writs of attachment subsequent to the first, each differing in date of levy, and all levied on the same property, each subsequent one is levied in subordination to the ones that precede it, and the lien of each dates from the moment of its levy; and, if all are prosecuted to judgment, they must be paid in the order of their respective levies. 1 Brick, Dig. 161; 3 Brick, Dig. 58; Drake, Attachm. §§ 225, 228. When Cartwright sued out and levied his attachment on the property of I. Pinkus, the law gave him a lien on it from the time of its levy, subject to be divested at law only on failure to prosecute his attachment to judgment, and to become fixed if and when

he obtained such judgment. This lien of an attachment is a legal, in contradistinction to an equitable, lien. It is in all respects similar in character to an execution lien, the one being general and the other specific. Each is acquired at law, and not through the instrumentality of a court of equity. The execution lien, so long as the creditor keeps it alive by renewals placed in the hands of the sheriff, cannot be defeated or impaired by the activity of other creditors who may have acquired junior liens; and so no junior attachment lien can override its senior, which is subject to no infirmity to make it void. In this case there were several attachments levied, subsequent to Cartwright's, on the same property. The complainants' was prior to the others in date of levy, and the attaching creditors subsequent to Cartwright, including complainants, have a common interest, and are proceeding to defeat Cartwright's on the same ground, namely, that it was issued on a simulated debt, and was intended to defraud the creditors of Pinkus, their common debtor. They each have filed a bill to remove this alleged fraudulent attachment, so as to displace it in favor of their own. However it may have been held elsewhere, it is the settled practice in this state that in an attachment suit at law another creditor cannot intervene by petition, and be made a party to the suit, in order that he may attack the proceedings on the ground of fraud, or fraudulent collusion between the attaching creditor and the debtor. *Cartwright v. Bamberger*, 80 Ala. 406, 8 South. Rep. 264. And it was held in that case that a junior attaching creditor had a right to invoke the aid of a court of equity, in a bill filed against the prior fraudulent attaching creditor, to declare his attachment fraudulent, and have it set aside, to make his lien, already fixed at law, operative against such fraudulent obstruction. The purpose of a bill of the kind cannot be to have a lien declared, but simply to aid in carrying into effect one already created and existing at law. Drake, Attachm. § 225. In discussing this principle in another case, in its application to execution liens, which is apposite to the case in hand, we said: "A court of equity, in dealing with legal rights, adopts and follows the rules of law in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances the court is as much bound by it as would be a court of law if the controversy was there pending. The court comes as an auxiliary to give effect to and render more available legal liens, not to displace them, nor to subvert their order of priority, which the law has established." And it was further said that a junior judgment creditor, proceeding in a court of equity for the removal of fraudulent conveyances or transfers of property, subject to execution at

law, does not acquire a preference over senior judgment creditors, who have the prior liens at law. *Mathews v. Insurance Co.*, 75 Ala. 85. No reason can be assigned for the application of this principle to execution and not to attachment liens. If the complainants and the defendants were in a court of law which was proceeding to direct the sheriff in the distribution of the proceeds of the sale of this property among the attaching creditors, they would be entitled to priority of payment according to the date of their respective levies. It is the duty of a court of equity, in this respect, to follow the law.

If Cartwright's attachment was fraudulent, and was intended, as is alleged, to transfer the property levied on from Pinkus to him, it had the same effect as a fraudulent conveyance, and no equity remained in Pinkus; for, as between him and Cartwright, the transaction was absolute and irrevocable. But, as between them on the one side, and the creditors of Pinkus on the other, the transaction would be void; and this bill, and those filed by the other creditors, are aimed, not at any supposed or real equity remaining in Pinkus, but to wrest the whole title from Cartwright and Pinkus, and subject the property, or its proceeds, to the superior liens of the creditors whose attachments have been in good faith sued out to enforce the collection of their debts. The contention, therefore, of the defendants, that the interest of Pinkus & Co. in the stock of goods seized under the fraudulent attachment of Cartwright, the moment the attachment was levied, became an equitable estate for the benefit of bona fide creditors, and that, therefore, it became a race of diligence between the creditors as to which of them would first take advantage of this equitable right and secure a first lien on the goods, or the proceeds of their sale, by filing a bill in a court of equity for that purpose, does not find sanction, it would seem, either in principle or authority. If no attachment had been sued at law, and no liens there created, the principle contended for might be applied, but it is inapplicable to this case. Enough has been said already to indicate that the complainants and other attaching creditors, defendants, have a common interest to overthrow the alleged fraudulent lien of Cartwright. They have a common tie that far; and whether the lien of the one or the other, as between themselves, is to have priority, it is a matter of common concern, growing out of the same alleged fraudulent transaction between Cartwright and Pinkus, and the legal relations of the creditors, respectively, to that transaction that it shall be annulled and held for naught. It cannot be said that the bill, having for its object the setting aside of said fraudulent attachment and attempted transfer of the property of the common debtor, and the adjustment of these competing liens

for the money in the hands of the sheriff,—matters springing from the same transaction, and in which all the parties are interested,—is multifarious, or that there has been an improper joinder of defendants. Though their claims against Pinkus are distinct, there is a contention between them as to priority out of a common fund, and it is necessary for complainants' relief, and proper for the relief of each, that they all be brought before the court, that their competing priorities may be rightly and finally adjusted. *Stone v. Insurance Co.*, 52 Ala. 589; *Adams v. Jones*, 68 Ala. 117; *Martin v. Carter*, 90 Ala. 97, 7 South. Rep. 510.

From the developments in this case we venture the suggestion to the lower court of the propriety of making an order consolidating with this case the other causes pending in equity in said court touching the same matters here involved for determination, and trying them all together as one case. The settlement of the matters in dispute will thereby be speedier and more satisfactorily adjusted, and at less expense. In Cartwright's Case, *supra*, we said: "It has been adjudged, and needs no argument to justify the conclusion, that the summary jurisdiction exercised by a court of law in determining the priorities of the legal liens of rival attaching creditors, whether on the motion of the sheriff or of the parties themselves asking for a distribution of the fund arising from the sale of the attached property, in no manner interferes with the jurisdiction of equity to adjust the rights of such rival claimants in a proper case for cognizance by a court of equity. *Gusdorf v. Ikellheimer*, 75 Ala. 148."

That other contention of the defendants, that the complainants are barred of their lien because of their supposed laches in filing this bill, cannot be sustained. In what respect have defendants been prejudiced or injured by any delay of the complainants? The money, the proceeds of the goods, was early tied up in the hands of the sheriff. The defendants made haste to file their bills for that purpose, and to distance the complainants in that mistaken race for priority; and if complainants, feeling safe in their position, delayed some time, but not so long as to damage any one, before they filed their bill, they ought not, for the short time that is pleaded as laches against them, to be deprived of the right which the law awards them for their superior diligence in having first sued out their attachment,—the real and legal struggle for priority. The laches, to be available, must be culpable.

Nor is there any merit in the grounds of demurrer that the bill fails to show that there has been a final determination of the suits between the other defendants and said Pinkus and Cartwright. It does not appear that the complainants were parties to those suits, nor that their decision would bind

them. We find no error in the decree of the chancellor overruling the demurrers to the bill, and it is affirmed.

(101 Ala. 331)

LOUISVILLE & N. R. CO. et al. v. PEOPLE'S ST. RY. & IMP. CO.

(Supreme Court of Alabama. May 23, 1893.)

CONDEMNATION PROCEEDINGS—APPEAL TO SUPREME COURT—WHEN LIES.

No appeal lies directly to the supreme court from a decree or order of the probate court, granted on a petition by a street-railroad company to condemn a right of way under Act Feb. 26, 1889, authorizing such a company to condemn land in the manner provided by Code 1886, pt. 3, tit. 2, c. 15, art. 2, for condemning land for public uses.

Appeal from probate court, Morgan county; E. M. Russell, Judge.

Condemnation proceedings by the People's Street-Railway & Improvement Company against the Louisville & Nashville Railroad Company and the South & North Alabama Railroad Company. From an order granting the petition for condemnation said railroad companies appeal. Appeal dismissed.

Harris & Eyster, for appellants. W. R. Francis and G. A. Nelson, for appellee.

MCCLELLAN, J. The act of December 10, 1886, conferred upon street-railroad companies the "right to condemn and take possession of" land, not exceeding a strip or tract 30 feet in width, for the right of way of such railroads, "on payment to the owner thereof a just compensation, in the same manner as now provided by law for taking private property for railroads and other public uses, in article 2, c. 17, tit. 2, pt. 3, of the Code" of 1876. Acts 1886-87, p. 122. This act was amended by the act of February 26, 1889, which provides "that all street-railroad companies \* \* \* organized and incorporated under the laws of Alabama \* \* \* may acquire by gift, purchase, or condemnation real estate in this state, for the right of way for street railroads, a strip, tract, or parcel of land not exceeding thirty feet in width for the right of way of said street railroads, and said street-railroad companies shall have the right to condemn and take possession of said land on payment to the owner thereof a just compensation, in the same manner as now provided by law for the condemnation of land for public uses in article 2, c. 15, tit. 2, pt. 3, of the Code" of 1886. Under this last statute and the article of the Code, which is made (or possibly only attempted to be made,—*Road Co. v. O'Donnell*, 87 Ala. 376, 6 South. Rep. 119) a part of it, the People's Street-Railway & Improvement Company proceeded in the probate court of Morgan county to condemn a right of way along a street of the town of New Decatur over the right of way, road-bed, and tracks of the South & North Alabama Railroad Company, which railroad was

in the possession of and being operated by the Louisville & Nashville Railroad Company; and from a decree or order of the judge of probate granting the petition to that end, and condemning said right of way, the two last-named corporations appeal to this court.

We need not go into the merits of the case thus intended to be presented for our consideration further than to say that we find no authorization in the act last quoted, or in the chapter of the Code made a part of it, for the condemnation of the right of way of one railroad company, a public corporation, for a right of way for a street-railway company, also a public corporation; and it has quite recently been held by this court that, in the absence of special statutory authority, such condemnation cannot be had. *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.*, (Ala.) 11 South. Rep. 642. But we are not required to decide that question, nor, indeed, would it be proper for us to go further than is implied from what we have said, for the reason that this case is not jurisdictionally before us. No appeal lies directly to this court from any proceeding, judgment, order, or decree of the probate court had, entered, or made therein under the provisions of article 2, c. 15, tit. 2, pt. 3, of the Code, under which this proceeding was had in the probate court of Morgan county. *Postal Tel. Cable Co. v. Alabama G. S. R. Co.*, 92 Ala. 331, 9 South. Rep. 555. This appeal must therefore be dismissed, and this though no motion to that end has been made, since, being without jurisdiction in the premises, no waiver of the point, implied or even expressed, can confer upon us the power to hear and determine the cause. Appeal dismissed.

(98 Ala. 239)

HIGHLAND AVE. & BELT R. CO. v. DUSENBERRY.

(Supreme Court of Alabama. May 25, 1893.)

RAILROAD COMPANIES—NEGLECT—ACTION FOR DEATH OF EMPLOYE—PETITION—SUFFICIENCY.

1. In an action against a railroad company for the death of a section hand, caused by a collision of defendant's hand cars, one of which deceased was riding, one count of the petition alleged that each of such cars was "under the superintendence of H., the foreman in charge, and by the allowance of the foreman aforesaid said cars were being run at a rapid and reckless rate of speed," and "that by the carelessness and negligence of the foreman in charge in allowing said cars to run at such a high rate of speed" the same collided, causing intestate's death. *Held*, that the petition sufficiently showed that the negligent acts charged were committed by defendant's servants.

2. A count of such petition, after repeating the facts set out in a previous count as to the manner of the accident, alleged that "on account of the negligence of the party or parties, namely, \* \* \* operating or moving said hand car in the rear, the same ran into or collided with the car in front, throwing or knocking plaintiff's intestate between the cars, and so injuring him that he died." *Held*, that



such count showed the necessary relation between the defendant and the persons to whom the negligence was imputed to charge the former with responsibility for their acts.

3. A count of such petition, after stating the facts as to the manner of the accident, alleged that the injuries were caused through the negligence of persons in the service of defendant, who had the superintendence of the hand car in the rear, etc., at the time of said injuries. *Held*, that such count stated a cause of action against defendant.

Appeal from city court of Birmingham.

Action by H. F. Dusenberry, administrator of the estate of William Johnson, deceased, against the Highland Avenue & Belt Railroad Company for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count of the complaint is stated in the opinion. The second count, after alleging substantially the same facts as stated in the first count, further alleged "that while he was so riding and engaged in the line of his employment in the rear of the hand car on which plaintiff's intestate was, said car being run at a high and reckless rate of speed, and in close and reckless proximity to the car in front, and said rear car being under the management and control of the party or parties moving or operating the same, plaintiff avers that on account of the negligence of the party or parties, namely, Jim Goldsby, Neal Jackson, Buster Cross, and Claib Coleman, operating or moving said hand car in the rear, the same ran into or collided with the car in front, throwing or knocking plaintiff's intestate between the cars, and so injuring him that he died." The third count, after alleging the same facts, continues: "While he was so riding and engaged in the line of his employment, another hand car was being run and moved over and along said line of road, in the rear of the hand car on which plaintiff's intestate was, and said car was so carelessly and negligently run that the same ran into or collided with the front car, knocking or throwing plaintiff's intestate between the cars, and so injuring, mangling, and bruising him that he died on the day and year aforesaid, as a result of said injuries; and plaintiff avers that said injuries were caused by reason of the negligence of some person or persons, namely, Jim Goldsby, Neal Jackson, Buster Cross, and Claib Coleman, in the service or employment of the defendant, who had the superintendence of the moving or running said hand car in the rear aforesaid, intrusted to him or them at the time of said injuries, and whilst in the exercise of such superintendence; hence this suit."

Alex. T. London, for appellant. Whittaker & Whittaker, for appellee.

HEAD, J. Action for wrongful injury causing death. The defendant demurred to the first, second, and third counts of the complaint, interposing to each count, among

others, the following ground of demurrer: "That it does not appear from said count that the injuries complained of were caused by the negligence of the defendant, or any one for whose negligence defendant is responsible." The argument is that the allegations do not show that the persons charged with committing the acts of negligence or wrong were in the defendant's service, or acting under its employment or authority, at the time. It is alleged that the injury occurred on the 16th day of November, 1889, and that on that day defendant was engaged in operating a railroad in the carriage of freight and passengers, and operated hand cars on its line of road for the purpose of transporting its employes and laborers and material over its said line of road; that intestate was a section hand on said railroad, employed by the defendant, and while in the discharge of duty as such, on said day, while riding on one of defendant's hand cars on said road, was injured by a rear-end collision of another hand car being run over the road with the one on which he was riding, causing his death. The negligence charged in the first count, after stating the above facts, is stated in the following language: "Each of said cars being under the superintendence of J. N. Hicks, the foreman in charge, and by the allowance of the foreman aforesaid said cars were being run at a rapid and reckless rate of speed, to wit, twenty miles per hour, and in close and reckless proximity to each other, to wit, fifty feet. Plaintiff avers that by the carelessness and negligence of the foreman in charge in allowing said cars to run at such a high rate of speed, and in such close proximity one to the other, the same collided, or the rear car ran into the front car, throwing or knocking plaintiff's intestate between said cars, so injuring," etc., causing his death. This is, in substance, all of this count. Though the pleading is loose to a degree raising question of its sufficiency, yet we hold that the allegation that the injury occurred on the defendant's road, on which it was at the time operating hand cars, and on one of defendant's hand cars, on which intestate, as an employe of defendant, was at the time engaged in the duties of his employment, and that Hicks was the foreman in charge of said car, are sufficient to show that Hicks was at the time the foreman of the defendant. The demurrer was properly overruled.

The second and third counts show, by direct averments, the necessary relation between the persons to whom the negligence is imputed and the defendant to charge the latter with responsibility for their acts; and the demurrers to these counts were properly overruled. We think there is nothing in any of the other grounds of demurrer.

There does not appear to have been a real controversy on the facts as to whether the injury occurred on the defendant's road,

or that the servants alleged to have been negligent were those of the defendant, engaged in its business. Several of the witnesses testified that it occurred, and that the servants were working on the Highland Avenue & Belt Railroad. In the absence of a more pointed issue on the trial upon these questions, we think the court was justified in its findings upon them.

The finding of the court for the plaintiff may, under the evidence, be well referred to the first count, which counts upon the negligence of the foreman in charge of the two cars. Hence it is unnecessary to consider whether the servants operating the rear car were technically in charge of that car, within the meaning of the statute, or not. This disposes of all the assignments of error insisted on in argument. We find no error in the record, and the judgment is affirmed.

(161 Ala. 229)

**MEDLIN v. TAYLOR, Judge.**

(Supreme Court of Alabama. May 25, 1893.)  
MANDAMUS TO JUDGE — TO COMPEL EXERCISE OF JURISDICTION—DISQUALIFICATION—INTEREST.

1. The finding of a probate judge that he is disqualified, because of interest, to exercise jurisdiction of a case, is not conclusive, but his competency may be tried on a petition for mandamus.

2. In proceedings to compel a judge of probate to exercise jurisdiction of an election contest for the office of tax collector, it appeared that, at the time he refused to hear such contest, defendant's election to the office of judge of probate was being contested in the circuit court on the same grounds specified in the statement of contest in question. *Held*, that while defendant had no disqualifying pecuniary interest in the result of the contest for the office of tax collector, within the constitutional inhibition, he was justified in declining to hear the same because of his personal interest and natural bias therein.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Petition by R. H. Medlin for mandamus to Thomas J. Taylor, probate judge. From a judgment denying the petition, petitioner appeals. Affirmed.

J. B. Moore and Roulhac & Nathan, for appellant. Milton Humes and R. C. Brickell, for appellee.

MCCLELLAN, J. Thomas J. Taylor, the probate judge of Madison county, declined to take jurisdiction of a contest instituted before him of an election to the office of tax collector of that county, and refused to hear and determine the same. Thereupon the contestant applied to the judge of the circuit court of that county for a writ of mandamus commanding the said judge to hear and determine said contestation. The petition for mandamus disclosed the grounds of Judge Taylor's recusation to be that he, said Taylor, and the contestee, one Esslinger, were candidates at the general election in August, 1892,—the former for the office

of probate judge, and the latter for the office of tax collector; that they were each returned as elected to these respective offices, and his (Taylor's) election was; at the time he refused to hear said contest between Medlin and Esslinger, "being contested before the judge of the circuit court upon grounds, causes, and for reasons in all respects similar to the grounds, causes, and reasons specified in the statement" of contest filed by said Medlin against said Esslinger. A rule nisi was entered, and upon the coming in of the respondent he demurred to the petition, assigning several grounds, two of which assignments were sustained. These were—First, that it appeared by the petition that respondent was, "for legal cause, incompetent" to hear and determine the contest; and, second, that it is shown by the petition for mandamus that said respondent judge, etc., "in the exercise of the jurisdiction with which, by law, he was clothed, adjudged and entered of record in said court of probate a judgment declaring his incompetency" to proceed with the trial of the cause, "and certified the fact of such incompetency to the register in chancery of the county of Madison."

To consider the second assignment of demurrer first, it is manifest that the gist of it lies in the assumption that the finding of the judge of his own incompetency, and the entry of his conclusion to this effect on the records of the probate court, is determinative and conclusive of the inquiry of competency vel non, whatever might be the real fact in that connection. That this is not the law, and that, of consequence, it was the duty of the circuit court, and our duty on this appeal, to determine the question of Judge Taylor's competency on the facts stated in the petition, and appearing by the exhibits thereto, wholly regardless of any adjudication he may have made in the premises, is thoroughly established by the decisions of this court. *Ellis v. Smith*, 42 Ala. 349; *Ex parte State Bar Ass'n*, 92 Ala. 113, 8 South. Rep. 768. So that, whatever view Judge Taylor may have entertained of his competency, and however he may have expressed it,—in the form of a judgment entry on the records of his court, or otherwise,—and whether or not he certified his conclusion of incompetency to the register in chancery, the sole question presented by this appeal has to do with the facts out of which incompetency is supposed to be evolved, and must be determined accordingly as we find, or do not find, those facts to involve a disqualifying interest on the part of Judge Taylor in the result of the contestation he was called on to try. That Judge Taylor did not have a disqualifying interest in the result of the case, within the provisions of our constitution and statutes, is virtually confessed in the argument of counsel, and cannot be doubted. To come within these inhibitions the interest must be a pecuniary one to be

affected by the judgment in the particular case, and not merely an interest, pecuniary or other, in the question involved, but not in the result of the particular case, and which, though not precluded by the judgment therein, may be affected by the "general operation of law on the status fixed by the decision." Judge Taylor not only had no pecuniary interest in the result of this contestation, but he had no interest whatever that could be affected by any possible determination of the issues involved. *Ex parte State Bar Ass'n*, 92 Ala. 113, 8 South. Rep. 768; 12 Amer. & Eng. Enc. Law, p. 48; *Mining Co. v. Keyser*, 58 Cal. 315; *People v. Edwards*, 15 Barb. 529; *McFaddin v. Preston*, 54 Tex. 403. It is the opinion of the court, however, that under the doctrines of the common law, aside from our constitutional and statutory provisions, he had such a personal interest in the questions involved in the contestation of *Medlin*, in the nature of things,—such a bias in favor of one of the parties to the case,—as disqualified him to hear and determine the same, and justified his action in declining so to do. *Gill v. State*, 61 Ala. 169, and authorities there cited. The judgment of the circuit court, denying the application for mandamus, must be affirmed.

(191 Ala. 294)

#### YANCEY v. SAVANNAH & W. R. CO.

(Supreme Court of Alabama. June 8, 1893.)

ADVERSE POSSESSION—CONDITION OF DEED—FUTURE.

1. In ejectment against a railroad company for land previously conveyed by plaintiff to defendant for a right of way, it appeared that the conveyance was in consideration of defendant's agreement to construct its road on and along plaintiff's lands, and was on condition that if the railroad should not be so located the conveyance should be void; that, after the conveyance, defendant located the roadbed on the land; that, after five years, plaintiff, without the knowledge of defendant, cultivated a part of said land for 13 years from the execution of the deed, at which time defendant entered without further permission of plaintiff, and completed said road. *Held*, that the re-entry by plaintiff was insufficient to originate a right to the land by adverse possession.

2. The consideration for a conveyance of a right of way to a railroad company was that the road should be built on the land, and was on condition that it should be void if the road was not so built. *Held*, that the grantor could not declare the conveyance forfeited after the road was completed, though not completed for more than 13 years after the conveyance.

Appeal from circuit court, Clay county; Le Roy F. Box, Judge.

Statutory ejectment by William A. Yancey against the Savannah & Western Railroad Company. Defendant had judgment, and plaintiff appeals. Affirmed.

This cause was tried before the court, without the intervention of a jury, on the following agreed statement of facts: "On the 1st day of December, 1872, W. A. Yancey, the

plaintiff in this case, executed to the Savannah & Memphis Railroad Company, an Alabama corporation, its successors and assigns, a deed to a certain tract of land in Clay county, Ala. A copy of the deed is hereto attached, and marked 'Exhibit A.' The deed was attested by two witnesses, and its execution is duly admitted. The lands sued for in this case are the lands described and embraced in the deed hereinbefore named, and marked 'Exhibit A.' Shortly after the execution of the deed hereinbefore mentioned, the Savannah & Memphis Railroad Company surveyed its line of road to Birmingham, Ala., and located its right of way, and leveled and graded the roadbed through the lands sued for, and embraced in the deed hereinbefore named. The terminus of said railroad at said time was at Goodwater, Ala., to which point it was then operated. The railroad was built and completed in the spring of 1887, through the lands sued for, and completed in 1888 to Birmingham, Ala., to which point it is now operated. The charter of the Savannah & Memphis Railroad Company authorized it to construct its road to Birmingham, Ala. The Savannah & Western Railroad Company, the defendant in this case, is an Alabama corporation, and the successor of the Savannah & Memphis Railroad Company, the original grantee in the deed hereto attached, and hereinbefore mentioned. That while said charter of said railroad company, now owning said line of railway, authorized its construction to Birmingham, Ala., yet the termini fixed by the charter of the company contracted with by plaintiff was from Opelika, Ala., on the south, to some point on the Tennessee river, near Tusculum, on the north or west. Said road was finally completed, and is now operated, from Opelika, Ala., to Birmingham, Ala., and is not yet completed beyond the latter point. Its charter fixes no time in which it shall be completed. After the execution of the deed from the plaintiff, above set out, with the exception of the survey of the route through the lands sued for, and the grading of the line of way for said road, nothing was done, or attempted to be done, by the grantee, in the way of completing the road through said lands, for the period of 13 years, though during all that time it was working on other parts of said road, and operating it from Opelika to Goodwater. That after the lapse of, to wit, for the term of, five years from the execution of said deed, plaintiff having never actually parted with the possession of said lands, except as herein mentioned and shown, plaintiff commenced and continued, without the knowledge or consent of the defendant, the cultivation of a part of said lands, and without interruption did so until the lapse of 13 years from the time of execution of said deed, at which time defendants entered thereon without further permission of the plaintiff, and without his consent, and completed said road as now located. It is agreed

that the rental value of said lands is four dollars per acre." The deed marked "Exhibit A," and attached to the agreed statement, conveyed the land sued. The provisions with which the decision has to deal are copied in the opinion. Upon the consideration of the cause, and the facts as stated in the agreed statement, the court rendered judgment for the defendant. Hence this appeal.

Gordon McDonald, for appellant. Geo. P. Harrison, for appellee.

STONE, C. J. This case was submitted on an agreed statement of facts, to be set out in the report of the case. The suit was commenced on January 18, 1890. The deed from plaintiff to defendant, under which defendant claims title, was executed December 10, 1872. By this deed the grantor granted to the Savannah & Memphis Railroad Company, of which the defendant is the successor, the right of way, 100 feet wide, over certain described lands, upon the recited consideration "of running their contemplated railroad on and along his lands, as well as in consideration of the sum of one dollar to him in hand paid." Immediately following the habendum clause of this deed is the following language: "Upon condition, and it is expressly understood, that should the said railroad, contemplated as aforesaid, be not located and established on and along said stretch, tract, or parcel of land described in the above and foregoing indenture, then said indenture is to be wholly null and void, and of no effect." "Shortly after the execution of the deed hereinbefore mentioned, the Savannah & Memphis Railroad Company surveyed its line of road to Birmingham, Ala., and located its right of way, and leveled and graded the roadbed, through the lands sued for and embraced in the deed." The easement, with right to possess and occupy, thereby passed to the grantee, and it was thus in actual possession of the tract of land conveyed. It must be regarded as holding adversely to all the world, including its vendor. The re-entry recited in the agreed statement of facts, by which the plaintiff sought to establish the inception of his adverse holding, is not sufficient to originate a right by adverse possession. "By the execution and delivery of a deed of land the entire legal interest in the premises becomes vested in the grantee, and if the grantor continues in possession afterwards his possession is not that of owner, but of a tenant of the grantee. He will be regarded as holding the premises in subserviency to his grantee, and nothing short of an explicit disclaimer of such a relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee." *Burhans v. Van Zandt*, 7 Barb. 91; *Butler v. Phelps*, 17 Wend. 642. But if it were otherwise, and his re-entry was sufficient to originate an ad-

verse holding, his possession was not of sufficient duration to revest the legal title in him. It was but little more than eight years. Ten years, under our jurisprudence, are necessary to mature a right by adverse possession.

Again, the plaintiff is in no position to maintain the present action. The only condition on which the conveyance was to become null and void had been met and fulfilled nearly three years before he brought his suit. The said railroad had been located and established on and along said stretch, tract, or parcel of land when he instituted his suit. The main consideration for the conveyance was the building and maintaining of a railroad through his property. This had been done, and plaintiff had had the advantage and benefit of this consideration for quite a long while when he complained. We discover no error in the finding of the circuit court, and the judgment is affirmed.

(38 Ala. 1)

### WILKINS v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

HOMICIDE—DEADLY WEAPONS—MALICE—BURDEN OF PROOF—INSTRUCTIONS—SELF-DEFENSE—CREDIBILITY OF DEFENDANT.

1. Where a deadly weapon has been used in effecting a homicide, thus arousing a presumption of malice, the burden is on defendant of rebutting such presumptions, unless the evidence proving the homicide itself rebuts it.

2. Instructions that, when self-defense is pleaded, the burden is on defendant to show an impending danger, etc., "from which there was no other probable means of escape," also that the circumstances must have been such as to impress a reasonable man with "belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant," do not imply the duty of flight where it would increase the peril, and are not therefore erroneous.

3. An instruction is not erroneous which requires, as one of the elements of self-defense, "that there must have been no other reasonable mode of escape, by retreat or by avoiding the combat, with safety."

4. Instructions that, if defendant enters into a contest dangerously armed, and slays his adversary, pursuant to a previously formed design to use such weapon in an emergency in which he would not be in danger of his life or of great bodily harm, or if defendant purposely killed deceased with depravity of heart, and the killing was determined on beforehand, and after reflection, for however short a time, the killing would be murder in the first degree, are proper.

5. Instructions that, in determining the weight to be given defendant's testimony, the jury should consider, with other circumstances, the fact that he is the defendant, and the fact that his testimony is in conflict with the other evidence in the case, will not, although the same might have been refused, work a reversal.

6. An instruction that, "to make the plea of self-defense available, defendant must be without fault," followed by a correct definition of the doctrine of self-defense, showing that, if defendant was himself the aggressor, he could not invoke the doctrine, does not invade the rule as to burden of proof, putting it upon defendant, where there was evidence to establish the plea, and also to show that defendant was at fault.

7. It is competent for the state to show that there was not such disparity in the size and strength of the two men as to induce defendant to believe himself in greater peril in consequence of such disparity.

Appeal from city court of Mobile; O. J. Semmes, Judge.

William Wilkins, having been tried for the murder of one Elchorn, by stabbing him with a knife, and convicted of murder in the second degree, appeals. Affirmed.

The testimony for the state tended to show that on the 7th of August, 1891, while the deceased was in the store where he was employed at work, the defendant and one Ben Worley and William Murdock passed the store together, and beckoned to deceased; that he walked out of the store in his shirt sleeves to where Worley and Murdock were; and that shortly afterwards there was a scuffle, in which the defendant stabbed the deceased twice with a knife; and that, as the deceased stumbled back into the doorway, the defendant struck him in the right shoulder with the knife. Witnesses for the state did not hear any conversation that took place between the defendant and the deceased. The testimony for the defendant tended to show that, on the night prior to the difficulty, the deceased told the said Worley that he could have gotten the defendant's job if he desired it, and that the deceased cursed the defendant, using very insulting language about him. That the next morning the said Worley told the defendant what the deceased had said to him, and that afterwards the defendant, on seeing the deceased in reference to such statements, was told by the deceased that he did not use such language about him. That later on in the day, when the defendant saw Worley, he told him that the deceased had denied saying anything about him, and that thereupon the said Worley asked the defendant to go with him to see one Willie Koppersmith, who had heard the deceased make the statements. That at first the defendant declined, saying that the matter was settled. That afterwards the defendant and the said Worley and Murdock started to see said Willie Koppersmith on business, and that, as they passed the deceased's place of business, the said Worley remarked, "There Elchorn is. Now call him." That thereupon the defendant beckoned to the deceased, and, on coming out, the said Worley asked him, "Did you not make the remark last night I told Willie [Wilkins] you made?" That the deceased hesitated a moment and then said, "After thinking over the matter, I did say it;" and again cursed him in the same language that Worley had told the defendant, at the same time striking the defendant in the mouth. That thereupon the defendant grabbed both of his hands, and that the deceased pulled away from him, and put his hand to his hip pocket, when the defendant took his knife out, and stabbed him. The defendant was

introduced as a witness in his own behalf, and his testimony was substantially the same as that above stated; and he also testified that, at the time of the killing, the deceased was larger than he was. The defendant introduced several witnesses who proved that his general reputation in the community was that he was a peaceable, quiet, and good citizen. Upon the introduction of all the testimony, the court, at the request of the state, gave the following written charges, to the giving of each of which the defendant separately excepted: (1) "In case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is un rebutted by the circumstances of the killing, or by other facts in the evidence, there can be no conviction for any less degree of homicide than murder." (2) "The apparent necessity which will excuse the taking of human life under the doctrine of self-defense, in cases of homicide, involves two considerations: First, the defendant himself must have entertained an honest belief in the existence of such necessity; and, second, the circumstances surrounding him must have been such as to impress a reasonable man, under the same state of facts, with the belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction on him [the defendant] of grievous bodily harm." (3) "Before the jury can acquit the defendant on ground of self-defense, three essential elements must concur: First, the defendant must be reasonably without default in bringing on the difficulty, and must not be disregardful of the consequences in this respect of any wrongful word or act; second, there must have existed at the time, either really or so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious, impending necessity to cut in order to save his own life, or to save himself from great bodily harm; and, third, there must have been no other reasonable mode of escape, by retreat or by avoiding the combat, with safety." (4) "If a party enters into a contest, dangerously armed, and fights under an undue advantage, even though mutual blows pass, if he slays his adversary pursuant to a previously formed design, either special or general, to use such weapon in case of an emergency in which his life would not be endangered, or he would not be in danger of suffering great bodily harm, it is not manslaughter, but it is murder." (5) "To make the plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the deceased was approaching him in a hostile

manner; and whether the necessity to take the life of the deceased was real or only apparent, if brought about by the design, contrivance, or fault of the defendant, he cannot be excused on the plea of self-defense." (6) "When the defendant sets up self-defense in justification or excuse of a killing, the burden of proof is upon him to show to the jury by the evidence that there was a present, impending danger, real or apparent, to life or limb, or of grievous bodily harm, from which there was no other probable means of escape, unless the evidence which proves the homicide proves also its excuse or justification." (7) "If the defendant, in Mobile county, and before the finding of this indictment, purposely killed the deceased, Andrew Elchorn, after reflection, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, even a moment before the fatal cutting was done, the defendant is guilty of murder in the first degree." (8) "If the defendant, in Mobile county, and before the finding of this indictment, purposely killed Andrew Elchorn, by cutting him with a knife, with a wickedness or depravity of heart towards said deceased, and the killing was determined on beforehand, and after reflection,—for however short a time before the fatal cutting was done is immaterial,—the defendant is guilty of murder in the first degree." (9) "The court charges the jury that, in determining the weight they will give to the defendant's testimony, they should consider, along with all other circumstances having any bearing on the matter, the fact that he is the defendant, and the fact, if they so find, that his testimony is in conflict with other evidence in the case." (10) "The court charges the jury that the interest the defendant has in the case may be considered by them in weighing his own evidence."

Gregory L. Smith, for appellant. Wm. L. Martin, Atty. Gen., for the State.

**HARALSON, J.** There were 10 charges given in writing, at the instance of the state, to the giving of each of which the defendant excepted, and assigns as error. These and one other assignment of error, arising on the admission of evidence, raise the questions we are to decide. We consider the charges according to their number, and grouped, as far as practicable, as the counsel for defendant has presented them in argument.

1. Charge No. 1 is a correct statement of the familiar principle of the presumption of malice, which, in cases of homicide, arises from the use of a deadly weapon, declaring that the burden of rebutting this presumption is on the slayer, unless the evidence which proves the killing rebuts it. Its correctness was not questioned in the argument of counsel, and could not be. *Hornsby v. State*, 94 Ala. 68, 10 South. Rep. 522; *Gibson*

*v. State*, 89 Ala. 121, 8 South. Rep. 98; *Sylvester v. State*, 72 Ala. 201; *De Arman v. State*, 71 Ala. 360.

2. Charges 2 and 6, considered together, have been criticised, each, as urged, as involving the proposition "that, before self-defense can be set up, flight must have been shown to have been impossible; they both ignore the material qualification upon this doctrine; that flight need not be attempted if it would increase, or apparently increase, the danger to which defendant was subjected,"—and the second, for the additional reason, as assigned, that it "asserts that self-defense cannot exist unless the defendant entertained the honest belief in the existence of such necessity." The grounds of objection, as first stated, to each of these charges, is not justified by the language of either. They do not assert, and cannot be fairly construed as asserting, that retreat must have been shown to be impossible before defendant could strike in self-defense. The words, taken from the sixth, "from which there was no other probable means of escape," and those from the second, "belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant," exclude the idea of retreat as a duty when an attempt to make it would increase one's peril; but they do imply, as we have before construed the language of the sixth particularly, that the means, if resorted to, would probably be safe and successful. *Hammil v. State*, 90 Ala. 582, 8 South. Rep. 380. The other ground of objection to the second is equally untenable. The doctrine of self-defense has its origin in the very principle questioned, namely, that to justify the taking of the life of another, when the slayer would excuse himself on the plea of self-defense, (the other justifying condition being admitted,) the danger to him must have been real, or so manifestly apparent as to create the reasonable belief in his mind of present, impending peril to life or limb, and that this belief must have been well founded and honest. *Lewis v. State*, 51 Ala. 3; *Cross v. State*, 63 Ala. 48; *Bain v. State*, 70 Ala. 7; *De Arman v. State*, 71 Ala. 359; *Storey v. State*, Id. 338; 1 Whart. Crim. Law, § 491.

3. The ground of objection to the third charge is opposed to our own adjudications on that subject. The third and last proposition in the charge is the only one excepted to, but the whole charge and this last instruction are thoroughly in accord with the established doctrine of self-defense, as repeatedly declared by this court. *Poe v. State*, 87 Ala. 69, 6 South. Rep. 378; *Tesney v. State*, 77 Ala. 39; *Willis v. State*, 73 Ala. 362; *Ingram v. State*, 67 Ala. 67.

4. Charges 4, 7, and 8 assert principles which have been heretofore recognized by us as correct, and from which we are unwilling to depart. They each contain the elements entering into the definition of "murder" in section 3725 of the Code. *Martin*

v. State, 77 Ala. 4; Lang v. State, 84 Ala. 1, 4 South. Rep. 193; Hammill v. State, 90 Ala. 582, 8 South. Rep. 380; Smith v. State, 68 Ala. 424; Mitchell v. State, 60 Ala. 28.

5. Charges 9 and 10 have heretofore been sustained as free from error. Allen v. State, 87 Ala. 109, 6 South. Rep. 370; Norris v. State, 87 Ala. 88, 6 South. Rep. 371. See, also, Whart. Crim. Ev. § 429. The only objection urged to them is that they single out and give undue prominence to the fact of defendant's interest in the cause, ignoring other evidence tending to corroborate him; and that charge 9 submitted to the jury the consideration of conflict in the evidence, when, in fact, there was none. As to the first objection, the charges may be open to criticism, and might have been refused. It has been heretofore said by us that "such charges should be avoided, as far as practicable, being calculated to unduly impress the minds of the jury and prejudice the defendant. When given, however, they will not work a reversal of the judgment, unless it appear that injury resulted. Cribbs v. State, 86 Ala. 616, 6 South. Rep. 109. Generally, neither the giving nor the refusal to give such charges will be considered as reversible error. If given, the party feeling himself aggrieved may always ask explanatory charges. McKleroy v. State, 77 Ala. 95; Lang v. State, 84 Ala. 1, 4 South. Rep. 193; Poe v. State, 87 Ala. 70, 6 South. Rep. 378; Waller v. State, 89 Ala. 79, 8 South. Rep. 153. The assumption that there was no conflict in the evidence is a mistaken conclusion. Worley was not a peacemaker between these two men. He fomented the strife, in which one of them, very unnecessarily, lost his life, and the other is overwhelmed in trouble not far short of death. He used language towards deceased which was violent and unfriendly, and easily persuaded defendant to accompany him on a visit, which did not appear to be a peaceable and friendly one, towards deceased. There are indications in the evidence that they carried one Murdock with them. He was along, and witnessed the killing, and neither he nor Worley raised a hand to prevent it, so far as appears. Might they not have done so? The jury might well have concluded from the evidence on the part of the state that the attack made on the deceased was in pursuance of a previously formed purpose to chastise or otherwise punish him, and that there was no real or apparent necessity, on the part of the defendant, to kill the deceased in order to save his own life or limb. The whole effort on the part of defendant, in the course of the trial, was to make it appear he acted in self-defense. The evidence of the state's witnesses is in implied conflict with that given by defendant and his witnesses in his effort to establish this defense, and tends to show that the killing was not done in self-defense.

6. It is said that the fifth charge, in that it contained, as one of the elements of self-

defense, the condition that, "to make the plea of self-defense available, the defendant must be without fault," was erroneous, in that it placed the burden of proving that fact on the defendant. This was only a part of the charge, which clearly and correctly defined the doctrine of self-defense, in accord with our uniform rulings. It did not misplace the burden of proof, for it was not given on, and had no reference to, that subject. It was but the declaration of a well-recognized principle of criminal law, which the jury were to apply to the evidence in the case. The charge, containing the clause excepted to, might have been erroneous, if there had been no evidence on the part of the state to show that the defendant was at fault in having brought on the difficulty; but there was evidence introduced by the state, and also on the part of defendant, which tended to show that defendant contrived to bring about, and did provoke, the conflict in which he slew his adversary, and that he could have retreated if he would. When the state proved the intentional killing of deceased by defendant with a deadly weapon, the burden rested on the defendant to show a pressing, imperious necessity to take life in self-defense, unless the fact arose out of the evidence produced against him to prove the homicide. If this was shown, the burden was then on the state to show that defendant was in fault in provoking the difficulty, which, being established, was a full answer to the plea of self-defense. The law does not presume such provocation, so as to impose the burden of its disproof on defendant; but when there is evidence tending to establish the plea of self-defense, and also to show that it was overcome, in that the defendant was at fault in bringing on the supposed necessity to take life to save his own, the court may, without any invasion of the rule we are considering as to burden of proof, charge the jury as was done in this fifth charge. McDaniel v. State, 76 Ala. 7; Baker v. State, 81 Ala. 38, 1 South. Rep. 127; Brown v. State, 83 Ala. 33, 3 South. Rep. 857; Cleveland v. State, 86 Ala. 9, 5 South. Rep. 426; Cribbs v. State, 86 Ala. 616, 6 South. Rep. 109; Lewis v. State, 88 Ala. 613, 6 South. Rep. 755; Gibson v. State, 89 Ala. 127, 8 South. Rep. 98; Hammill v. State, 90 Ala. 580, 8 South. Rep. 380.

7. In the course of the examination of the mother of deceased as a witness for the state, the solicitor propounded to her, and the court allowed, against the objection of defendant, the question, "Was he [the deceased] a larger man than Mr. Wilkins, the defendant?" to which she replied that he was about the same size. There was no error here. It was certainly competent for the state to show that there was not such disparity in the size and strength of the two men as to induce the defendant to believe that he was in the greater peril in consequence of such disparity, if it existed.

Whether he was larger or smaller than, or of equal size with, the defendant, was a fact competent to be brought out for the fair consideration of the jury, in construing the motive and conduct of the defendant on the fatal occasion. If he had been larger, the defendant would have been permitted to show it, as he did introduce evidence tending to show, in the course of the trial. If of equal size or smaller, the state, for the same reasons that defendant was properly permitted to show the size of deceased, could show that the two men were of equal size, or that deceased was smaller than defendant. Whart. Hom. § 606. We find no error in the record, and the judgment and sentence of the court below are affirmed.

(98 Ala. 77)

#### BLACKMAN v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

#### TAKING ANIMAL OR VEHICLE FOR TEMPORARY USE —NECESSITY OF PROSECUTOR — SUFFICIENCY OF INDICTMENT.

1. Code, § 3861, which makes it a misdemeanor to take an animal or vehicle for temporary use without authority, and provides that no prosecution shall be commenced or indictment found except on complaint of the owner or person having control of the animal or vehicle, does not require the owner or person having control to become a "prosecutor," within the meaning of Code, § 4354, so that his name must appear on the indictment.

2. Under Code, § 3861, making it a misdemeanor to take an animal for temporary use without the consent of the owner "or person having control thereof," an indictment which fails to negative the taking of an animal with the consent of the "person having control thereof," is bad.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Leroy Blackman was convicted of unlawfully taking a mare for temporary use, and appeals. Reversed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that before the finding of this indictment Leroy Blackman did unlawfully take for temporary use, or use temporarily, an animal, to wit, a mare, the personal property of Lizzie Thomas, without the consent of the said Lizzie Thomas, the owner of said mare, and without a bona fide claim of title to said animal, against the peace and dignity of the state of Alabama." There was indorsed on this indictment, "No prosecutor." Before pleading, the defendant moved the court to quash the indictment on the ground that it was indorsed, "No prosecutor." This motion being overruled, the defendant then demurred to the indictment on the ground that it failed to negative the fact that the animal was taken with the consent of the person having control thereof. The court overruled this demurrer, and, issue being joined on the plea of not guilty, the court,

after hearing the evidence, gave the general charge for the state, and refused to give the general charge for the defendant. The defendant duly excepted to each of these rulings.

John Gindrat Winter, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The defendant was indicted under section 3861 of the Code, which reads as follows: "Any person who unlawfully takes for temporary use, or uses temporarily, any animal or vehicle, without the consent of the owner or person having control thereof, and without a bona fide claim of title thereto, must, on conviction, be fined," etc., "but no prosecution shall be commenced, or indictment found, under this section, except upon complaint of the owner or person having control of such animal or vehicle." Section 4354 of the Code provides that if a prosecutor appears before the grand jury his name must be indorsed by the foreman on the indictment; and, if no prosecutor appears, the words "No prosecutor" must be indorsed thereon; and the next section makes the prosecutor, in cases of misdemeanor, liable for the costs, if, in the opinion of the court, the prosecution is frivolous or malicious. By another provision (section 4352) the discretion vested in the grand jury in reference to finding indictments for misdemeanors is withheld if a prosecutor appears. A prosecutor, within the meaning of these provisions, is one who appears before the grand jury, and has his name entered as prosecutor, and undertakes the prosecution of a particular case, subject to the burdens and penalties which that office and undertaking impose. It does not include one who merely complains and makes known to the grand jury that a particular offense has been committed by a particular person, and asks that the complaint be investigated and acted upon. The statute under which this indictment is presented does not require the owner or person having control to become a prosecutor. It is sufficient if the indictment is found upon his complaint, which may be instituted by making known to the grand jury the commission of the offense, and his desire to have it investigated and the party indicted. The motion, therefore, to quash the indictment, because of the indorsement thereon, "No prosecutor," was properly overruled.

But the demurrer to the indictment was unquestionably well taken, because the indictment omits to negative the taking or use of the mare with the consent of the "person having control thereof." This is too plain to need discussion. *Bellinger v. State*, 92 Ala. 86, 9 South. Rep. 399. The judgment of the city court is reversed, and the cause remanded.



(99 Ala. 225)

Ex parte PRUITT et al.

(Supreme Court of Alabama. June 6, 1893.)

JUSTICES OF THE PEACE — JURISDICTION IN COMPLAINTS FOR MISDEMEANOR.

Acts 1876-77, p. 197, gives justices of the peace in Madison county concurrent final jurisdiction of all misdemeanors. 2 Code, § 4237, provides that, in all trials before a justice of the peace, he must determine both the law and the facts without a jury. Section 4239 provides that if accused does not demand a trial by jury the trial must proceed before the justice. *Held*, that where defendant, charged in Madison county with removing seed cotton between the hours of sunset and sunrise, which is made a misdemeanor by section 4141, did not demand a trial by jury, it was the duty of the justice to try the charge himself, instead of holding defendant to the circuit court, though sections 4255 et seq. provide generally for preliminary examinations before magistrates, and binding the accused over to the court having jurisdiction of the offense.

Application of Richard Pruitt and Thomas Harper for discharge from custody on habeas corpus. Application granted.

David D. Shelby and S. S. Pleasants, for petitioners. Wm. L. Martin, Atty. Gen., for respondent.

MCCLELLAN, J. Petitioners were arrested and brought before a justice of the peace on a charge of removing seed cotton of the value of five dollars from the premises of J. M. Hampton between the hours of sunset and sunrise. The complaint was made before this justice, and the warrant thereon was issued by him. The prisoners being brought before him, he examined witnesses touching the alleged offense, and thereupon made the following order: "State of Alabama, Madison county. In the case of Thomas Harper and Richard Pruitt, they are committed to jail to answer the charge of removing seed cotton from the premises of John M. Hampton. The amount of bond at the rate of \$500 each." Failing to give the required bail, the defendants were committed to jail under the following mittimus: "State of Alabama v. Thomas Harper and Richard Pruitt. To the jailer of Madison county, Alabama: In the case of the State v. Thomas Harper and Richard Pruitt, charged with grand larceny, upon the examination I find that such offense has been committed, and have sufficient cause to believe them guilty of the same. You are therefore commanded to take them into your custody, and keep them till they are legally discharged. I fix their bond at five hundred dollars each, to appear at the next term of the circuit court. Witness my hand and seal this, the 2d day of November, 1892. J. B. Smith, J. P." In answer to the writ of habeas corpus issued by the judge of the circuit court, the sheriff of Madison county justified his custody of petitioners under this mittimus. On this state of case the circuit judge denied the petition, and remanded the petitioners to custody.

The offense charged in the complaint, and described in the order of commitment made by the justice, is a misdemeanor. 2 Code, § 4141. It is manifested by the complaint, the order of commitment, and the evidence of the justice of the peace, given without objection on the hearing of the petition, that the petitioners were committed to answer an indictment for this misdemeanor, and that it was this offense which is in fact, through misconception of the magistrate, described in the mittimus as grand larceny. And hence we feel warranted in affirming that on the hearing of the petition by the circuit judge it was made to appear, and is made to appear by the record before us, that the petitioners were committed in default of bail to answer an indictment for a misdemeanor. Under general statutes, justices of the peace have concurrent final jurisdiction with circuit courts of certain specified misdemeanors, (2 Code, § 4233,) when the prosecution therefor is commenced within 60 days after the commission of the offense. 2 Code, § 3712. By special enactment the concurrent final jurisdiction of justices of the peace in Madison county is extended to all misdemeanors. Acts 1876-77, p. 197. This prosecution was commenced the day after the alleged commission of the offense. The justice, therefore, had jurisdiction to finally hear and determine it, adjudge guilt or innocence, and impose punishment, or discharge the defendants. The statutes expressly declare and fix his duties and powers in respect of such cases with clearness and emphasis. Saving defendant's constitutional right to a jury, if he elects to claim it, it provides that if he does not demand a jury—and there is no pretense that these defendants made such demand—the trial must proceed, either presently, or on a day to which a continuance may be had for good cause shown, before the justice. This is its language: "If the accused and the prosecutor are both present, and also the witnesses for the prosecution and defense, and the accused does not demand a trial by jury, the trial must proceed before the justice, unless, for good cause shown, he continues it to some other day, not more than ten days distant." 2 Code, § 4239. The trial referred to in this section is not a preliminary one, but final. A previous section is clear to this conclusion. It provides: "In all trials before a justice of the peace of causes which are within his jurisdiction, he must determine both the law and the facts without the intervention of a jury, and award the punishment which the offense may demand." 2 Code, § 4237. These sections are parts of the article of the Code which specially prescribes the duties, powers, and jurisdiction of justices of the peace in prosecutions for misdemeanors, and the proceedings therein. 2 Code, § 4233 et seq. And they are the source and limitation of all power, authority, and jurisdiction in these officers in respect of the misdemeanors named in section 4233, and, in connection with the spe-

cial act referred to above, in respect of all misdemeanors committed in Madison county. The sections which we have set out in to-didem verbis are as imperative and mandatory in their terms as language, without express exclusion, could make them. They leave no room for discretion, and there is every reason why they should not. The organic law guaranties a speedy trial. It is the policy of the law that a speedy trial shall be had. It is equally to the interest of the public and alleged misdemeanants that the question of their guilt or innocence should be speedily adjudged, to the end that if guilty they may the sooner pay the penalty, and, if innocent, the sooner so adjudged and discharged; in either case avoiding expense, and in cases like this avoiding incarceration amounting, it may be, to greater punishment than the law has set against the crime, and this, too, without any adjudication of guilt, upon which the law authorizes the infliction of punishment by that name. In such cases the justice, the statute declares, must proceed with the trial. He must determine both the law and the facts, and he must award the punishment. These duties are imposed for the benefit of defendants, as well as upon other general public considerations. They vest defendants with the right to have their causes finally heard and determined by the justice. As is fully illustrated in this case, it is a valuable right, and by the very terms of the statute it must be accorded to them, unless they elect to exercise another right, which is no more valuable and assured to them than this is, so long as these statutes are unrepealed,—that of demanding a trial by jury. This right, as in the case at bar, being waived, the only other way to carry the case to the circuit court is by appeal after final judgment by the justice,—a judgment which has never been entered here, and now cannot be. We hold, therefore, that there was no warrant of law for sending this case to the circuit court. The justice of the peace was without authority or jurisdiction to bind these petitioners over to that court, and, in default of bail, to commit them to await the action of its grand jury. His mittimus to that end is void, and affords no justification for their detention.

The argument against this conclusion is based on the provisions of the general law made to apply in broad terms to all magistrates named in section 4680 of the Code, among which are justices of the peace, and authorizing these officers to hold a preliminary investigation upon complaint made that "a person has been guilty of a designated public offense," and bind such person over to a court having jurisdiction thereof, if it be made to appear that the offense has been committed, and that there is probable cause to believe the defendant is guilty thereof. 2 Code, § 4255 et seq., and section 4680. Upon a well-settled and familiar principle, this general law, applying to all magistrates and to

all offenses, in general terms, will not be allowed to override specific and imperative enactments, specially, and for obvious reasons, applicable to justices of the peace, and prosecutions for offenses of a particular class, finally triable and determinable by them; and especially ought this rule to be applied here, since it still leaves a field for the operation of the general statute in respect of justices of the peace, in that under it they have jurisdiction preliminarily to try, and commit or discharge, all alleged felons, and all misdemeanants who have not been proceeded against within 60 days after the commission of the alleged offense.

A good many adjudged cases have been brought to our attention,—cases decided in other jurisdictions. It does not appear that any of them had to deal with statutory provisions similar to those embodied in sections 4237-4239 of our Code, and hence they cannot be said to be authority in the present case. Among them is the case of *In re Donnelly*, 30 Kan. 191, 1 Pac. Rep. 648, and (on rehearing) 30 Kan. 424, 1 Pac. Rep. 778, where it was directly held that a justice of the peace could not commit for an offense of which he had final jurisdiction; and this, though, so far as the report of the case discloses, justices had preliminary jurisdiction under a general law identical in terms with our own, and it did not appear that their duties, power, and jurisdiction in respect of misdemeanors were specifically prescribed as in our statutes. The conclusion of the Kansas court was in some measure rested on a consideration which we have not before adverted to, but which is equally forceful under our statutes. It is this: A committing magistrate is, in general terms, authorized to bind defendants over to any court having jurisdiction of the offense. To hold that a justice of the peace could bind over a misdemeanant, of whose offense he has final jurisdiction, is to hold that he may, upon the statutory preliminary trial,—upon an examination of witnesses,—recognize such offender to appear before another justice of the peace, or even for another and final trial before himself, which is an absurdity.

We need not pursue the discussion further. The application for habeas corpus will be granted, and the writ will be here issued unless, upon advice of this opinion, petitioners are content to renew their application before a *nisi prius* judge having jurisdiction.

Application granted.

(38 Ala. 71)

#### DEAN v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

##### CARRYING WEAPONS—EVIDENCE.

1. As the act of carrying a concealed weapon is continuous, on a trial for such offense evidence is admissible that a few minutes before the act shown by the complaining witness another witness saw a pistol in defendant's hip pocket.

2. On a trial for carrying a concealed weapon evidence is inadmissible that defendant, a short time before the discovery of a pistol on his person, said he was going to "raise hell" that night.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Abe Dean was convicted of carrying a pistol concealed on his person, and appeals. Reversed.

On the trial the state introduced one Adam Ellis as a witness, who testified that one afternoon in the latter part of September, 1892, at half past 7 o'clock, Abe Dean was in witness' back yard, and that, upon their having some angry words, the defendant drew his pistol from his hip pocket, which had hitherto been concealed. Simon Nelson, another witness for the state, testified that on the same night, and a few minutes before this occurrence and dispute with Adam Ellis, the defendant was at his house, and that while there he brushed his coat aside, and disclosed a pistol in the hip pocket. The defendant objected to the testimony of Simon Nelson, and moved to exclude the same, and duly excepted to the court's overruling his objection. This witness further testified that the defendant said "he was going to raise hell on the hill that night." The defendant objected to this evidence, and moved to exclude the same from the jury. The court overruled this objection and motion, and the defendant duly excepted. Four witnesses testified for the defendant that they were with the defendant on the night in question, and at the time spoken of, and that he did not have a pistol at all that night. The court gave the general charge for the state.

John W. A. Sanford, Jr., for appellant.  
Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The offense of carrying a weapon concealed about the person being continuous in its nature, the trial court did not err in allowing the state to prove by the witness Simon Nelson that a few minutes before the time at which Adam Ellis saw the defendant draw a pistol from his hip pocket, which had theretofore been concealed, and at a different place he, Nelson, had seen a pistol on defendant's person when the latter's coat had been casually brushed aside. *Etress v. State*, 88 Ala. 191, 7 South. Rep. 49; *Smith v. State*, 79 Ala. 257; *Ladd v. State*, 92 Ala. 53, 9 South. Rep. 401. The further testimony of this witness, Simon Nelson, to the effect that the defendant then said "he was going to raise hell on the hill that night," ought, in our opinion, to have been excluded. We are unable to say that a man's purpose to raise hell "on the hill" or elsewhere affords any ground for a legitimate inference on the part of the jury that, even shortly before the time for the beginning of the proposed disturbance, he had a pistol concealed about his person. A contrary conclusion would

have to be rested on the presumption that all men, when intending to raise a disturbance or to "raise hell," whatever that may mean, arm themselves with deadly weapons, which they carry concealed. We do not think such a presumption can be indulged. The evidence was irrelevant, and should have been excluded. For the error committed by the trial court in refusing to exclude it the judgment must be reversed.

The cause is remanded.

(98 Ala. 70)

#### STEWART v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

GRAND JURY—ORDER TO SUMMON QUALIFIED PERSONS—RESIDENTS OF COUNTY.

An indictment should not be quashed because the court ordered the sheriff to summon "qualified persons" to complete the grand jury, without directing the summoning of residents of the county, since only residents of the county are qualified.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

Tract Stewart was convicted of carrying a concealed weapon, and he appeals. Affirmed.

Gamble & Powell, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. One of the qualifications of a grand juror is that he be a resident of the county, in the circuit court of which his services in that capacity are required. Therefore the order of the court, made in this case, that the sheriff summon "eight qualified persons" to complete the grand jury,—the number originally summoned and present being less than 15,—was essentially an order that he summon residents of the county, since only such residents could be qualified persons, within its terms. It follows that the motion of defendant to quash the indictment on the ground that the order in question did not, in direct terms, require the summoning of residents of the county, was without merit. No other point is presented by this record. Affirmed.

(98 Ala. 448)

#### JONES v. ROSS.

(Supreme Court of Alabama. June 7, 1893.)

SALE—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

1. Damages for personal injuries received by the buyer of a horse that ran away are not recoverable in an action for breach of a warranty that the horse was gentle, where it is not shown that the seller knew or had reason to believe that the horse was vicious or unsafe, or that the affirmation of the horse's gentleness was of such reckless character as to be equivalent to bad faith.

2. In an action for breach of such warranty it was competent to ask a witness the name of the horse, as his name would tend to identify him; but an answer that he had heard him called "the big-legged runaway horse"

should have been excluded as irresponsible to the question, and calculated to prejudice defendant.

3. Such testimony was in the nature of hearsay.

Appeal from circuit court, Etowah county; John B. Tally, Judge.

Action by W. A. Ross against L. G. Jones. From a judgment for plaintiff, defendant appeals. Reversed.

Amos E. Goodhue, for appellant.

COLEMAN, J. The plaintiff, Ross, sued appellant, Jones, to recover damages for a breach of warranty and deceit in the sale of a horse. The damages claimed are based upon personal injuries, and destruction of buggy and harness, sustained by plaintiff, caused by the running away of the horse on the day of and soon after the purchase. There is but one count in the complaint, and to this the defendant interposed a demurrer. The complaint avers that "defendant sold to plaintiff a horse, which defendant falsely represented to be gentle, and to work kind and gentle anywhere." After stating the fact that plaintiff made the purchase, and his reliance upon these representations, and the fact that the horse being hitched to his buggy ran away, the damage to the buggy and the personal injuries sustained, the complaint avers "that the defendant knew said horse was vicious, and unsafe, and falsely and intentionally represented him to plaintiff to be safe and gentle." In the case of *Herring v. Skaggs*, first reported in 62 Ala. 180, and afterwards in 73 Ala. 446, the extent and character of damages recoverable in an action for breach of warranty was considered and adjudicated. After reviewing the authorities, this court held that, in the absence of fraud or bad faith, the proper measure of damages, in a suit by the purchaser of a safe against the maker who warranted it "burglarproof," is the difference between the value of the safe as it was and what it would have been worth if it had been as represented, and not the damages sustained in the loss of valuables taken out of it by burglars;" that to justify a recovery for the loss of valuables placed in the safe it was necessary to show bad faith on the part of the seller. "There must have been," says the court, "an assertion as fact of that which the seller knew to be false, or a reckless, false affirmation that the safe was burglar proof, when the seller did not know whether the assertion was true or not, or a knowledge on the part of the seller that the safe was not burglar proof, and a failure to communicate that knowledge, when he knew the purchaser was contracting for the safe as burglar proof, and the purchaser must have trusted these representations, and been misled by them." We think the complaint in this case showed a good cause of action, and authorized the introduction of evidence of the

larger damages. 62 Ala. and 73 Ala., supra; *Bell v. Reynolds*, 78 Ala. 516. The witness Hoseltine was asked, "What is the name of the horse?" to which the witness replied he had heard him called "the big-legged runaway horse." The question was objected to, and, after answer, the defendant moved to exclude it from the jury. The court overruled the objection to the question, and refused to exclude the answer. We see no legal objection to the question as to the name of the horse, as such testimony tended to identify the horse, but the answer should have been excluded. It was not responsive to the question, was in the nature of hearsay evidence, and calculated to prejudice the jury against the defendant. The defendant asked the court to charge the jury "that in no phase of the evidence in the case is the plaintiff entitled to recover damages for the injuries received by the running away of the horse." The bill of exceptions purports to set out all the evidence. To recover for the personal injuries it was necessary to allege and prove bad faith or fraud, or that reckless, false affirmation that the horse "was gentle and would work kind and gentle anywhere" to be the equivalent of bad faith. The complaint is ample. It avers that the plaintiff knew the horse to "be vicious and unsafe, and falsely and intentionally represented him to be safe and gentle." There is not one particle of evidence in the record tending to show that defendant knew or had reason to believe the horse to be vicious and unsafe, or that the affirmation was of that reckless character to be the equivalent of bad faith; and without proof of some fact or circumstance tending to sustain these averments plaintiff was not entitled to recover for personal injuries in this action. Under the evidence in the case the charge should have been given.

Reversed and remanded.

(38 Ala. 206)

STEINER et al. v. LOWERY et al.

(Supreme Court of Alabama. June 6, 1893.)

FRAUDULENT CONVEYANCES—CONSIDERATION—EVIDENCE—PARTNERSHIP.

In a suit to try the title to goods levied on as the property of L. K., there was evidence that A. K., (L.'s brother,) having failed, was employed by L., at a yearly salary of \$2,500, to conduct a business under the name of K. or L. K., in which about \$2,000 were invested. A. had entire control of the enterprise, and in corresponding with plaintiffs used the pronouns "we" and "us," and spoke of "this firm." About three years afterwards, A. sent plaintiffs a statement to be used as a basis of credit, showing assets of \$33,000, and liabilities of \$23,000, and representing the value of the stock of goods on hand to be \$26,700, and through such statement, and the offices of one of claimants, procured credit from plaintiffs. About two months thereafter, L. sold the stock of goods to claimants; the consideration being the cancellation of a debt due them, of \$6,412, and their agreement to pay A. \$4,332, which L. claimed he owed the latter for salary, and for which he had given A. his note. The state-

ment as to L.'s indebtedness to A. was made by A., and L. did not know whether it was correct. After the sale, claimants employed A., at a yearly salary of \$2,500, to dispose of the goods, and subsequently transferred the goods to A.'s father-in-law, who, with A. and two brothers-in-law of A., formed a corporation, and continued the business, employing A. at the same old salary. *Held*, that A. and L. were both interested in the mercantile establishment, and that the transfer to claimants was fraudulent.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Attachment by J. S. Lowery & Co. against L. Klein, which was levied on a stock of goods of defendant. Steiner Bros., a banking house, interposed a claim against the goods, as having purchased them from defendant. On trial before the court, jury having been waived, judgment was rendered for plaintiffs, and the goods ordered sold to pay their judgment against Klein, and Steiner Bros. appeal. Affirmed.

White & Houze and Cabaniss & Weakley, for appellants. Mountjoy & Tomlinson, for appellees.

HARALSON, J. This is a statutory claim suit to try the right of property in a stock of goods. The plaintiffs in the court below, J. S. Lowery & Co., the appellees, sued out an attachment in the circuit court of Jefferson county on the 2d of December, 1890, against L. Klein, and, placing the same in the hands of the sheriff, caused it to be levied on a part of a stock of goods in a storehouse, No. 15 North Twentieth street, in Birmingham, Ala., in which said L. Klein claimed to have carried on a clothing and furnishing store. Steiner Bros., a banking house in said city, the appellants, interposed a claim to the goods levied on, claiming to have purchased them from said L. Klein on the 28th of November, 1890. The claim suit, on issue properly made up under the direction of the court, was tried by and before the circuit judge of that judicial circuit without the intervention of a jury, the same having been waived by the parties. The issue was found in favor of the plaintiffs, against the claimants, and the property condemned to the payment of their judgment recovered against said L. Klein. The plaintiffs proved their debt against the said Klein,—about \$7,000,—and that it was contracted and existed before the 28th November, 1890, the date of the alleged sale to claimants from said Klein.

In the trial of an issue of this character, as has been repeatedly held, the inquiry should be directed (1) to the bona fides of the debt; (2) the sufficiency of the consideration; and (3) whether there was a reservation of benefit to the debtor. *Dawson v. Flash*, (Ala.) 12 South. Rep. 68; *Pollock v. Meyer*, (Ala.) 11 South. Rep. 385; *Hodges v. Coleman*, 76 Ala. 104. Our investigations will be made with

reference to these decisive tests of the validity of this transaction. The facts of the case, as set out in the transcript, are of voluminous recital, taken down stenographically—questions and answers—just as they were propounded and answered by the witnesses, and we can do no more than refer to such of the salient points as lead us to the conclusion at which we have arrived.

The plaintiffs were merchants, doing business in the city of New York, and had been extending a liberal and generous credit to the concern trading in Birmingham under the name of L. Klein, or Klein, whether it was composed of one or more persons. A. I. Klein was a brother of L. Klein, and came to this country, many years ago, from Austria-Hungary. He did business as a merchant in Greensborough, Ala., prior to the year 1879, and in that year failed in business. He knew the claimants there as early as 1875, and the proofs show that their acquaintance has been intimate and friendly, though said A. I. Klein testifies to having met them a few times, only, since. B. Steiner testified that he went to Klein's frequently; traded with him; was on good social terms with him; that their families visited; that he knew him in South Alabama, where he failed; and that he knew as much about him as a man knows about one of his customers. It was also shown that said A. I. Klein consulted with, and said Steiner advised him, about the composition and settlements of those old debts which were hanging over him. One cannot resist the conclusion, on reading the evidence, that the parties were intimate, and that Klein's financial embarrassments and attitude as a trader were well known to the Steiners. They were such as that said A. I. Klein could not undertake, in advance of a settlement of his debts, to do business under his own name, and it is certain as circumstances can well make it appear that he was doing business on his own account under the name of his brother, L. Klein, as will presently very satisfactorily appear. Within a short time after the failure of A. I. Klein, in Greensborough, his brother, L. Klein, the defendant in attachment, came to this country from Austria-Hungary, bringing with him, as he swears, \$2,000, which he procured to be changed into American money in Bremen, and after his arrival in Birmingham kept it in his trunk, and did not deposit it in any bank. We do not wonder that he did not risk a bank with his money on his arrival, since he might not have known it would be safe; but if he was cautious to take care of such possessions, as people generally are, it was contrary to the suggestions of safety for him to have transported a sum of money so large and valuable to him across the ocean, and to Birmingham, on his person or in his trunk, when it could have been done with no risk, and at little expense, by investing it in New York ex-

change. It was convenient, however, and perhaps necessary, in the trial of this cause, for him to appear to have had \$1,500 in Birmingham, without any earmarks at all, when he and his brother claim that he started a clothing and gents' furnishing enterprise in that place, in July, 1887. In March of that year the said L. Klein and one Eisenberg bought out a clothing establishment from other parties, in which venture he invested \$1,500. How much Eisenberg put in is not stated, but, it is to be presumed, not a large amount. These parties immediately engaged the services of said A. I. Klein as manager and salesman, and in any other capacity in which his services might be required, at a salary of \$2,500 a year, payable monthly, and this notwithstanding the fact they had a capital of only \$3,000, (if each partner contributed an equal amount,) with two partners, who, for aught that appears, were capable of attending to the whole business, which did not exceed \$20,000 or \$25,000 of sales a year. This copartnership arrangement lasted, as might have been expected, only to the 15th of October following, when L. Klein bought Eisenberg out, and the following very suggestive obligation was entered into by L. Klein with said A. I. Klein: "I hereby obligate myself and agree to pay Alex. I. Klein, for services to be rendered as herein stipulated, the sum of \$2,500 per year, granting him the privilege to draw the same per month, if he so desires, and further agree and obligate myself to pay said salary to said Alex. Klein every year, for as long a term as it may prove mutually agreeable and satisfactory, and that I will, under any circumstances, protect him from loss of any balance due him at any time hereafter, until said Alex. I. Klein may desire to quit his position with me. Signed and sealed this 15th October, 1887. L. Klein." In addition to this, L. Klein gave A. I. Klein a general power of attorney to take charge of, manage, and control said business; and he did so in such manner as to impress those who dealt with him, and to create the belief generally, that he was the owner of the establishment. He bought the goods; sold them, or had them sold under his direction; took out insurances; rented the store, and managed it as owner. The sign put up was "Kline" and "L. Kline." In his correspondence with J. W. England, the representative of plaintiffs, he speaks of "Kline" as "this firm," the "firm of K.," "the firm of L. K.," and uses in connection with it the pronouns "we" and "us;" and in one of his letters he explains the sign "K.," and was not at all satisfied with it, and speaks of the time when "I can use my initials." In referring to his brother in that immediate connection, he says: "I can never afford to trust him on any business questions, as I do not find him competent; and that's the way matters stand, and may remain so."

In September, 1890, L. Klein went to New York to effect with the plaintiffs an

extension of their claim against "Kline." He says he saw Mr. Dixon, of the firm of plaintiffs, and asked him for an extension, and he was unwilling to give it. On returning to his hotel he saw Mr. Sig. Steiner, one of the claimants, and asked him to go to Lowery & Co., and speak a good word for him, which he did, and afterwards he arranged with Mr. Dixon. That while there A. I. Klein sent him a statement to be used with plaintiffs as a basis of credit, showing total assets of \$32,937.96, with total liabilities of \$23,014.66, leaving balance of \$9,923.96. In this statement he represented the stock on hand as \$26,782.45; fixtures, \$750; safe, \$143; cash and papers, \$2,500; good accounts, \$3,680; merchandise bought since June 1, 1890, \$5,313.85; and cash receipts since that date, \$8,801.39. This statement was a remarkably good one for a business that had been in existence for about three years, starting on so small a capital. Having, through such a statement, and by the kind offices of one of the claimants, induced the plaintiffs to extend their claims through a period of 12 months, it requires explanation, such as we do not meet in the record, why it was that, within about two months from that time, L. Klein should have sold out his entire possessions to the claimants to secure their debt to them of \$6,412.37, —\$4,332 due, as claimed, to said A. I. Klein, which claimants agreed to pay. Coming to this last transaction, the evidence of L. Klein shows, and that of the Steiners confirms it, (and, besides them, we are without any evidence on the subject,) that the claimants, in November, notified L. Klein of his note of \$1,000, maturing on 1st December. They sent him the usual bank statement to that effect. Thereupon, several days before the 28th November, 1890, Klein went and asked them for an accommodation for some money, and also for an extension; and they informed him they could not let him have any more money, and desired him to pay the note that was nearly due. Klein informed them he did not have any money, and could not get any, and proposed to them to take the stock for the money, which they agreed to do. The two Kleins are found, immediately following, taking and making out an inventory of the stock, which amounted to \$17,582.76, and at the foot of this inventory is the following receipt: "Received of Steiner Brothers payment in full of the foregoing account, in consideration of which I hereby sell and assign the goods therein named and described to them. Nov. 28, 1890. [Signed] L. Klein." But this receipt seems to have been unadvisedly given, and, procuring the assistance of their attorneys, they had prepared and signed another agreement, executed by both parties, to the effect that the party of the first part had bargained, granted, and sold to party of second part the goods in question, as shown by the inventory attached, at the price of \$10.

741.37, "in consideration whereof, the party of the second part acknowledges the full payment to them of the debt due from said L. Klein to them, which is the sum of \$6,412.37, and accept said goods in full payment thereof, and also agrees to pay a certain note made by the said Leo Klein on the 26th Nov., 1890, payable to the order of A. I. Klein, at the banking house of Steiner Bros., on the 28th December, 1890, amounting to the sum of \$4,332; in all, \$10,744.37." The same day this transaction occurred the said Klein turned over to Mrs. A. I. Klein \$1,500 worth of goods, out of the store, in payment of an alleged indebtedness to her by him for that amount, and for an individual debt he owed England, of \$3,400, he transferred the goods at his branch store, inventoried at \$3,300, reserving the notes and accounts due the house as his exemptions, on which he says he has collected only the sum of \$800. No reason is given, though called for by plaintiffs, why he did not transfer to A. I. Klein \$4,332 worth of goods in payment of his alleged debt to him, as he did to the wife of said A. I. Klein, to the Steiners, and England. But the reason is obvious, in the after transaction and dealing with Steiner Bros. as to this alleged debt. A conveyance of goods to pay that note could not have withstood the test of judicial inquiry, on the attack of an attaching creditor, and its chances to run the gauntlet, purporting to have been paid by claimants as a condition and consideration of their purchase, were deemed, no doubt, far more favorable, especially if it should appear, as they proposed to make it, that they paid without any knowledge of, or participation in, the fraud, if it should be shown to exist. A. I. Klein claims that, under the contract of L. Klein with him, L. Klein owed him, on a settlement made between them, on the 26th November, that sum of money. A statement of that settlement was introduced in evidence, showing an indebtedness of \$9,095.98, with credits reducing it to \$4,337, as stated. This statement was made by A. I. Klein, and L. Klein shows he did not know whether it was correct or not. The plaintiffs endeavored, in vain, to get the Kleins to produce the book of "Kline," in which this account was kept. They each stated that the account was on the book, and they produced the transcript, but were unable, as they said, to find the book from which it was taken, leaving very grave suspicion of its ever having been kept, as stated by them, on any book of accounts. As corroborative of such a suspicion the fact appears that when A. I. Klein made out and forwarded to the plaintiffs, in September, 1890, as a basis of credit, the statement of L. Klein's indebtedness, it did not contain any mention of this large debt. A. I. Klein makes another incredible statement touching this transaction. He swears he did not know that his brother was going to sell out to the Steiners. Yet we find him engaged

with his brother, taking an inventory, at an unusual time, and at the same time we find him making out this great claim against his brother. Why should he have made it out at that time, and taken a note for the balance, unless he knew what was going on? And can any one be found to believe that he who claimed to control, and who did manage, the whole business, in which L. Klein, according to his representations, was a mere figurehead, did not know what was going on between the Steiners and his brother? Besides, Leo Kline swears that when he gave him the note he told him, according to his best recollection, that Steiners would pay it.

Just at this point another very convenient actor appeared upon the stage,—one Bernhelm, the brother-in-law of A. I. Klein. The evidence tends satisfactorily to show that he was acquainted with what was going on. He was in attendance, around and about, as an interested participant. He had written to plaintiffs on September 8, 1890, that, if L. Klein succeeded in extending his debts with them, A. I. Klein had his assurance, and he would gladly lend him his support, to meet those obligations. This proffer, together with the kindly offices of Sig. Steiner, had much to do, we may believe, in allaying the apprehensions of the plaintiffs, and preventing them taking steps which would have placed them in the front, in an effort to recover their debt. When A. I. Klein got this note from his brother, instead of taking it to the Steiners to pay, as his brother says he told him to do, and which note the Steiners had given their obligation to pay, he says he sold it to Bernhelm for \$3,500,—\$1,850 in cash, and \$1,650 for claims for cash that Bernhelm says he let him have at different times from April to July, 1890. It would seem that with a business so prosperous as A. I. Klein had represented to plaintiffs, in September, this one was, with the amount of cash he was taking in, and with over \$4,000 due him for wages, he would have been under no necessity of making a convenience of his brother-in-law. Yet he says, and Bernhelm confirms the statement, that he lost \$852 by transferring it to Bernhelm. And another singular circumstance, which cannot be explained, and which, of itself, characterizes this whole transaction, is that A. I. Klein, when he transferred the note to Bernhelm, payable, not as the bill of sale, in the haste with which it was prepared, inadvertently states, on the 28th November, but on the 26th December, 1890, indorsed the note, not without recourse, but so as to bind him; and when Bernhelm carried it to the Steiners, on the 28th November, instead of paying it according to obligation, they discounted it at 1 per cent. a month, which they required him to pay, or which he did pay, in cash, by giving them a check on Moses Bros., of Montgomery; and Bernhelm indorsed the

note to them, and waived protest on it, and the Steiners acquired it, in a manner to make it binding on him; and they hold it to-day, from aught that appears, as an obligation on both A. I. Klein and Bernhelm. And, inconsistent as all this is, we are met by that other contradictory fact, that Bernhelm, when he discounted the note, says he did not need the money, and Steiner asked him to leave it there, which he did, on deposit, without interest, so far as is shown, until the 7th of May—about six months—before he drew it out. All this is utterly at variance with ordinary, open, fair, and intelligible dealing. The only explanation that can be given to the transaction, as thus exposed, is that the note was simulated, and never intended to be real by either the Steiners, Bernhelm, or the Kleins.

But we weary in pursuing the details of this transaction. As much remains, as has already been said, to show the invalidity of this sale. We hasten through, with but slight references to other phases of the evidence. Without discussing at length the evidence tending to show it, we feel safe in saying that the goods sold to the Steiners, according to a fair interpretation of the evidence, were worth more than the consideration recited in the bill of sale. The judge who tried the case found they were worth \$12,000. His finding is conservative, and we approve it. The Kleins inventoried the goods at \$17,582.76 when they were preparing to sell to the Steiners. When the sheriff levied on the goods, and appraised them by competent men, the valuation put on them was \$14,500. T. W. Smith, the deputy sheriff, J. W. England, and E. C. Dickson testified they were worth \$14,500. M. Israel, who occupied a part of Klein's store for about 18 months, who assisted in making the inventory, and who shows himself to be competent, estimated their value at fifteen or sixteen thousand dollars. After the claimants had executed their claim bond, and retaken the goods, they had an inventory of their own taken, showing their value to be \$7,907.47, but the evidence shows that this valuation is too low, and it certainly is not as reliable as the one taken by the sheriff. The Steiners claim, as a part of the consideration of said purchase, that they assumed and promised to pay certain small bills of the Kleins, about town, amounting to \$448.58, about half of which was for insurance premiums on policies taken out by Klein on the stock of goods in October, 1890, to run a year. These policies, as was shown, were transferred to the Steiners, but they are not mentioned in the inventory of goods, nor is anything said about them, or any part of this \$448 claim, in either of the two bills of sale of the goods executed by Klein to claimants. After the sale to

claimants it was their business to insure their own property, and if, instead of allowing the old policies to lapse and taking out new ones, they paid the premiums on the old, it was their debt, and not Klein's; and this claim, so far as insurance premiums go, was certainly no part of the consideration of said purchase. The evidence shows that, when Steiner afterwards disposed of the stock of goods to one Dreyfus, he transferred these policies to him. The assertion of this claim favors an effort merely to bring the price alleged to have been paid, and the value of the goods, that much closer together.

After the sale to claimants they employed A. I. Klein to close out the goods for them, at a salary of \$2,500 a year. Having executed their claim bond, and becoming repossessed of the goods, they placed him in charge again, on the same pay. They transferred the goods to one Sol. Dreyfus, of Montgomery,—the father-in-law of A. I. Klein; and he and D. S. Dreyfus and H. W. Bernhelm,—two of his brothers-in-law,—also of Montgomery, in March, 1891, chartered what is called the "Kline Furnishing Company" at the same old stand, and A. I. Klein was installed as manager and salesman, at the same old salary, and thus the transaction ends where it began. The incorporation of this company is not of itself evidence of fraudulent combination between the parties. Consulting our general observation in reference to such matters, however, and taking it in all its bearings and surroundings, we are not prepared to believe that the end is worse for the Kleins than the beginning. There were, it may be added, striking inconsistencies, if not contradictions, in the evidence of some of the more important witnesses examined for the claimants, as between themselves and between them and others, and an indisposition on the part of some of them to answer some questions which were pertinent, and which it required the stimulating suggestions of the court to allay, all of which are disparaging to the claimants and their cause.

Our conclusion is that L. and A. I. Klein were both interested in the mercantile establishment which was sold to the claimants, and that this sale, when tried by the tests with which we commenced the investigation, cannot be upheld. The bona fides of the Bernhelm note, alleged to have been paid by claimants as a part consideration of the sale, has not been established, and claimants are not, in respect to that claim, in an attitude of bona fide purchasers. The fair value of the property purchased was materially in excess of the real consideration paid for it, and in the transaction there was a reservation of benefit to the Klein brothers. The judgment of the court below is affirmed.



(38 Ala. 61)

## HAYGOOD v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

## PROSTITUTION—TAKING GIRL FOR PURPOSES OF.

The offense of taking away a girl for the purpose of prostitution is not committed by one who takes her to an unoccupied house, that a third person might, for that one occasion, have intercourse with her.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Mary Haygood was convicted of taking away a girl for the purpose of prostitution, and appeals. Reversed.

Gordon McDonald and J. W. Thorington, for appellant. Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. The defendant was indicted and convicted under section 3744 of the Code of 1886, which declares that "any person who takes any girl under fourteen years of age from her father, mother, guardian, or other person having the legal charge of her, for the purpose of prostitution, concubinage, or marriage, must, on conviction, be imprisoned in the penitentiary for not less than two years." The charge in the indictment is "that Mary Haygood did unlawfully take one Minna Jones, a girl under the age of fourteen years, from her mother, for the purpose of prostitution." The testimony, if believed, proves that defendant did induce Minna Jones to leave the home of her mother, and go with her, the said Mary Haygood, to an unoccupied house, some distance away, for the purpose of there meeting one S., and having sexual intercourse with him; and that this purpose was carried into execution. There is no testimony which proves, or tends to prove, that defendant in all or anything she is proven to have done had any purpose other than to bring the said S. and the said Minna Jones together on the one occasion, and in the unoccupied house, that they might have sexual intercourse. Exceptions were severally reserved by defendant to charges given by the court, and to the refusal of charge asked by and for the defendant. They all raised the single inquiry whether the testimony, if entirely believed, justified a conviction of the offense charged. The following charge, given by the court of its own motion, and excepted to by defendant, presents the question: "If the defendant took the child from her mother to Riverside park for the purpose of having sexual intercourse with one S., and did in fact shut her up in a house for some hours with said S. (who then and there did have sexual intercourse with her) for such purpose, this was prostitution, within the statute." The defendant asked the following charges, which were refused: (1) "The court charges the jury that if they believe from the evidence that all the defendant did was to procure the girl, Minna Jones, to go to Riverside park

for the purpose of having sexual intercourse with one S., and that she in fact had sexual intercourse with him but one time, they must acquit the defendant." (3) "That if the defendant only intended to obtain the body of said Minna Jones for one S., for his own personal enjoyment, and no more, then this did not amount to prostitution in the sense of the law." In the case of *State v. Stoyell*, 54 Me. 24, the court used this language: "Worcester defines 'prostitution' thus: 'To offer to a common, lewd use; to make a prostitute of; to corrupt. 'Do not prostitute thy daughter.' Lev. xix, 29.' A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting oneself to sale, or of devoting to infamous purposes what is in one's power. In its more restricted sense it is the practice of a female offering her body to an indiscriminate intercourse with men." The principle of this case is thus expressed in the headnote: "Proof that the defendant, by false representations, persuaded an unmarried female to go with him to a neighboring town, and there, having induced partial intoxication, had repeated sexual intercourse with her, will not support an indictment for enticing her away 'for the purpose of prostitution.'" In the case of *Carpenter v. People*, 8 Barb. 603, the court employs this language: "We are entirely clear that by the expression in question, as used in the statute, it was intended that, in order to constitute the offense thereby created, the abduction of a female must be for the purpose of her indiscriminate meretricious commerce with men; that such must be the case to make her a prostitute, or her conduct prostitution, within the act." In *Com. v. Cook*, 12 Metc. 93, the supreme court of Massachusetts, in construing a statute similar to ours, thus expressed the unanimous opinion of the court: "The court are of the opinion that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view and for the purpose of placing her in a house of ill fame, place of assignation, or elsewhere,—to become a prostitute in the full and exact sense of that term; that she must be placed there for common, indiscriminate sexual intercourse with men; or, at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her; and that a mere enticing away of a female, for a personal intercourse, will not subject the offender to the penalties of this statute." The foregoing principles are fully supported by the following cases: *State v. Ruhl*, 8 Iowa, 447; *Osborn v. State*, 52 Ind. 528; *Slocum v. People*, 90 Ill. 274. The city court erred in the several rulings noted above. Reversed and remanded.

(36 Ala. 615)

**GARRETT v. HEFLIN et al.**

(Supreme Court of Alabama. June 7, 1898.)

**WILLS—VALIDITY—SETTING ASIDE—UNDUE INFLUENCE—WITNESSES.**

1. Where a will is drawn by a person standing in a confidential relation to the testatrix, and who takes a considerable benefit under it, it is not necessary to prove that the will was read to testatrix, or that she gave instructions for its drawing, but the court must be satisfied that the will expresses the real intentions of the testatrix.

2. In a suit to set aside the probate of a will, which made the servants of testatrix legatees and devisees thereunder, and defendant, her family physician, who drew the will, the residuary legatee, and to declare such instrument void because of undue influence, it appeared that testatrix, for over 40 years, had had no communication with any of her relatives who lived in Georgia, except complainant; that defendant had been her personal friend for 20 years, and, since her husband's death, her adviser in all business matters; that the will was written for more than a year before her death, and she expressed no dissatisfaction therewith. Defendant testified that the will was made at her request, and as she dictated, and that on his mentioning her relatives she said she did not intend to leave them anything. *Held*, that the will was in accordance with the intentions of the testatrix.

3. Under Code, § 1, it is sufficient for the subscribing witness to a will to make his mark, where the testator signs his name.

Appeal from chancery court, Chambers county; S. K. McSpadden, Chancellor.

Bill by James R. Garrett against W. L. Heflin and others to set aside the probate of a will, and have the instrument declared void. The bill was dismissed, and complainant appeals. Affirmed.

J. M. & E. M. Oliver, for appellant. W. L. Wood, for appellees.

COLEMAN, J. The present bill was filed under section 2000 of the Code to contest the validity of the will of Prudence Baily, which had been admitted to probate by the probate court of Chambers county. The grounds of contest are fraud, want of testamentary capacity, and undue influence. Testatrix died without issue or descendants, but left surviving her a brother, the complainant, and also descendants of a sister. Her former slaves and their children, and Mrs. Vickers, who waited upon and attended to her during the latter three or four years of her life, were the devisees and legatees of her will; and, by the ninth clause of the will, W. L. Heflin was made her residuary legatee. No provision was made for any of her next of kin by her will. The will was attested by one witness who could and did write his name as such, and by two other witnesses, who could not write, but subscribed their names by making their mark. The instrument was declared to be, and duly published, by testatrix, at the time of signing it, and when attested, her last will and testament. The evidence is in conflict as to whether the will, as an entirety, was read over to her, and explained, at the time

it was executed and published. We know of no law which requires that the witnesses to a will should be informed of its contents. It is rarely the case that a witness is informed of the contents of an instrument which he attests. *Leverett v. Carlisle*, 19 Ala. 80. It is not pretended that testatrix could not read and write. All the evidence tends to show she could do both. Testamentary capacity has been so often declared and defined in this state, it is unnecessary to repeat the general rule again. See the following authorities: *Kramer v. Weinert*, 81 Ala. 414, 1 South. Rep. 26; *O'Donnell v. Rodiger*, 76 Ala. 222; *Taylor v. Kelly*, 31 Ala. 59; *Stubbs v. Houston*, 33 Ala. 555; *White v. Farley*, 81 Ala. 563, 8 South. Rep. 215.

There is some evidence tending to show that testatrix at times labored under some mental delusions or hallucinations; was at times, on some subjects, "flighty," as to matters not at all connected with the practical transactions of life. But a consideration of all the evidence satisfies us that testatrix possessed sufficient mental capacity to make a valid will.

The law as to what constitutes undue influence has also been clearly settled by numerous decisions. *Eastis v. Montgomery*, 93 Ala. 300, 9 South. Rep. 311; *Lyons v. Campbell*, 88 Ala. 462, 7 South. Rep. 250; *Leeper v. Taylor*, 47 Ala. 222; *Pool v. Pool*, 35 Ala. 17; *Taylor v. Kelly*, 31 Ala. 64; *Bancroft v. Otis*, 91 Ala. 290, 8 South. Rep. 286. As to all the devisees and legatees under the will, except W. L. Heflin, the residuary legatee, there is not only no evidence to show that testatrix was unduly influenced by them, but it is affirmatively shown that the provisions made for them were in accord with the intentions of testatrix. A different principle of law applies to Heflin, the residuary legatee. He wrote the will. In the case of *Hill v. Barge*, 12 Ala. 687, it is said: "Ordinarily, when a man of sound mind and memory executes a will by signing and publishing it, and calling on witnesses to attest it, the presumption is that he knew the contents, although it is not written by him. But when the will is written by the person intended to be benefited by it the presumption and onus probandi are against the instrument, but as the law does not render such an act invalid the court has only to require strict proof. The onus probandi may be increased by circumstances," etc. It is said in the opinion rendered in the foregoing case that "the proof should be so satisfactory and convincing as not to leave a reasonable doubt on the minds of the jury that the testator knew its contents at the time of its execution." Possibly the measure of proof exacted by this statement is too stringent. In civil cases the proper measure of proof is that the jury must be reasonably satisfied of the truth of any fact.

The case of *Daniel v. Hill*, 52 Ala. 430, after quoting from many authorities, cites with approbation the following rule: "When a will is drawn by a person standing in a confidential relation to the testator, who takes a considerable benefit under it, that it is not necessary to prove the will was read over to the testator, or instructions given for its drawing, but that the court must be satisfied the will expresses the real intentions of the testator. The authorities in this country assert the same doctrine. Affirmative evidence, in any legal mode, that the will expresses the spontaneous intentions of the testator, satisfies the court, and removes the unfavorable presumptions which would otherwise be indulged." The same rule is declared in *Lyons v. Campbell*, and in the more recent case of *Bancroft v. Otis*, *supra*. It becomes necessary to examine the facts and circumstances surrounding, and connected with, the execution and publication of the will. It appears that testatrix and her husband had resided on the place where she died for more than 40 years; that her husband, Jacob Baily, died about 12 years before testatrix's death, and left some portion of his property to his old servants, and the remainder to his wife, the testatrix. The will of Jacob Baily was not introduced in evidence, but such seems to have been the disposition made of his property. During the 40 or more years testatrix resided in Alabama, it does not appear that she visited her relatives who resided in Georgia, or that any of them visited her, or had any communication with her, except the complainant, who visited her twice, and wrote to her. There is some evidence of declarations made by testatrix to the effect that her relatives were displeased at her marriage with Jacob Baily, and that she and her husband moved away from them to Alabama, and that by their own efforts, with the assistance of their servants, some of whom were their former slaves, they had made what property they owned, and that she did not care to let her next of kin have her property. There was certainly no concealment of the making of the will. Three witnesses were called to attest it, none of whom, it seems, were at all especially friendly to Dr. Heflin. Two other witnesses were present, who did not attest the instrument. All knew it was her will. One of the witnesses who attested the will, examined by complainant, testified that the will was read over to the witnesses, but not to testatrix, in his presence. Another witness, examined by complainant, who was present, but did not attest the will, testified at one time that she heard the will read to testatrix, but she afterwards qualified this statement by stating that the will was read to testatrix, except the ninth clause. The evidence shows that Dr. Heflin had been a warm personal friend of Jacob

Baily in his lifetime, and of testatrix for 20 years, and was their family physician, and, after the death of her husband, testatrix advised with him in all her business transactions. The will was written for more than a year before her death, and she was never heard to express any dissatisfaction with the will. Heflin testifies that the will was prepared at her repeated solicitation, and as dictated by her, and that, when he called her attention to her relatives, she said that her husband had made provision for their old servants, and she wanted to do the same thing, and that she did not intend to leave any of her property to her relatives, giving certain reasons for such intention. Looking at all the evidence in the case, we cannot say the conclusion reached by the chancellor was not warranted by the evidence, and that the instrument declared and published as her will truly disposed of the property as testatrix intended.

It is contended that the will was not executed according to law, in that only one subscribing witness wrote his name, while the other witnesses only subscribed by making their marks. We are of opinion that this was a sufficient attestation of the will. Our statute in this respect is substantially the same as the English statute of wills, 29 Car. II. c. 3. The direct question arose in the case of *Den v. Mitton*, 12 N. J. Law, 70. The court charged the jury that "making of a mark is a sufficient subscription by the witness." In considering this charge the court said: "He who is unable to write his name, and makes his mark, is notwithstanding a competent and legal witness to the execution of a will;" citing a number of cases in support of the principle. In the case of *Bailey's Heirs v. Bailey's Ex'r*, 35 Ala. 690, this court used the following language: "It is the settled construction of the English statute, and of similar statutes in the United States, that the signature of the testator, or of the witnesses, by making a mark, is sufficient;" citing many authorities. Of course, under our statute, (section 1, Code,) where the testator or grantor cannot write, but subscribes by making his mark, the attesting witnesses must write their names. A mark, in such a case, is insufficient. But section 1, *supra*, in a case where the party to be bound writes his name, does not require that the attesting witnesses must also write their names. The question was considered in *Bailey's Heirs v. Bailey's Ex'r*, *supra*, and this was the conclusion of the court. We adhere to this construction. In *Riley v. Riley*, 36 Ala. 496, *arguendo*, the same rule—that an attestation or subscription by a witness by his mark was a legal and sufficient attestation—was recognized. When the cases of *Bailey's Heirs v. Bailey's Ex'r*, and *Riley v. Riley*, *supra*, were decided, section 1 of the Code was the exist-

ing law, as it now exists. See section 1, Code 1852. We find no error in the record available to appellant, and the decree of the chancery court must be affirmed.

(98 Ala. 535)

SAVAGE, Judge, et al. v. MATTHEWS.  
(Supreme Court of Alabama. June 7, 1893.)  
PROBATE JUDGE—LIABILITY ON BOND—WARRANT  
ON COUNTY TREASURER—IMPROPER ISSUANCE.

The purchaser of a warrant on the county treasurer, which is void as not representing any valid claim, and as issued without authority from the county commissioners, as required by Code, § 901, cannot maintain an action on the bond of the probate judge for having issued the warrant.

Appeal from circuit Court, Cherokee county; John B. Tally, Judge.

Action by T. R. Matthews against R. R. Savage, judge of probate, and the sureties on his official bond. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

J. L. Burnett, for appellants. Matthews & Whiteside, for appellee.

HEAD, J. This is a novel action in this state. We have been referred to no authority which supports it, and can find none. We are sure it has no support in principle. Section 901 of the Code provides that "the court of county commissioners must, in term time, audit all claims against their respective counties, and every claim, or such part thereof as is allowed, must be registered in a book kept for that purpose; and the judge of probate must give the claimant a warrant on the treasurer for the amount so allowed." It is the duty of the treasurer to register, according to prescribed forms, in well-bound books, all claims allowed by the commissioners' court, and presented to him,—designating date of allowance, when presented, the character of the claim, to whom allowed, and the amount,—and to number, register, and pay all claims in the order in which they are presented, etc. Section 915. The substance of plaintiff's complaint is that the defendant Savage, who, with the sureties on his official bond, is sued for the supposed grievance, as probate judge of Cherokee county, acting by and through his duly appointed and authorized clerk, carelessly or fraudulently issued to, or in the name of, one Converse, certain warrants on the county treasurer for the payment from the treasury of designated sums of money which were not authorized by any order or allowance of the commissioners' court, and which in fact represented no lawful or proper charge or claim against the county; that one of said warrants, after passing by transfer through the hands of other holders, was purchased by the plaintiff from one West, and a specified sum of money paid therefor, without

any knowledge or notice of the spurious character of the warrant, but relying upon its validity. The judge of probate and his sureties are sued upon his official bond for the damage alleged to have resulted from this purchase.

It is perfectly obvious that these warrants are not authorized to be issued for commercial circulation. They are but means and safeguards provided by law for the disbursement of the public money of the county by the officers intrusted with its keeping and disbursement. A warrant is the command of one duly-authorized officer to another, whose duty it is to obey, to pay from the county funds a specified sum to a designated person, whose claim therefor has been allowed by the court of county commissioners. So far from being intended as a circulating paper, to which the rights of third persons might attach in commercial dealing, it possesses no element of a contract. It is not assignable, so as to be made the foundation of an action at the suit of a transferee. Code, § 1762; *West v. Foreman*, 21 Ala. 400. Indeed, strictly speaking, no action at all can be maintained upon such a warrant against the county, or any officer or person. If the treasurer has funds in his hands, lawfully applicable to its payment, it is his official duty to pay it; but he is not bound by virtue of any contractual obligation, as a party to the instrument. His failure to pay, having funds for that purpose, is an official dereliction, for which he is liable to an action. The warrant, it may be, raises prima facie evidence of his duty to pay; but it is not, in a legal sense, the foundation of an action brought against the treasurer. Such action would be for the breach of official duty, to which the warrant bears only a collateral relation. In *Commissioners' Court v. Moore*, 53 Ala. 25, this court properly said: "If, after the audit and allowance, a warrant is, pursuant to the statute, drawn on the county treasurer, it is a mere authority to him to pay. It is nothing more, really, than an order on the county itself,—the debtor;" citing *Dill. Mun. Corp. §§ 406-412*. And again, in the same case: "When the claim has been audited and allowed by the commissioners' court it ceases to be the subject of a suit, in the ordinary modes, against the county. If the commissioners' court fail to levy and collect a tax for the payment of such claim, they fail to exercise a ministerial or executive power with which they are clothed, and in the exercise of which an individual has a right and interest, and mandamus lies to compel its exercise." The case of *Grayson v. Latham*, 84 Ala. 546, 4 South. Rep. 200, 868, was not really a suit on the warrants, though mentioned as such in the statement of facts. It was a summary motion against the treasurer for his failure to perform his official duty. The warrants were evidence of his official duty to pay, if he had funds suffi-

cient, but in themselves there was no assumption of obligation on his part by which they could be made the cause or foundation of action against him. It results that individuals composing the public, other than the common interest all feel in the due and lawful disbursement of the public revenues, have no interest or concern whatever in the issuance of such warrants, which can, in any legal sense, be said to be contemplated by, or involved in, such issuance. No one has any interest therein but the county and the person in whose favor the warrant is issued; and, as a sequence, none other can complain of the official action of the judge in reference to it, whether characterized by misfeasance, malfeasance, or nonfeasance. It is not to be questioned that such misconduct on the part of the judge, when committed, is done under color of his office, within the meaning of subdivision 3 of section 273 of the Code; and if, thereby, the funds of the county should be unlawfully diverted and lost, an action would lie upon his official bond, at the suit of the county, for the injury. *Lewis v. State*, (Miss.) 4 South. Rep. 429. But when a stranger to the subject-matter of the official act, having no interest therein, sees fit to voluntarily anticipate, for the county treasurer, payment of the warrant, or to purchase it from the holder, and if thereby he acquires, if the warrant had been a lawful one, an equitable right to have the money paid to him by the treasurer, the wrongful act of the judge was but the remote cause of his injury, and furnishes him no cause of action against that officer. In *Murfree, Off. Bonds*, § 468, this language is used: "In general a public officer is liable only to the person to whom the particular duty is owing, and whenever he is called to account the first and ruling question is whether the plaintiff shows any breach of a particular duty to him. It is by no means sufficient to show negligence on the part of the officer, and an injury to the plaintiff. It must be shown, also, that such negligence and consequent injury constituted a breach of some duty which the officer owed to the plaintiff. Hence a mortgagee cannot maintain an action against a county trustee because the latter neglected or failed to collect the taxes due on the mortgaged premises from the personal estate of the mortgagor, and thereby threw that charge upon the mortgaged property. It is true that it was the duty of the county trustee to collect the tax from the personalty of the mortgagor, but that was not a duty which he owed to the mortgagee. It is true that the failure of the officer to discharge his duty in this respect caused an injury to the mortgagee, but that injury was indirect and remote, and was wholly unprovided for by the law. The law fixes the liability of the officer, and the law and the bond that of the surety, not only in other respects, but also as to the persons

to whom the duty or the penalty is due." This author proceeds, in the same section, to give numerous illustrations of the principle we declare, demonstrating the proposition that a person entitled to sue an officer for official wrong or delinquency must have had at the time a direct, proximate interest in the matter of the official act complained of, and that a remote interest, not legally contemplated in the wrongful act or omission, gives no cause of action. The words, "for the use and benefit of every person who is injured," as found in subdivision 3, § 273, of our Code, include only persons having a direct, proximate interest in the official act or omission complained of. It is clear, therefore, that neither count of the complaint contains a substantial cause of action, and the demurrers to them should have been sustained; and, as it is obvious no amendment can be made which will give a cause of action, the judgment of the circuit court will be reversed, and judgment here rendered for the defendants.

(38 Ala. 23)

## HORN v. STATE.

(Supreme Court of Alabama. June 5, 1893.)

ASSAULT WITH INTENT TO MURDER—EVIDENCE—INSTRUCTIONS—CONVICTION OF LESSER OFFENSE—CHANGE OF VENUE—INTERPRETER.

1. Where, although a very strong showing is made in support of an application for a change of venue, there are many affidavits of residents of the county that the public sentiment has settled down and determined that defendant shall have a fair trial, the denial of the application will not be disturbed on appeal.

2. Where a witness for the state cannot speak English well enough to be understood by all of the jurors, the court may employ a sworn interpreter.

3. On a prosecution for assault with intent to murder it was permissible to show that defendant told a witness that "the Jew [the person assaulted] had five dollars of his money; that he was going down there after it, and was going to have it or give him a frailing."

4. Under an indictment charging that defendant, with malice aforethought, committed an assault with intent to murder, defendant may be convicted of assault and battery or simple assault, of which malice aforethought is not an ingredient, and hence defendant is not entitled to an instruction that he should be acquitted unless malice aforethought is shown.

5. On a prosecution for assault with intent to murder, an instruction as to defendant's right to defend himself against the person assailed should be refused where it pretermits all inquiry as to defendant's conduct anterior to the time of the assault upon defendant, and does not hypothesize that such assault menaced grievous bodily harm.

6. A requested instruction that the testimony of a witness "who is shown to be unworthy of credit" is insufficient to justify a conviction unless corroborated, should be refused as containing an intimation on the part of the court that the witness is not worthy of credit.

7. Where instructions are requested and refused in a lump, to authorize a reversal, each of them must be free from error.

8. The refusal of several charges, all written on one piece of paper, is a single ruling, and cannot be made the subject of several exceptions.

9. Where defendant's testimony tended to show that at the time he fired a pistol he was being held, but it was not an uncontroverted fact, an instruction assuming that he was being held was erroneous.

10. On a prosecution for assault with intent to commit murder, defendant is entitled to an instruction that the facts must raise the presumption of intent to murder, otherwise there can be no conviction of assault with intent to murder.

Appeal from circuit court, Marengo county; James T. Jones, Judge.

Paul Horn was convicted of assaulting Isaac Rosenberg with intent to murder, and he appeals. Reversed.

The state introduced Mack Walker as a witness, whose testimony tended to show that he knew defendant, and saw him in Faunsdale, the place of the difficulty, on the day of the afternoon of the shooting, a short time prior to the difficulty; and, after stating that he had a conversation with the defendant on that afternoon, the state then asked him the following question: "What was that conversation?" The defendant objected to this question, on the ground that it was illegal, irrelevant, and too broad, and that a proper predicate had not been laid. The court overruled the objection, and the defendant excepted. The witness answered: "The defendant told me that this Jew had five dollars of his money; that he was going down there after it, and was going to have it, or give him a frailing." The defendant requested the court to give the following written charge to the jury: "If the jury believe from the evidence that Paul Horn went to the store of Isaac Rosenberg, and that Isaac Rosenberg assaulted him, and that several persons jumped on him, and were beating him, and he fired the shot at Isaac Rosenberg, when Rosenberg was advancing on him, under the belief that it was necessary for his protection, then he is not guilty of an assault with intent to murder, although he might have struck Rosenberg, and got in a fight with him." The defendant also requested the court to give to the jury the following charge: "The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction without corroborating evidence; and such corroborating evidence, to avoid anything, must be a fact tending to show the guilt of the defendant. *Cohen v. State*, 50 Ala. 108; *Porter v. State*, 55 Ala. 96."

C. K. Abrahams and Peter M. Horn, for appellant. Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. There was an application for a change of venue in this case, and a very strong showing was made in support of it. On the other hand, a full showing was made that before the trial came off better

counsels prevailed, passions had cooled, and the sentiment of the public had settled down to the determination that the accused should have a fair and impartial trial upon the evidence as it should be developed. This counter showing was supported by many affidavits of persons residing in many different precincts of the county. We have no means of knowing the character and intelligence of the several affiants, and hence cannot speak of the same. The judge of the circuit court was on the same ground, and could inform himself in these respects. He had, therefore, much better opportunity for arriving at a conclusion on this application than we can have. He denied the motion, and we are not satisfied that he erred. This case, on this question, is not distinguishable in its legal bearings from that of *Hawes v. State*, 88 Ala. 37, 7 South. Rep. 302; and on the authority of that case we hold that appellant can take nothing on this alleged ground of error. *Hussey v. State*, 87 Ala. 121, 6 South. Rep. 420; *Seams v. State*, 84 Ala. 410, 4 South. Rep. 521.

The circuit court did not err in the employment of a sworn interpreter to interpret the testimony of the prosecuting witness. Some of the jurors were unable to understand his attempt to speak the English language, and it was the court's duty to have the testimony put in such shape as that it could be understood by the body whose duty it was to pronounce on the facts. *Code* 1886, § 2764; 1 Whart. Ev. §§ 174, 407.

There was certainly nothing in the objection to the question propounded to the witness Walker, or to the answer he gave to that question. Their purpose and tendency were to prove the accused contemplated violence on the person he is charged to have assaulted. This was material testimony to be considered by the jury in determining who brought on the difficulty, and also on the inquiry of formed design,—an essential element of the offense with which he was charged. *Ross v. State*, 62 Ala. 224; *Fields v. State*, 52 Ala. 348; *Ex parte Nettles*, 58 Ala. 268; *Ex parte Warrick*, 73 Ala. 57; *Mitchell v. State*, 60 Ala. 26; *Cleveland v. State*, 86 Ala. 1, 5 South. Rep. 426; *De Arman v. State*, 71 Ala. 351; *Gibson v. State*, 91 Ala. 64, 9 South. Rep. 171.

The indictment in this case, pursuing the form prescribed in our Code, (form 12,) charges "that Paul Horn unlawfully, and with malice aforethought, did assault Isaac Rosenberg, with intent to murder him." This indictment, while it specifically charges a felony, by operation of law charges every lesser offense included in the one charged. Hence it charges the defendant with assault and battery and with a simple assault, in neither of which is malice aforethought an essential ingredient. *Jones v. State*, (Ala.) 11 South. Rep. 399. Charges 8, 5, and 6, asked by defendant, claimed an acquittal of defendant if there was a failure of proof of

malice aforethought. These charges were rightly refused for the reason stated above, if for no other.

Charge No. 1, asked by defendant, is too meager in its postulates. It pretermits all inquiry of defendant's conduct anterior to the time Rosenberg is supposed to have assaulted him, and fails to hypothesize that the supposed assault from Rosenberg menaced grievous bodily harm. If one by his conduct provokes an assault, or assault and battery, on his person, which is not likely to produce death, and then, pursuant to a formed design, general or special, shoots his adversary with intent to kill him, this would be an assault with intent to murder. This charge was calculated to mislead, and was rightly refused. 3 Brick. Dig. pp. 111, 112, §§ 84-86.

Another charge, asked by defendant and refused, appears in the transcript before us as No. 1. It is the sixth in the series as they appear in the bill of exceptions. Its language is, "The testimony of a witness for the prosecution, who is shown to be unworthy of credit," etc. This charge was calculated to mislead, in this: that, if given, the jury might have understood the court as affirming as matter of fact that the witness was unworthy of credit. That was a question to be left to the jury. 3 Brick. Dig. p. 111, §§ 80, 82.

Charges asked in a lump and refused in a lump furnish no ground for a reversal, unless each one is free from error. The defendant asked two charges at the same time, one of which we have commented on last above, and pronounced faulty. We need not consider the other. 3 Brick. Dig. p. 80, § 41.

Defendant also asked at one and the same time three several charges, all written on one piece of paper, and the presiding judge wrote across the paper, "Refused," and signed his name. As shown in the record, this was a single ruling, and cannot be made the subject of several exceptions. The first of these three charges assumes and states as a fact that when the defendant fired the pistol he was "at the time held by Charley Tennerson." His own testimony tended to show such was the case, but it was not an uncontroverted fact. It should have been left to the jury. *Bain v. State*, 70 Ala. 4; *Dolan v. State*, 81 Ala. 11, 1 South. Rep. 707; *Watson v. State*, 82 Ala. 10, 2 South. Rep. 455. Charges 2 and 3 of that lot are also wanting in clearness. Each of these was rightly refused.

Charge A, asked by defendant, refused by the court, and the refusal excepted to, is in the following language: "The facts must raise the presumption of intent to murder; and, if the jury find that the state has failed in this, then they must acquit the defendant of an assault with intent to murder." This charge ought to have been given. It states succinctly and clearly the controlling principle in all prosecutions for this offense.

There must be an assault, and there must be an intent to take life, under circumstances which, if successful, would constitute murder. That intent, being a mental purpose or state of the mind, is rarely, if ever, susceptible of direct proof. It is an inference to be drawn by the jury from the facts testified to by the witnesses. When the proof shows that an act was done, or attempted to be done, which in the course of nature was calculated to take life, and the attendant circumstances fail to show a case of self-defense, and fail to show it was brought about by sudden passion aroused by an unprovoked, personal wrong, not less grievous than an assault; or if the circumstances show that the accused made the attempt, pursuant to a formed design, to take life, no matter how recently that design may have been formed,—this is an assault with intent to murder; and if the facts which raise the presumption of such intent to take life be proved to the jury's satisfaction beyond a reasonable doubt it is their duty to convict. But the facts which raise this presumption must be proved so clearly as to leave no reasonable doubt of the intent of the prisoner to commit the murder. "A man must be taken to intend that which he does, or which is the immediate or necessary consequence of his act." *Meredith v. State*, 60 Ala. 441; *Williams v. State*, 77 Ala. 53; *Lawrence v. State*, 84 Ala. 424, 5 South. Rep. 83; *Walls v. State*, 90 Ala. 618, 8 South. Rep. 680.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

(96 Ala. 629)

# MAYOR, ETC., OF CITY OF ANNISTON v. DAVIS.

(Supreme Court of Alabama. June 6, 1893.)

## CITY COUNCIL—MINUTES OF MEETING—CORRECTION.

A vacancy having occurred in the city council, petitioner was voted for at a meeting of the remaining members, and declared elected. The minutes showed the election to have been unanimous, whereas in truth only three members—less than the required majority—voted for such election. *Held*, that the council had power to correct such minutes at a subsequent meeting, and that, when corrected, they could not be collaterally impeached, and were a complete answer to proceedings in mandamus brought to compel petitioner's restoration to the office of councilman.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Petition by W. A. Davis for writ of mandate to the mayor and city council of Anniston to compel the petitioner's restoration to the office of councilman. Writ issued. Defendants appeal. Reversed.

Knox, Bowie & Pelham, for appellants.  
Blackwell & Keith and Caldwell, Johnson & Acker, for appellee.

COLEMAN, J. The city council of Anniston is composed of eight councilmen, two from each ward of the city. On the 19th day of May, 1892, R. J. Riddle, who was a member of the council from ward No. 1, tendered his resignation, which was accepted by the mayor and council, then in session. An election was held for the purpose of filling the vacancy caused by his resignation. The minutes of the council meeting at which these proceedings were had are as follows:

"Council Chamber, Anniston, Ala., May 19th, 1892. Present: Jas. Noble, Sr., Mayor, and Councilmen R. J. Riddle, W. H. Weatherly, G. W. Jones, T. G. Dunn, N. H. Reid, D. M. Sawyer. Absent: Councilmen A. S. Johnston, T. H. Slaughter. Mr. R. J. Riddle tendered his resignation as a member of the city council, which \* \* \* was accepted. An election was held to fill the vacancy. \* \* \* For this position Mr. Weatherly nominated Mr. W. A. Davis, and he was unanimously elected to fill said vacancy.

"Attest: Geo. T. Anderson, Clerk.

"Approved: James Noble, Sr., Mayor."

"Council Chamber, Anniston, May 27th, 1892. Present: James Noble, Sr., Mayor, and Councilmen W. A. Davis, W. H. Weatherly, G. W. Jones, N. H. Reid, D. M. Sawyer. The minutes of the last regular and called meeting were read and approved.

"Attest: Geo. T. Anderson, Clerk.

"Approved: James Noble, Sr., Mayor."

The charter, in section 4, provides that "vacancies occurring in the city council shall be filled by a majority vote of the remaining members thereof." And in section 15: "All elections by the city council shall be by viva voce, on the call of the roll." At a regular meeting of the council held September 23, 1892, N. H. Reid and G. W. Jones, two of the councilmen, in a protest to the council, stated that W. A. Davis had never been legally elected as a member of the council; that at the time of his supposed election there were present only five councilmen, three of whom, Weatherly, Dunn, and Sawyer, voted for Mr. Davis; that Jones did not vote, and that Reid voted against him. A resolution was then adopted, declaring that Mr. Davis had not been legally elected, and the vacancy caused by the resignation of R. J. Riddle was still vacant. An election was then held to fill the vacancy, and Mr. R. H. Stickney, having received four votes, was declared duly elected. A resolution was then introduced to correct the minutes of May 19, 1892, "to make them speak the truth, and show the facts as set forth in the protest, by striking out the word 'unanimously,' in the minutes of the election of W. A. Davis. Five of the councilmen, exclusive of Mr. Stickney, voted for the adoption of the resolution. The minutes of the meeting of May 19, 1892, were corrected by resolution of the council to read as follows:

"Mr. R. J. Riddle tendered his resignation as a member of the city council, which, on

motion of Mr. Weatherly, was accepted. An election was held to fill the vacancy caused by the resignation of Mr. Riddle. For this position Mr. Weatherly nominated Mr. W. A. Davis. The question being put by the chair, Mr. Davis was voted for by Councilmen Weatherly, Dunn, & Sawyer. Of the other two members present Councilman Reid voted 'No,' and Councilman Jones did not vote.

"Attest: Geo. T. Anderson, Clerk.

"Approved: James Noble, Sr., Mayor."

Thereupon Mr. Davis filed his petition praying for a writ of mandamus to be directed to the mayor and council, commanding that he be restored to his said office as councilman, with its rights and privileges. The petition sets out the facts substantially as we have stated them. Upon the filing of the petition a rule nisi was ordered. To the petition there was a demurrer, and, the demurrer having been overruled, an answer was filed in the nature of a return to the rule nisi, setting out substantially the same facts. A demurrer was sustained to the answer or return to the rule nisi, and a peremptory writ issued as prayed for in the petition. It will be noticed that the common council is composed of eight members. At the meeting at which Davis was elected only five members were present. To fill the vacancy occasioned by the resignation of Riddle by the terms of the charter "a majority vote of the remaining members" was necessary. The minutes of the council as corrected show that only three members, one less than a majority of the remaining members, voted for Mr. Davis. If this be true, he was never legally elected. The council have no authority to disregard the charter provision. No subsequent approval or ratification could legalize or make valid a disregard of this mandate of the charter. The rule that a majority of a quorum controls has no application under such a provision. *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. Rep. 422.

The main question, and about the only material one, presented is whether the city council had the power at a subsequent meeting to correct the minutes of the meeting held on the 19th of May, 1892, at which Mr. Davis was elected, so as to show that his election was not "unanimous," and that in truth only three members of the council voted for his election, and, if so, what effect did the minutes, when thus corrected, have upon his claim to the office of councilman? We are of opinion that the common council was fully authorized to correct its minutes so as to make them speak the truth, and this conclusion finds support in all the adjudicated cases we have been able to examine. Whether the correction shall be allowed to affect rights which have become vested in the interim presents altogether a different question. The correction can and should be made. The extent of the application of the



corrected minutes must depend upon the circumstances to be affected. In the case before us no question is presented of rights acquired under or in consequence of the minutes of the meeting of May 19, 1892, as first entered upon the journal. The power of the council to correct its minutes at a subsequent meeting is discussed at length in the following authorities: 1 Dill. Mun. Corp. (3d Ed.) §§ 293-297, and notes; 15 Amer. & Eng. Enc. Law, p. 1077, § 7, and notes. The petitioner does not deny that the minutes as corrected speak the truth. On the contrary, his demurrer to the answer and return of the respondents admits that only three votes were for his election. His contention is that the council, once having declared that he was "unanimously" elected, had no power over its minutes at a subsequent council meeting, although held by the same members of the council. In this petitioner has mistaken the law. If, in point of fact, the minutes as entered of the meeting of May 19, 1892, at which time he was declared to be elected, were correct, and spoke the truth, petitioner has his remedy. By direct proceeding for that purpose he may have the minutes of the council meeting of the 23d of September, 1892, set aside and annulled, and the minutes of May 19, 1892, restored. This would leave him a lawfully elected councilman, and, if unlawfully removed by the mayor and council, he would be entitled to the writ of mandamus. The authorities are numerous to this proposition. *Ex parte Lusk*, 82 Ala. 519, 2 South. Rep. 140; *Carter v. City Council of Durango*, (Colo. Sup.) 27 Pac. Rep. 1057; *Board v. Johnson*, 124 Ind. 145, 24 N. E. Rep. 148. So long as the minutes of the meeting of September 23, 1892, remain as the minutes of the council, they cannot be impeached or varied in a collateral proceeding by parol testimony, and are a complete answer to the petition for a writ of mandamus. The pleadings show an effort by one who was for a time a de facto officer by mandamus to compel his restoration to an office held by a de jure officer, and the decision of the court upon the pleadings was to the effect that this could be done. In this the court was in error. We cannot say whether petitioner desires or can amend his petition, or whether he desires to take issue upon the facts set up in the answer to his petition, and which we have held, if sustained by the proof, was sufficient in law. We will reverse and remand the case, so that it may be determined in accordance with the principles herein declared.

(98 Ala. 52)

## WILLIAMS v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

PROSTITUTION—NIGHT WALKING—EVIDENCE—EXAMINATION OF DEFENDANT'S PERSON BY JURY—INSTRUCTIONS.

1. On a trial for night walking, evidence that defendant had been seen at night talking

to men at a certain bar, and that the women who visited the bar were prostitutes, is admissible, though the proprietor of the bar also had a general grocery store under the same roof, and other people went there besides prostitutes.

2. Evidence that defendant and another girl had been found in bed with a man was admissible.

3. Evidence that defendant had been seen on the street late at night, coming from a saloon frequented by prostitutes, and had also been seen, but not accompanied by a man, coming from a dance attended by "tough" people, and that she had once been seen standing on a corner near the saloon, talking to a man, is admissible.

4. On a trial for night walking, where defendant voluntarily testified in regard to her age, the court did not err in requiring her to stand up and face the jury, that they might observe her appearance and development.

5. On a trial for night walking, while the general proposition that the jury might consider defendant's youth as a circumstance in her favor was correct, the court did not err in refusing to charge it, since it is proper to refuse instructions which single out and give undue prominence to particular facts which have to be considered by the jury in connection with other evidence.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Callie Williams was convicted of night walking, and appeals. Affirmed.

John W. A. Sanford, Jr., for appellant.  
Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The constituents of the offense of night walking, with which defendant is charged, made essential by the averments of the present indictment, are that defendant "was a common night walker, and did walk and ramble in the streets and common highways in the city of Montgomery, Ala., at unseasonable hours of night, without having any lawful business, and without any necessity therefor, for the unlawful purpose of picking up men for lewd intercourse, against good morals and good manners, to the common nuisance of all good people of said county." *Stokes v. State*, 92 Ala. 73, 9 South. Rep. 400. The only evidence introduced by the state for the purpose of supporting this charge is the testimony of Murphy, a police officer, that he had seen defendant at O'Rear's bar, at night, in the city of Montgomery, and had seen her talking to men at that bar; that one night witness went to the house of Carrie Stoudenmire, and found defendant and Carrie in bed with a man, and that the character of people who visited O'Rear's bar was that of prostitutes. And the testimony of one Doran that he had seen the defendant in O'Rear's Bottom, and at a dance in O'Rear's five or six months ago; that tough people attended O'Rear's dances; that the dance kept up as late as 12 o'clock; that he had seen her in the streets, going to and from O'Rear's bar, and coming from O'Rear's dance, late at night, but not with any man; that he saw her once talking to a man on O'Rear's corner. The proof further showed that O'Rear kept a

general grocery store and bar under one roof, and that other people went there besides prostitutes, and that defendant was between 12 and 13 years of age at the time of the alleged night walking. The defendant, in a proper way, objected and excepted to each of the several facts testified to by the witness Murphy, and objected and excepted also to the statements of Doran that he had seen defendant in O'Rear's Bottom, and at a dance in O'Rear's, five or six months ago, and that tough people attended O'Rear's dances. We think these several facts, taken in connection with the further testimony of Doran that he had seen defendant in the streets, going to and from O'Rear's dance, late at night, and that she had been seen talking to men on O'Rear's corner, had some tendency to prove the offense charged in the indictment. Although they may have been weak and inconclusive, they were circumstances which the jury had the right to consider for what they were worth. There was no error in admitting them.

The defendant introduced herself as a witness, and testified touching the facts of the case, testifying, among other things, as to her age. Thereafter the solicitor requested the court to require her to stand facing the jury, that they might determine as to her age from her appearance. The defendant objected. The court overruled the objection, and required the defendant to rise, and come round in front, and face the jury for their inspection, and defendant excepted to this ruling and requirement. It is contended that this was a violation of the constitutional provision that the accused shall not be compelled to give evidence against himself. Section 7, art. 1, Const. It is very clear that if defendant had not voluntarily made herself a witness in the cause, as by the statute she was privileged to do, the action of the court would have been an invasion of the constitutional immunity above referred to. The principle is settled in the case of *Cooper v. State*, 86 Ala. 610, 6 South. Rep. 110. In *Clarke v. State*, 78 Ala. 474, and other subsequent cases, we held that the accused, having voluntarily testified in his own behalf in the cause, was subject to cross-examination, like any other witness, touching all material facts within his knowledge. He will not be allowed to avail himself of the statutory privilege of becoming a witness merely to testify to such facts as he deems favorable to himself, or as he chooses to testify to; but, availing himself of the privilege, he will be required to disclose all facts within his knowledge material to the issue, although such facts may tend to criminate him. We cannot perceive that the present question involves a different principle. The defendant had offered herself as a witness, and had the benefit of all evidence she was able to give in her behalf. She had the benefit of her testimony touching her age, which became a material subject of inquiry

before the jury. By merely standing and presenting herself before the jury, whereby the jury might observe her appearance and development, she was able to give some further testimony as to her age, and this is all the court required her to do. Such a requirement of a witness is not an unreasonable one. It subjects him or her to no indignity, and cannot justly offend the most refined sensibility. The requirement being reasonable, and its effect being to furnish the jury with some additional evidence material to the question of age, and the defendant having voluntarily taken the benefit of all evidence she desired to give in her own behalf, it was but just that she be required to give this additional evidence by presenting herself before the jury for their inspection.

The court was requested by the defendant to instruct the jury that they might consider the defendant's age as a circumstance in her favor. The proposition is correct, and the instruction might have been given without error; but we have many times held that such instructions single out particular facts, which have to be considered by the jury, not alone, but in connection with the other evidence, and give undue prominence to the facts so singled out, and may for this reason be properly refused. The court did not err, therefore, in refusing this charge. We find no error in the record, and the judgment is affirmed.

(38 Ala. 38)

## PETERS v. STATE.

(Supreme Court of Alabama. June 8, 1893.)

INDICTMENT — INCAPACITY OF GRAND JURORS — FAILURE TO DISCHARGE — INCREASE OF MEMBERS.

Upon the report of a grand jury of fifteen members that their number had been reduced to thirteen by reason of the sickness of two jurors, the court, without making an order discharging the two jurors, directed the sheriff to add two members to the jury. *Held*, that the court's failure to order a discharge of the jurors incapacitated by illness was fatal to the presentation of an indictment by the jury as constituted by the addition of the two new jurors, in that it would appear that there were seventeen jurors composing the panel.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Linville Peters was convicted of grand larceny, and appeals. Reversed.

John T. Ashcraft, for appellant. Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. The district court of Colbert and Lauderdale counties was created by the act approved February 13, 1891, (Sess. Acts 1890-91, p. 605.) In section 9 of said act it is provided "that the grand and petit juries shall be drawn and impaneled in the same manner as is or may be provided by law for grand and petit juries in the circuit court of said counties." By our latest jury law, approved February 28, 1887, (Sess. Acts, p. 151; 2 Code 1886, p. 131, note,) after provid-

ing for the drawing of jurors, in section 9 of said act it is provided "that out of the grand jurors so summoned and attending, the court shall organize a grand jury, as now provided by law; and if, by reason of sickness or nonattendance or any cause, a sufficient number shall not appear, the court shall order the sheriff to summon from the qualified citizens of the county twice the number necessary to complete the grand jury, and from such number shall be drawn in the manner required by law a sufficient number to complete the grand jury." In volume 2, Code 1886, § 4337, is this provision: "At least fifteen persons must be sworn on the grand jury, one of whom must be appointed as foreman by the court; and, if he is discharged or excused for any cause after the jury is sworn or charged, the court may appoint another in his place." At a district court for Lauderdale county, commencing on January 2, 1893, a grand jury was organized, consisting of fifteen persons, of which J. H. Olive was appointed and sworn as foreman. At a late day of the term, to wit, on January 11, 1893, the court made the following order: "The grand jury comes into court and reports that the number composing the grand jury have been reduced to thirteen by reason of the sickness of Hiram Cox and the sickness of the family of James H. Olive. It is ordered by the court that the sheriff summon from the qualified citizens of the county four persons, and place their names in a hat, from which to complete this grand jury; and the sheriff thereupon, after a compliance with the order of the court, drew from the hat the names of J. R. Cox and J. L. Howell, who being found to possess the necessary qualifications as grand jurors of this court at this term, they were then duly and legally sworn as grand jurors for the purpose of completing the grand jury as aforesaid. And the court then directed that, owing to the absence of J. H. Olive, the regular foreman of the grand jury, that W. T. Calahan be sworn as foreman of the grand jury, which was accordingly done by the clerk of this court administering to the said W. T. Calahan the oath prescribed by law for the foreman of the grand jury; and after these proceedings were completed, the grand jury retired to further prosecute their labors." On the next day, January 12, 1893, the grand jury returned into court the indictment on which the defendant in this case was tried and convicted of grand larceny. That indictment was returned "A true bill," signed, "W. T. Calahan, Foreman of the Grand Jury." It will thus be seen that the grand jury, at that term of the court, was first organized and consisted of fifteen members, of which body J. H. Olive was selected and sworn as foreman. This was a judicial determination that the body should consist of fifteen persons. At a later day of the term, without making any order discharging or excusing any of the members constituting

that body, the court added two members to its number. This was done on the report of the body that one of their members was sick, and that another member, the foreman, had a sick family. Such order should not have been made without a prior order discharging the jurors as to whom the report had been made. Made as it was, it had the effect of increasing the grand jury to seventeen members, although we feel morally sure such was not the court's intention. This was an error committed by the court itself in an order made, and not an error committed by a ministerial officer. It is fatal to the indictment, and will compel its quashal in the court below. *Finley v. State*, 61 Ala. 201; *Cross v. State*, 63 Ala. 40; *Scott v. State*, Id. 59; *Weston v. State*, Id. 155; *Peck v. State*, Id. 201; *Murphy v. State*, 86 Ala. 45, 5 South. Rep. 432.

Reversed and remanded. The prisoner will remain in custody until discharged by due course of law.

(38 Ala. 550)

ISELL et al. v. LEWIS et al.

(Supreme Court of Alabama. June 7, 1893.)

NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR—RESIDENCE OF INDORSER—CUSTOM—PLEADING AND PROOF.

1. In a city of less than 10,000 inhabitants, not having free mail delivery, and which is not within Code, § 1777, permitting notice of dishonor to be given by mail, although the indorser and holder live in the same town, personal notice must be given.

2. By the law merchant, personal notice of dishonor need not be given presently and directly to the indorser, but the notice may be left with any person in charge of his place of business, whether such person is his agent or not, or with any person found on and belonging to the place where he resides, apparently capable of transmitting the notice to the indorser.

3. Where an indorser of a note has a permanent residence, it is such for the purpose of serving him with notice of dishonor, notwithstanding the temporary absence of his family.

4. Failure to give notice of the dishonor of a note at the indorser's residence is not excused by the fact that an agent of the bank, in casually passing the indorser's house at 6 P. M., in May, found no lights in the windows, and saw no one in the house; such agent not stopping at the house, or making any inquiry as to whether the indorser was in.

5. Plaintiffs, doing a banking business, after abandoning a practice to give notice of the dishonor of notes by mail notwithstanding that the indorser and holder lived in the same town, could not rely on such custom, even though it continued to prevail among other banks.

6. An allegation by plaintiffs, doing a banking business, that a general custom prevailed among all the local banks to give notices of dishonor by mail, notwithstanding that the indorser and holder lived in the same town, is not supported by proof of a practice prevailing among other banks, in which plaintiffs did not participate.

7. The indorser of a note, who was not given notice of dishonor, stated that he allowed the note to go to protest so as to bind the maker; that he did not desire to shirk any liability, but that his attorney had advised him

that he was not liable; and he disclaimed liability. He offered to indorse a note for half of the amount if the holder would apply to the payment of the other half certain money previously paid by the maker, and also offered to pay half of the note, and be relieved from further liability. These offers were declined. *Held*, that the indorser had not waived the failure to give him notice of dishonor.

Appeal from circuit court, Talladega county; Le Roy F. Box, Judge.

Action by Isbell and another against D. L. Lewis and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Bishop & Whitson, for appellants. Cecil Browne and H. L. McElderry, for appellees.

**MCLELLAN, J.** This is an action by Isbell & Co. against D. L. Lewis and George T. McElderry, composing the partnership of D. L. Lewis & Co., on a promissory note executed by D. W. Rodgers & Co. to said Lewis & Co., and by the latter indorsed to plaintiffs, before maturity, for value. Isbell & Co. is a partnership engaged in the business of banking in the city of Talladega. At the time of the maturity and dishonor of the note that place was the domicile—permanent residence—of McElderry; but Lewis, who also resided there when the note was made and indorsed, had removed to Birmingham. The note was executed in Talladega, and payable at plaintiffs' bank. It was protested for nonpayment at maturity. The pleas and replications were, in short, by consent, as follows: "Defendants plead payment, failure to give notice, [of dishonor,] and all other special matters of defense." Plaintiffs joined issue as to payment, and for the rest replied: "(1) That there was a good and sufficient excuse for a failure to give personal notice of the dishonor of the note. (2) That it was the custom and usage of the bank and banking house of Isbell & Co., and of the banks of Talladega, to give notice of dishonor of notes and bills, and notice of protest, through the mails, where both maker and indorser resided in Talladega. (3) That defendants, with knowledge of the want of notice, acknowledged and recognized their liability on the note subsequent to the 12th day of May, 1891, [when the paper went to protest,] and also that defendants subsequently promised to pay the same." By agreement, both plaintiffs and defendants had leave "to introduce all special matters of defense and in replication as though pleaded in full." There were, however, no matters of defense or replication involved on the trial, beyond those indicated above. Of these we shall first consider the defense of want of notice, and the sufficiency of the excuse offered by plaintiffs for their failure in that regard, assuming for the moment that they did so fail.

Talladega, the evidence shows, has less than 10,000 inhabitants, and it does not appear that it has a free mail delivery. Hence the questions we are now to consider are to

be determined on the law merchant, and without reference to our statute. Code, § 1777. By that law, it is confessed, personal notice of dishonor must be given to an indorser when the holder and indorser live in the same town. Notice by mail will not suffice. Here personal notice was not given, and the notice which was mailed to McElderry did not reach him, if it can be said to have reached him at all, until three or four days after the last day for his notification. Two reasons are advanced for the pretermission of the requisite personal notice. The first is that upon diligent effort and inquiry he could not be found in the city, and it was impracticable to give him notice. It is manifest, when this excuse is considered with reference to the evidence, that it is rested on the theory that the requisite notice must be given to the party sought to be charged in person; that is, that the notification must pass directly and presently from the holder or his agent to the indorser or his agent. This is not the law. If the indorser have a place of business, the notice may be left there with any person found in charge of the place, whether such person be the agent of the indorser, or not, and if he has a residence in the town the notice may be left with any person found on the premises, and belonging there, in any capacity, and apparently capable of transmitting the notice, in the form in which it is given, to the person for whom it is intended. 1 Brick. Dig. p. 262, §§ 150-152, 154, 156; *Rives v. Parmley*, 18 Ala. 256; *Stanley v. Bank*, 23 Ala. 652; 3 Rand. Com. Paper, §§ 1248, 1273, 1296, and authorities there cited; 2 Daniel, Neg. Inst. § 1017, and authorities. And it has been held by this court that notice intended for an attorney who was absent from his place of business, and had no clerk, might be efficaciously served by leaving the original or a copy in his office. *Stanley v. Bank*, 23 Ala. 652. Therefore, if the office of the Talladega Mercantile Company was the place of business of George T. McElderry, the law required Boynton, the agent of the bank, to leave a notice of dishonor with J. B. Little, who was in charge of the place; and this though, in point of fact, Little was not the agent of McElderry at all. If, on the other hand, the office of the mercantile company was not McElderry's place of business, then it was Boynton's duty to leave the notice at McElderry's residence, if he had a residence in the city of Talladega. And if he had such residence on May 12, 1891, it is wholly immaterial to inquire whether he also had a place of business at the office of the mercantile company, or not, since, upon any conclusion as to that, the bank failed of its duty either in respect of service at that place, or in respect of service at the residence, it being entirely uncontroverted that no service was made anywhere. We are of the opinion that the evidence, without any conflict or adverse inference which the law regards as at all material, es-

establishes that McElderry did have a residence in Talladega at the time in question. This evidence was that McElderry's permanent residence was in the town; that its location was perfectly well known to Boynton, who lived in the same neighborhood, and passed the house daily, in going to and from his own place of business; and that McElderry himself then occupied the house and residence there. To this extent there was no controversy whatever either in testimony which was allowed to go to the jury, or in any that was offered by plaintiffs and excluded. There was a conflict upon a point beyond this, namely, whether, prior to May 12th, McElderry's family "had removed temporarily to the country." The bill of exceptions sets forth that there was evidence tending to show such removal of his family, and it also appears that the court declined to allow plaintiffs to prove that on the day named their agent, Boynton, had been informed "that said McElderry's family were out of town, and in the country." And, to the contrary, McElderry himself testified that he had a residence in Talladega at the time, known to Boynton, and that his family were at his said residence "during the month of May, 1891, and on the 12th of May, 1891, and that he resided there during such month, and that his family did not remove to the country until the early part of June, 1891." This presented an immaterial conflict. We may concede the truth in this connection to be in line with the tendencies of plaintiffs' testimony,—that defendant's family had removed temporarily to the country prior to May 12, 1891, (and this is the utmost that plaintiffs contend for),—without at all conceding that defendant's residence, for all the purposes of notice, was not still in the city of Talladega. Indeed, the fullest proof of such temporary removal of defendant's family, taken with the undisputed evidence that he himself still resided in the town, had a residence there, and lived in it, would afford no ground for an inference on the part of the jury that his residence was not in the city. It may well have been, as is not infrequently the case, that McElderry had sent his family away temporarily,—for the summer months, even,—and yet continued to keep up, and personally occupy, his house in town, as a residence; and if this were not true in this instance it was on the plaintiffs, especially in view of defendant's own testimony, to prove that it was not so. But our conclusion on this part of the case need not be rested on these considerations. The authorities sustain us in the further position that where one has a permanent residence, and temporarily removes from it, himself and his family, it is yet, after such removal, and pending such temporary absence and residence elsewhere, his residence, for all the purposes of service there of notices of dishonor required by the law merchant. 2 Amer. & Eng. Enc. Law, p. 415, and note; 3 Rand. Com. Paper, §§

1233—1235. And therefore, conceding that McElderry and his family had taken up their temporary residence without the limits of the city of Talladega, it was still the duty of the plaintiffs to leave a notice for him at his town residence, or to show other facts which justified them in omitting to do so. It might—probably would—be a good excuse that the house was closed, and there was no person on the premises to whom notice could be given, or with whom it could be left. But no such showing is made in this case. Indeed, no showing at all, in this connection, is even attempted. No agent of the bank made any inquiries at the house, or attempted to do so, or went to the house, or even near the house, for the purpose of giving notice to McElderry. All that appears in this connection is that Boynton, in casually passing by the house, and within about 150 feet of it, going to or returning from his own home, at 6 o'clock in the afternoon of May 12th, having at the time no purpose, so far as the evidence discloses, of making inquiry for McElderry, or of serving notice on him, or upon anybody at the residence for him, "looked at the house, and saw no lights appearing in the doors or windows of the house, and saw no one there, but did not stop, or leave any notice at such residence." It was scarcely to be expected that Boynton would have seen lights in the house at 6 o'clock in the afternoon of May 12th, even though McElderry and all his family and servants had been within. The fact that a casual and purposeless glance at the building did not disclose the presence of persons on the inside of it certainly was no evidence that there were not persons within. For all that this evidence shows or tends to show, it may well be that McElderry and his entire household were in the residence at that moment of time. Most manifestly this evidence utterly fails to show the diligence which the law required of Boynton in respect of leaving a notice at McElderry's residence, if indeed he had any desire or intention so to do, which is not made to appear. He should, at least, have made some effort to ascertain whether there was any person there with whom the notice could be left, with a view to its service on McElderry. The excuse is wholly insufficient, on the aspects of the evidence most favorable to the plaintiffs, for Boynton's failure to leave a notice at McElderry's residence; and so far as the absence of notice is sought to be justified on the ground that the exercise of that diligence which the law required to give notice to McElderry was abortive because of the impracticability of finding him, or any person with whom notice for him could be left, is concerned, the general affirmative charge might well have been given for the defendants.

The custom pleaded as justifying and authorizing notice of dishonor to be given by the bank to McElderry through the mail was not proved, nor would any testimony

offered and excluded by the court have legitimately tended to prove it. The evidence, all of which was given by plaintiffs' witnesses, in this connection, not only had no tendency to prove the custom relied on as existing at the time of the dishonor of the note in suit, but, to the contrary, was direct and positive to the point that while the custom pleaded had obtained in the business of this bank up to January 1, 1891, since that time, and covering the time when notice should have been given the defendants, an entirely different custom had prevailed in this respect, and that since the first of the year 1891 the usage of the bank had been to give the personal notice required by law, and which, confessedly, was not given in this case. Proof that the other banks in Talladega continued the practice which had formerly obtained in this bank, of giving such notices, where the parties resided in the city, only by mail would neither have availed the plaintiffs, abstractly speaking, since the custom did not prevail with them, nor have supported their replication, upon which issue, it is to be assumed, was joined, since the custom therein set up was a general one, alleged to obtain in all the banks of Talladega; and hence the plaintiffs could not possibly have been injured by the exclusion of testimony tending to prove the alleged usage in other banks.

As to the replication that defendants, with knowledge of plaintiffs' laches, acknowledged and recognized their liability on the note, and promised to pay the same, the evidence supposed to sustain this position is that of R. L. Ivey, a partner in, and the cashier of, Isbell & Co., as follows: A few days after the note sued on was protested, (some three or four days after,) said George T. McElderry and D. W. Rodgers (one of the firm of D. W. Rodgers & Co., the makers of the note) called to see him at the bank, (Isbell & Co.'s.) That, when they came in, McElderry said to him, (Ivey,) "I have brought Mr. Rodgers in, to see if he cannot make an arrangement to pay that note," (the note sued on.) That McElderry stated that if he (Ivey) would allow certain money which had been paid into the bank by or for D. W. Rodgers & Co., to the extent of one-half the note, to be placed as a credit on the note, he (McElderry) would individually indorse D. W. Rodgers & Co.'s note, at 30 or 60 days, for the balance. Said D. W. Rodgers offered to give such note at 30 or 60 days in renewal of one-half the note sued on. This proposition the witness declined. That said McElderry then stated that he allowed the note to go to protest so as to bind D. L. Lewis; that it was not his desire to avoid liability on it himself; but that, if D. L. Lewis got a chance, he would "get out," and leave all the liability on him. Said McElderry also proposed to witness to pay one-half the amount of such note if plaintiffs would release him, indi-

vidually, from further liability on the note. This the witness, acting for plaintiffs, refused to do. This evidence of Ivey, taken in connection with the uncontroverted testimony of McElderry himself, to the effect that on the occasion referred to by Ivey, and again, about that time, in a conversation with Isbell, another member of the firm of Isbell & Co., he stated that he (witness) did not desire to shirk or avoid any liability, either legal or moral, but his (McElderry's) attorney had advised him that neither he nor D. L. Lewis was liable on the note, and he disclaimed liability on it, fully presented the case made under the replication we are considering. Taking all of it which is supposed to be favorable to the plaintiffs, whether controverted or not, as true, and all of it which is favorable to the defendants as true, because not controverted, it falls to show, or to afford any ground for a jury to conclude inferentially, that McElderry either promised to pay the note, or any part of it, or acknowledged and recognized his liability, in whole or to any less extent, upon it. It is elementary law that to amount to a waiver of the defense of want of notice in such case, and to entitle the holder to recover notwithstanding the requisite notice has not been given, the promise to pay must be unequivocal and unconditional, or, if conditional, it must be accepted on the conditions and in the terms which it involves. And so with an admission or acknowledgment of continued liability. It must appear that the admission or acknowledgment was without equivocation, and unlogged by reservations. As was said by Judge Story: "The promise must be unequivocal, and amount to an admission of the right of the holder, or the act done must be of a nature clearly importing a like admission of the right. If it be defective in either respect, or if it be a conditional offer of payment, unaccepted, then and in such a case the holder has no right to insist upon it as a waiver. So, if the promise be qualified, it must be received with its qualification, and cannot be insisted upon as an absolute waiver." Story, Bills, § 321. To the same effect is the text of Daniel on Negotiable Instruments: "If the promise is conditional, the acceptance of it must be proved in order to make it binding. And where it appeared that the indorser offered to give his own note, which was not accepted, it was held no waiver. [Sice v. Cunningham, 1 Cow. 397; Agan v. McManus, 11 Johns. 180.] So an offer to pay part cash, and give his note for the balance, [Barkalow v. Johnson, 16 N. J. Law, 397,] or to procure a renewal, [Laporte v. Landry, 5 Mart. (N. S.) 359,] or to pay in depreciated bank bills, [Newberry v. Trowbridge, 13 Mich. 263,] or in Confederate currency, [Tardy v. Boyd, 26 Grat. 637,] Daniel, Neg. Inst. § 1163. See, also, 3 Rand. Com. Paper, §§ 1374 et seq.; Kennon v. Mc

Rae, 7 Port. (Ala.) 175. Here the defendant McElderry, for himself and his codefendant, expressly disclaimed any liability on the note. While he said he had no desire to avoid liability, either legal or moral, he at the same time gave the plaintiffs to understand that he had been advised by his attorney that he was under no legal liability whatever, and asserted that he was not. It is manifest, and must have been so to plaintiffs, that McElderry did not want or intend to pay the note unless he was legally or morally bound to do so. He was not legally bound, and he knew it, and relied pro tanto, so to speak, upon his absolution from all liability that could be enforced in the courts. It is equally manifest that he considered he was under a moral obligation to pay one-half of the note; that Lewis should pay the other half upon like obligation; and that everything he said, and every proposition he made, had reference to this moral liability. He nowhere admitted that, in point of legal fact, he owed the debt, or any part of it, but always asserted to the contrary. Moved by his considerations of morality, he did offer to give or indorse a note for one-half of the note; and we may concede, for the purposes of this discussion, he also offered to pay one-half of it. But both propositions were expressly conditional. The first, upon the bank's entering a credit on the note to the sum of the other half; and the other, upon the bank's releasing him from all further liability on the paper; having in view, it is fair to assume, the avoidance of a necessity to make the defense he was advised and asserted he had, in the courts. And both these propositions were expressly declined. Guided by authority and reason, we cannot hesitate to declare that the waiver of notice by promise to pay, or admission of liability, set up in the replication, finds no lodgment in the evidence, or any inference which the jury could properly draw from the evidence. Our conclusion, therefore, is that the court was authorized to instruct the jury, upon the hypothesis of their belief of the evidence, (1) that the notice of dishonor required by the law was not given to the defendants; (2) that no custom of the bank, justifying its pretermission, was shown; and (3) that defendants had not waived the failure to give notice by any subsequent promise to pay, or acknowledgment of their liability on the note; or, in short, that the defendants were entitled, on this question of notice alone, to the general affirmative charge, with hypothesis. The status of the case on the evidence justifying this charge would not be altered by the admission of all plaintiffs' testimony which was excluded on defendants' motion, or the exclusion of all of defendants' evidence which was admitted over the objection of plaintiffs; and it is therefore immaterial to inquire whether there was error in any of these rulings of the court, or in its

action on special instructions requested. Whether erroneous or not, these rulings could not have prejudiced the plaintiffs.

The judgment is affirmed.

(32 Fla. 295)

# ROAN v. HOLMES et al.

(Supreme Court of Florida. June 15, 1893.)

**DOWER — DAMAGES FOR DETENTION OF — WHEN SUIT FOR DOES NOT SURVIVE TO ADMINISTRATOR OF WIDOW.**

1. Where the wife joins with her husband in the execution of a mortgage upon land in which she had an inchoate right of dower, and in such mortgage releases her dower therein, such release is not absolute, but is conditional only; and, under section 8, p. 765, McClell. Dig. (section 1982, Rev. St.) she cannot be divested of her right by means of such conditional release thereof in such mortgage except in the same way that the absolute fee of the husband could be divested by means of such mortgage, viz. by sale under decree of foreclosure thereof.

2. Where land is sold during the lifetime of the husband at forced sale to satisfy a judgment against him, the purchaser at such sale acquires the same status, so far as the wife's right to dower in such land is concerned, as though he were the alienee of the husband by his own voluntary act and deed.

3. Mesne profits by way of damages for the detention of the widow's dower, if recoverable at all as against the alienee of the husband can only be recovered from the time of her demand for her dower interest, and refusal thereof by the alienee.

4. Where land has been aliened in the lifetime of the husband, and the widow dies pending her suit for the admeasurement of dower therein, but before any adjudication of her contested right thereto, her administrator cannot proceed with the suit, as against the alienee of the husband, for the sole purpose of recovering mesne profits as damages for the detention of such dower. Damages in such cases is an incident to the principal right, and falls, on the death of the widow, at the termination of the principal demand.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Bill by H. L. Roan, administrator of the estate of Mary Jernigan, deceased, against George M. Holmes and others, for the recovery of dower in lands. Defendants had decree, and complainant appeals. Affirmed.

William H. Jewell, for appellant. C. F. Akers, for appellees.

TAYLOR, J. On the 18th of July, 1888, Mary Jernigan filed her bill in equity in the circuit court of Orange county against George M. Holmes, John C. Slocum, Alexander R. Hargraves, and M. F. Hargraves, in which she alleged that she was the widow of Isaac Jernigan, deceased, who formerly resided in Orange county, Fla., and who died there on the 22d of October, A. D. 1886, intestate, leaving no real or personal estate; that during her said coverture her said husband, the said Isaac, was seised in fee of that parcel of land in Orange county, Fla., described as being the S. E. ¼ of section 10, township 23 S., range 29 E., con-

taining 160 acres; that she has never during her coverture or since conveyed, aliened, or released her dower interest in said land, but that the said defendants, she is informed, are in possession thereof, claiming title thereto, and that they refuse to let her in possession with them, or to pay her her part of the rents and profits of said land accruing to her since her husband's death, according to her said dower interest. The bill prays that one-third in value of said land be assigned to her as dower, and for one-third of the mesne profits of said land from and since the decease of her said husband, and for general relief.

The defendants answered the bill on the 1st of October, 1888, and admit that Isaac Jernigan died intestate at the date alleged in the bill, and that he did not have any property, real or personal, at his death. The answer neither admits nor denies the marriage and coverture of the complainant with the said Isaac, but demands strict proof thereof.

Isaac Jernigan's former seisin and possession of the land in controversy are admitted. The answer alleges, as a bar to the recovery of dower in the premises, that the said Isaac Jernigan, on the 9th of April, A. D. 1856, executed and delivered to one Arthur Ginn a mortgage thereon to secure a note for \$182, in the execution of which mortgage the said Mary Jernigan joined with her husband, conveying her right of dower and all title she had in said land, as appears from the records of said county; that subsequently to the execution and delivery of this mortgage, to wit, on the 1st of March, 1858, the said land was levied upon and sold by the sheriff of said county under a judgment and execution in the circuit court of said county in favor of Madison Post and against Isaac Jernigan, and that at this sheriff's sale the mortgagee, Arthur Ginn, became the purchaser, and took a sheriff's deed thereto at such sale; that in said mortgage the complainant released and conveyed her dower, and that neither the said Isaac Jernigan, nor the complainant, nor any one else for them, have ever paid said mortgage, or redeemed or offered to redeem the said land from said mortgage; that the said Arthur Ginn, after purchasing said land at said sheriff's sale, at once went into possession thereof, and afterwards sold and conveyed the same to the defendant George M. Holmes, who has since sold and conveyed 40 acres thereof to the defendant Slocum, and 40 acres to one Roberson, who also conveyed it to Slocum, and 40 acres to Hargraves.

The answer alleges that the land at the time of its purchase by Arthur Ginn at the sheriff's sale was wild and unimproved, and of but little value, and without income or rental value; that since defendants have purchased same they have enhanced its value greatly by building thereon and plant-

ing thereon orange groves. The answer expressly denies that said lands have ever yielded any profits, but, on the contrary, avers that more money has been expended every year on said lands than they have received therefrom. The answer also alleges that since the filing of her bill the said complainant has died, and that, whatever right of dower or of mesne profits she might have been entitled to if living, all such rights have ceased and determined by her death.

After the filing of the defendants' answer, to wit, on the 5th of November, 1888, Henry L. Roan, as administrator of the estate of the said Mary Jernigan, filed his amended bill in said cause, alleging therein that the said Mary Jernigan had died on the 27th of September, 1888, and prayed that said suit instituted by her before her death might proceed for the recovery of the mesne profits from said lands from the death of Mary's husband, Isaac Jernigan, on October 22, 1888, to the time of the death of the said Mary, on September 27, 1888, for the benefit of her estate. To this amended bill the defendants interposed a plea in bar, alleging that with the death of the said Mary all claim to mesne profits ceased and determined. At the hearing upon the bill, answer, amended bill, and plea thereto the parties admitted the seisin and possession of Isaac Jernigan during coverture with the said Mary, his wife, the sale of the land by the sheriff and the sheriff's conveyance to Arthur Ginn, and the possession of the lands by the defendants since Isaac Jernigan's death, and the death of the complainant Mary since the institution of the suit; and it was further agreed that the cause should be submitted upon the issue whether or not the claimant is barred of her dower interest by the mortgage of Isaac Jernigan to Arthur Ginn, attached as an exhibit to the defendants' answer, or by the sale of said land under execution against the said Isaac, or by the death of the dowress since bringing her suit, or by all of said facts combined. At said final hearing upon the issues thus presented it was adjudged that the defendants' plea to the amended bill be sustained, and that the bill be dismissed. From this decree H. L. Roan, as administrator, appeals.

The answer attempts to set up as a complete bar to the widow's dower the mortgage executed by her conjointly with her husband in 1856. There is no allegation in the answer that this mortgage was ever foreclosed, or that there was ever any sale of the mortgaged premises, or of the wife's dower right thereunder; the only averment being that it was never paid, and that no redemption or offer of redemption therefrom had ever been made. The contention of the defendants is that, the mortgagors' equity of redemption being purchased at the sheriff's sale under the judgment and execution by the mortgagee, the equitable title was conveyed by the mortgage, and the legal title thereby



became merged in the mortgagee, and was tantamount to a foreclosure of the mortgage. There may be some foundation for this contention, in so far as the title of the husband, Isaac Jernigan, was concerned, but this cannot affect the widow or her right to dower. She was no party to the judgment at law against her husband under which his equity of redemption was sold; and the sheriff, in selling under such judgment, could not, and did not pretend to, dispose of her inchoate right to dower; and, so far as the pleadings show, there has been no foreclosure or sale of her dower right, nor any adjudged forfeiture of it in any form. Our statute (section 3, p. 765, McClell. Dig.; section 1982, Rev. St.) provides "that a mortgage is and shall be held in our courts a specific lien on property therein for a specific object, and in point of fact as well as law the mortgagee is incapable of acquiring possession until after a decree of foreclosure, and then only by bidding and outbidding all competitors in market." Mary Jernigan's right of dower was not absolutely released or conveyed in consequence of her joining in the mortgage, but was conditionally released only, and when her right ripened from an inchoate to an absolute one on the death of her husband she then became clothed with the right to the possession and enjoyment of the corpus of her interest, and could not be divested of it by the mortgagee or any one else by virtue of any mortgage that she had executed upon such interest, except by a sale thereof under decree of foreclosure. The right of the wife to dower is a legal right, and the title thereto, when complete on the husband's death, is a legal title; and when the right in its inchoate state during the life of the husband is mortgaged by the wife it can, under this statute, be divested, by means of such mortgage, only in the same way that the absolute fee of the husband could be divested thereby, viz. by sale under decree of foreclosure thereof.

In *Berlack v. Halle*, 22 Fla. 236, this court, passing upon this statute, have said that a mortgage is a specific lien on the land it covers, and a failure to comply with its conditions does not divest the mortgagor of the legal title, nor vest it in the mortgagee. *McMahon v. Russell*, 17 Fla. 698. Mary Jernigan occupied the position here of mortgagor of her dower interest. A failure on her part, or on her husband's part, to comply with the conditions of the mortgage, did not divest her of such interest, nor vest it in the mortgagee; and the sale of her husband's equity of redemption in the fee under the judgment and execution against him did not carry with it her equity of redemption of her dower estate therein. The mortgage urged as a bar to her recovery of dower was made in 1856. Her husband did not die until 1896. Her bill for dower was filed in 1888, 32 years after the execution of the mortgage. During that time no steps appear to have been taken to

foreclose or enforce such mortgage as against either her husband or herself. Under these circumstances, when such mortgage is set up as a bar to her bill in equity to have her dower assigned, the presumption, from the lapse of time, would run in her favor that such mortgage had been satisfied, instead of in favor of the theory that her dower estate, therein conditionally released, had merged in the mortgagee on his purchase of the husband's equity under another judgment against the husband alone, to which she was no party. Under these circumstances, we think that she was entitled to dower in the lands, notwithstanding the conditional relinquishment thereof in the mortgage. Had the mortgage been alive, unaffected by the statute of limitations, at the time of her application for admeasurement of dower, then, where the mortgage debt, as here, was not for purchase money of the premises, she would have taken dower subject to its equitable proportion of the lien of such mortgage, or else she could have been held to a proportionate redemption by payment of one-third part of the mortgage debt before having her dower assigned. *McMahon v. Russell*, supra.

The demandant here died before any assignment of her dower, and before any adjudication of her right thereto, and within a few months after the institution of her suit to have her right determined and the dower assigned. Her original bill prayed, not only for an admeasurement of dower in the land, but for mesne profits from the death of her husband, which occurred two years before the filing of her bill. After her death, her administrator, by amended bill, admits the termination of the right to dower in the land, but insists upon proceeding with the suit for the recovery of the mesne profits accruing between the death of the husband and that of the widow. It was admitted at the hearing that the land was aliened during the lifetime of the husband, not voluntarily by the husband, but by the sheriff's sale under judgment and execution against him, which gave to the purchaser at such sale, so far as the wife's dower was concerned, the same status as though he had been the alienee of the husband by his own voluntary act and deed. *McClanahan v. Porter*, 10 Mo. 746. There is no allegation in the bill or amended bill that there was any demand made upon the defendants by the widow for her dower interest at any time prior to the institution of her suit. Under these circumstances, the land out of which dower is sought having been aliened during the lifetime of the husband, and no demand having been made by the widow upon his alienees until the filing of her bill for the assignment of dower, nearly two years after the death of the husband, was she entitled to mesne profits by way of damages for the detention of her dower from the death of her husband? While there is conflict in the authorities, the preponderance of them seem to agree that, where the lands

have been aliened in the lifetime of the husband, the widow can in equity recover mesne profits by way of damages for the detention of her dower as against the alienee, but can recover such damages only from the time of her demand for dower and refusal thereof by the alienee. *McClanahan v. Porter*, supra; *Chiswell v. Morris*, 14 N. J. Eq. 101; *Tod v. Baylor*, 4 Leigh, 517; *Sellman v. Bowen*, 8 Gill & J. 50; *Steiger's Adm'r v. Hillen*, 5 Gill & J. 121; *Francis v. Garrard*, 18 Ala. 794; 2 Scrib. Dower, p. 709, § 20, c. 25. As there was no demand made in this case prior to the filing of the bill, damages or mesne profits, if recoverable at all, could not have been recovered by the widow, had she lived, as against the husband's alienees, except from the time of the filing of her bill. Her administrator certainly cannot be allowed to recover more. The widow having died in this case within two or three months after the filing of her bill for dower, and before any adjudication of her right that was earnestly contested, the question arises, can her administrator proceed with the suit, begun against the husband's alienees by her, for the sole purpose of recovering mesne profits or damages that may have accrued between the time of the filing of her bill and her death? There seems to be conflict, too, in the authorities here, but we are satisfied that the weight of the decided cases in point preponderates in favor of a negative answer to the question. *Johnson v. Thomas*, 2 Paige, 377; *Turney v. Smith*, 14 Ill. 242; *Miller v. Woodman*, 14 Ohio, 518; *Conklin v. Bush*, 8 Pa. St. 514; *Kiddall v. Trimble*, 1 Md. Ch. 143. The land here having been aliened in the lifetime of the husband, and the widow having died pending her suit for the admeasurement of dower, but before any adjudication of her contested right thereto, as against her husband's alienees, her administrator cannot proceed with the suit for the sole purpose of recovering mesne profits as damages. The damages in such cases is an incident to the principal right, and falls, on the death of the widow, at the termination of the principal demand.

The decree appealed from is affirmed.

(45 La. Ann. 975)

**STATE v. JACKSON. (No. 1,273.)**

(Supreme Court of Louisiana. June 14, 1893.)

**INFORMATION—FILING IN VACATION.**

Act No. 35 of 1880 authorizes the district attorney to file informations in the office of the clerk of the district court, when not in session, in all cases where the penalty is not imprisonment at hard labor or death. His duty in filing such information is not limited to those held in custody by the sheriff.

(Syllabus by the Court.)

Appeal from district court, parish of Union.

W. A. Jackson was convicted of selling intoxicating liquors unlawfully, and appeals. Affirmed.

Kidd & Vanhook, for appellant. J. D. Everett, Dist. Atty., for the State.

**McENERY, J.** The defendant was convicted for retailing spirituous liquors without a license, and fined in an amount over \$300. He was tried on an information filed by the district attorney under Act No. 35 of 1880. He filed a motion for a new trial on the ground that the verdict of the jury was contrary to the law and the evidence, and that the district attorney, in his closing address to the jury, referred to matters outside of the record, which were calculated to mislead them. The motion was overruled, and he then filed a motion in arrest of judgment "for the reason that the bill of information on which defendant was tried and convicted by the jury was filed at a time when no court was in session, and out of term time; and avers that such proceedings, in a case of this character, are illegal, null, and void." This motion also was overruled.

1. There is no evidence in the record to sustain the ground alleged, that the verdict was contrary to the law and the evidence. The second ground for the motion—the indiscreet utterances of counsel in argument—is disposed of for the reasons assigned in the case of *State v. Anderson*, 45 La. Ann. —, 12 South. Rep. 737, (recently decided.)

2. Act No. 35 of 1880, under the provisions of which the defendant was tried, is not logically arranged by sections. The several sections are, however, closely related, and germane to each other, and the act as a whole is consistent. The title of the act is, "To provide for the trial of offenses where the penalty is not necessarily imprisonment at hard labor or death," and the several sections of the act are responsive to this title. Logically arranged, the act authorizes the holding of the district courts at terms other than regular jury terms, and empowers the judge to order a special jury for the trial of all criminal cases where the penalty is not necessarily imprisonment at hard labor or death. That in all trials of such cases, under the act, they shall be before a jury of five, giving the defendant the right to elect to be tried by the court, and to challenge five jurors peremptorily, and any number for cause. In the trial of cases provided for, the district attorney is authorized to file informations in the office of the clerk of the district court, which said filing shall be as valid as if made in open court. The act provides that the sheriff, shall, immediately after the arrest and commitment of any person charged with an offense triable under the act, notify the district attorney. The title of the act indicates its object, which is to provide for the trial of all offenses where the penalty is not necessarily imprisonment at hard labor or death. The

several sections of the act, as we have stated, are responsive to the title. The section of the act which makes it the duty of the sheriff to notify the district attorney of all persons charged with such offenses who are under arrest does not limit his authority to file informations only against those whom the sheriff holds in custody. The intention of the section was that the district attorney should do so in order that he might proceed at once to file the information required by the act, and the sheriff's duty imposed by the act was merely to aid and assist the prosecuting officer in the discharge of his duty. The information was filed by the district attorney on his oath of office. While it is usually filed upon knowledge given by some other person than the district attorney, in this state he can file it on information originating with himself. The act authorizes him to file informations for offenses described in the act with the clerk of court, to have the same validity as if filed in open court. It is clearly the meaning and intent of the act that the information could be filed with the clerk when the court was not in session, as the act authorizes the judge to order a special jury to be drawn to try such offenses at other than regular jury terms. The information is clothed with all the regularity as though filed in open court. Its validity as to form and substance is not questioned. The proceeding instituted by the district attorney was authorized by the act, and he has literally followed its requirements.

Judgment affirmed.

(45 La. Ann. 973)

STATE v. JACKSON. (No. 1,274.)

(Supreme Court of Louisiana. June 14, 1893.)

Appeal from district court, parish of Union. W. A. Jackson was convicted of selling intoxicating liquors unlawfully, and appeals. Affirmed.

Kidd & Vanhook, for appellant. I. D. Everett, Dist. Atty., for the State.

McENERY, J. The defendant was tried on an information filed in the office of the clerk of the district court, and, in accordance with provisions of Act No. 35 of 1890, convicted and sentenced to pay a fine of over \$300. He appealed. He filed a motion for a new trial and in arrest of judgment. The motion for a new trial is based on alleged errors of the trial judge in sustaining peremptory challenges by the state to certain jurors, and to the charge of the court "that all parties aiding and abetting in any manner, for any purpose, or for no purpose, any person retailing spirituous liquors without a license, was equally guilty as the actual owner of the liquors, and that said charge was misleading," etc. There was no exception taken at the time, and bills reserved to the ruling of the trial judge. We cannot, therefore, notice these alleged errors, referred to and embraced in a motion for a new trial for the first time. We may add, however, that there is no force in the motion, and that it is entirely without merit. The matter urged in the motion for arrest of judgment is identical

with the issues presented in a like motion in the case of State v. Jackson, 13 South. Rep. 342, (No. 1,273, just decided.) For the reasons in that case and those herein assigned the judgment appealed from is affirmed.

(101 Ala. 15)

FLORENCE GAS, ELECTRIC LIGHT & POWER CO. v. HANBY.

(Supreme Court of Alabama. May 24, 1893.)

RECEIVER — APPOINTMENT AND POWERS — CONSTRUCTION CONTRACT — ACCEPTANCE OF WORK — WAIVER OF DEFECTS — SPECIFIC PERFORMANCE — MECHANICS' LIENS.

1. The fact that a bill prays for alternative relief does not render it multifarious.

2. A petition under Code, § 1683, by a majority of the stockholders of a corporation, for the dissolution thereof, may be incorporated with a bill alleging facts which show a necessity for the intervention of the court, pending the dissolution proceeding, by the appointment of a receiver.

3. The validity of the appointment of a receiver cannot be attacked, in a suit instituted by him, on account of defects in the bill under which he was appointed.

4. The court may empower the receiver of a corporation, appointed pending proceedings for its dissolution, to execute and perform existing contracts of the corporation, or to enter into and carry out new contracts in its behalf.

5. In an action by a receiver appointed under Code, § 1686, on the dissolution of a corporation, it appeared that the dissolved company had contracted to erect an electric plant for defendant, and had nearly completed the work when it was dissolved, and that no part of the agreed price had been paid. Held, that complainant, as receiver, had power to complete the work under the contract, and his offer to complete the work, and defendant's refusal, had the same effect as if the company had not been dissolved, and had itself made the offer.

6. A stipulation for the completion of work "as soon as possible" requires its completion within a reasonable time, or within such time as is reasonably necessary under the circumstances.

7. By accepting an electric light plant constructed for it, before it is entirely completed, and by making use thereof, the company for which it is constructed waives its right to rescind for failure to entirely complete the plant.

8. The F. Co. agreed to construct an electric light plant for defendant, and to pay off an existing mortgage to third persons on an old plant of defendant. The latter agreed to issue first mortgage bonds to the F. Co. to secure the debt arising from the performance of the services, with certain powers to take the bonds as absolute payment after a certain time. Held, that an action by the receiver of the F. Co. for specific performance of defendant's contract would not lie, in the absence of any averment that the F. Co. had offered to pay off the mortgage to third persons, or that it was able or willing to do so.

9. Such failure to pay off the old mortgage did not deprive the F. Co. of the right to recover, as on an implied contract, for such of the new plant as had been completed, when defendant accepted and used the latter for the purpose for which it was built.

10. The F. Co. was entitled to a lien for so much of the work performed as was within the terms of the statute.

11. Act Feb. 12, 1891, providing for mechanics' and material men's liens, and repealing certain provisions of Code 1886, does not apply when the labor and materials were furnished, a lien therefor perfected, and a bill to enforce the lien filed, all prior to the passage of the act.

Appeal from chancery court, Lauderdale county; Thomas Cobbs, Chancellor.

Bill by S. M. Hanby, as receiver of the Southern District Telegraph & Electric Company, against the Florence Gas, Electric Light & Power Company, for the enforcement of a mechanic's and material man's lien, and for the specific performance of a contract. From a decree overruling its demurrers, defendant appeals. Affirmed.

The respondent demurred to the bill of complaint, and assigned the following grounds: (1) That the bill shows that S. M. Hanby was appointed receiver of the Southern District Telegraph & Electric Company upon the filing of a bill by the stockholders of said corporation for its dissolution under section 1683 et seq. of the Code of Alabama, and that upon his appointment the said receiver was authorized and empowered to collect, by suit or otherwise, all of the debts of said corporation, and to complete all its outstanding contracts, which said corporation had made for the erection and construction of electric plants; and the bill shows that said appointment was unauthorized, illegal, null, and void, and that no subsequent action of the court could render the appointment of said Hanby valid, or vest in him the power and authority claimed. (2) That as the appointment of said Hanby as receiver was made immediately upon the filing of the bill praying for dissolution, and before a decree of dissolution of the corporation was rendered, the said appointment was illegal, unauthorized by the statute under which the petition to dissolve the corporation was filed, and that, therefore, said Hanby was not legally receiver of said corporation, and was not authorized to institute said proceedings. (3) That said bill shows that on the filing of the bill of dissolution of the corporation the said Hanby was appointed the receiver of said corporation, with power to collect all the debts, and to complete all outstanding contracts, of said company, that it may have made for the erection and construction of electric plants, etc., and upon the decree rendered, dissolving the corporation, that said Hanby's receivership, and his powers thereunder contained, were continued; that this was not authorized, under the statute by virtue of which the original bill for dissolution was filed; and that, therefore, his appointment was null and void, and the court could not by subsequent decree legalize its action. (4) That the contract between the Southern District Telegraph & Electric Company and the respondent was that the plant contracted to be erected should be completed as soon as possible, and the bill shows that said plant was not erected at the time said Hanby was appointed receiver, more than a year after said contract was made; and said bill failed to show that said plant could not have been completed sooner, or that the Southern District Telegraph & Electric Company was not guilty of unreasonable delay in

completing the said contract. (5) That under the said contract, above mentioned, the plant was to be completed as soon as possible, and the bill failed to show any reasonable cause why said plant was not erected or completed before the dissolution of the Southern District Telegraph & Electric Company, or the appointment of said Hanby as its receiver. (6) That said bill shows that the Southern District Telegraph & Electric Company did not erect and complete said electric plant as they contracted to do with the respondent as shown by the contract, and that, therefore, the defendant was released from all obligations arising under said contract, by the unexcusable delay and negligence of said corporation to comply with its contract. (7) That the bill shows that the Southern District Telegraph & Electric Company went into the hands of a receiver more than a year after it had entered into a contract with the defendant, and that at the date of the appointment of the receiver it had failed to comply with said contract; and the bill fails to show any satisfactory legal reason or excuse for its failure to comply with said contract, or that it could not, by ordinary diligence, have completed said contract before the expiration of one year, and before the appointment of a receiver. (8) That the bill shows that Hanby was appointed receiver of the Southern District Telegraph Company upon a bill being filed under section 1683 et seq. of the Code of Alabama, and that under the provisions of said statute the receiver could not be vested with power to complete the unexecuted contracts of the corporation, and that the decree of the court, vesting in him such power, was null and void, and therefore the receiver had no authority to complete said contract made by the defendant. (9) The said bill shows that at the time of the dissolution of the Southern District Telegraph & Electric Company it was involved, and that it went into the hands of a receiver on account of its inability to collect its debts, and the stringency of the money market, and that it had no means to complete its contract with the defendant. (10) The said bill does not show that the said Southern District Telegraph & Electric Company has ever offered or proposed, by its officers or agents, or any one authorized to represent it, to complete its contract with the defendant, and that S. M. Hanby had no power, by virtue of his appointment as receiver, to complete said contract. (11) The bill shows that the said Southern District Telegraph & Electric Company, in its contract with the defendant, contracted to pay at once the money due by the defendant to the Westinghouse Electric Company for the purchase of its plant, and the debts then owed by the defendant, and that the said company had failed; and the bill fails to show or allege that the said Southern District Telegraph & Electric Company, or its receiver, has paid said moneys as it con-

tracted to do, and therefore the receiver is not in a position to ask for specific enforcement of the contract with the defendant. (12) That under the contract with the defendant the Southern District Telegraph & Electric Company were to pay the amount due the Westinghouse Electric Company and the debts due by the defendant, which the bill shows were due at the time of the execution of said contract, but the bill fails to allege said payments were made by said Southern District Telegraph & Electric Company, or its receiver. (13) The bill shows that the purpose of the Southern District Telegraph & Electric Company, agreeing to pay said moneys due by the defendant, was to enable the defendant to pay and satisfy a mortgage due by it on its plant, held by the Westinghouse Electric Company, and the debts pressing at the time, so that it could execute a deed of trust on all of its property to secure bonds which were to be issued and delivered to said Southern District Telegraph & Electric Company, as required in the contract, and that the lifting of the mortgage held by the Westinghouse Electric Company on the plant of the defendant was a condition precedent to the issuance of said bonds, and to the delivery of them to the Southern District Telegraph & Electric Company, and the bill fails to show that this condition precedent has been complied with. (14) The bill presents inconsistent alternative claims for relief, in that it prays for the enforcement of a lien in favor of the plaintiff, and also for the specific performance of a contract set forth in an exhibit to the bill. (15) That neither said bill nor the exhibits thereto allege or show when the sum claimed to be due by the defendant to the Southern District Telegraph & Electric Company became due and payable. (16) The bill fails to show that the plaintiff filed its claim or lien in the probate office of Lauderdale county, claiming a lien on the property of the defendant, within six months after the indebtedness accrued. (17) The bill shows that both the Southern District Telegraph & Electric Company and S. M. Hanby, as receiver of said company, filed in the office of the probate court of Lauderdale county, Ala., statements in writing claiming liens on the property of the defendant. (18) That neither said bill nor the exhibits thereto show when the indebtedness claimed against the defendant accrued. (19) That said bill and the exhibits thereto show that complainant has no lien, either as a mechanic or a material man, as provided by law. (20) That the bill and exhibits show that the account claimed to be due to complainant was due more than six months before the filing in the office of the probate court of Lauderdale county the claims and accounts preparatory to the enforcement of the lien. (21) That the complainant has a plain, adequate, and complete remedy at law. On the submission of this cause on the demurrers to the bill the chan-

cellor sustained the sixteenth and seventeenth grounds, and overruled all the other grounds of demurrer.

Emmet O'Neal, for appellant. Mountjoy & Tomlinson, for appellee.

McCLELLAN, J. The appellee, Hanby, as receiver, etc., is the complainant in the present bill, to which the appellant, the Florence Gas, Electric Light & Power Company, is respondent. The corporation of which complainant is now receiver entered into a contract on July 6, 1889, with the respondent corporation, to construct and erect, complete, for the latter, an electric light plant, at Florence, and equip the same, with specified machinery, appliances, etc., for lighting the town of Florence with electricity. The contract contains a stipulation for the erection of the plant "as soon as possible." The construction company also undertook, in said contract, to pay an outstanding indebtedness of the Florence Company to the Westinghouse Electric Company, amounting to \$2,200, which was secured by a mortgage on an existing plant of the former, "thereby lifting" said mortgage, which existing plant, it is fairly inferable, was to be incorporated with, and made use of in the construction of, the new plant, and also to pay the current indebtedness of said company, amounting to \$2,000. For all this the construction company was to receive \$26,000, payable, at certain specified rates of discount on face value, in bonds of the Florence Company, which were to be "secured by a mortgage or deed of trust on the entire plant and lot, [on which a power house was to be erected,] of sufficient face value to net the above amount, (\$26,000;) said plant and lot to be free of all incumbrances." It was further stipulated that the bonds should not be issued to the construction company in excess of the work done or machinery furnished by it, the implication being that partial issues and deliveries of bonds were to be made during the progress of construction. The contract contains also the following provisions: "Said bonds to be delivered to us, to be used by us as collateral security for six months, unless sooner sold; but either you [the Florence Company] or ourselves shall have the privilege of selling said bonds at par. If said bonds shall not be sold before the expiration of six months, then we shall have the option of extending the time for the sale of said bonds until they can be sold, or of taking them in payment of the debt of \$26,000. If taken in payment of the debt, you are to issue to us enough bonds bearing 7 per cent. interest to net us, at 90 cents on the dollar, \$26,000, or you will furnish us enough bonds bearing 6 per cent. interest to net us \$26,000, at 85 cents on the dollar." It thus appears that, contrary to the first provision of the contract in this connection

noted above, the contract did not contemplate, absolutely, that bonds should be taken in payment of the \$26,000, but that in the first instance the construction company should take the bonds as collateral, with power to sell and apply the proceeds to the debt within six months, and that after the lapse of that time the construction company was to have the option either to extend the time of sale indefinitely,—until the bonds could be sold,—or to take them in payment of the debt. The bill avers that on August 5, 1890, a majority of the stockholders of said Southern District Telegraph & Electric Company, representing more than three-fourths of the capital stock thereof, filed a bill in the chancery court for a dissolution of said corporation according to law; and the present complainant, upon special grounds set out and shown in said bill, was appointed, upon the filing thereof, receiver of all the corporate property and assets of said company, and empowered and authorized to collect, by suit or otherwise, all the debts due to said company, and to complete all the outstanding contracts which said company had made for the erection of plants, etc., and that on the 20th January, 1891, upon a decree rendered in the cause, dissolving said corporation, the complainant's receivership, and his powers thereunder, were continued, and he was further appointed receiver upon the dissolution of said corporation as provided by law, with all the powers and authority given him as such receiver by law. The averments of the bill, as to what has been done and offered to be done by the construction corporation, and the complainant, as receiver thereof, in performance and discharge of the contract with the Florence Company, and as to the latter's attitude in respect of the matter of performance, are contained in the third paragraph thereof, which is as follows: "That said Southern District Telegraph & Electric Company immediately undertook and proceeded to perform said work and erect said plant; that it had substantially completed said work, and erected said plant, when the same was turned over to and accepted by respondents, who are now operating the same in lighting the city of Florence; that after substantially completing the work, as aforesaid, owing to the stringency of the money market, and its inability to collect its debts, said Southern District Telegraph & Electric Company went into the hands of a receiver; that your orator, the said receiver, at once notified said Florence Gas, Electric Light & Power Company that he would go on as he was authorized and employed by the chancery court, and complete said contract; that your orator sent necessary workmen to Florence to complete all of said work, and had material shipped there to complete the same, but defendants refused to allow said work to be proceeded with, claiming that they had a right to re-

scind said contract." The bill further avers the filing of verified statements of the claim and debt of the construction company against the Florence Company for work and labor done and materials furnished by the former under the contract, in the office of the judge of probate of Lauderdale county, with a view to fastening a mechanic's and material man's lien on certain described property of the latter company, and upon the improvements thereon, etc. Copies of these statements are exhibited to the bill, and assignments of demurrer numbered 16 and 17, which went to their sufficiency under the statute, were sustained. No appeal is taken by complainant, and this ruling of the chancellor is not presented for review, nor does this record present any question as to whether the statements can be amended in the particular of their adjudged insufficiency, and we are neither called upon nor authorized to decide whether they are so amendable or not. What we have quoted from the bill is all shown by it as to the performance of the contract on the part or in behalf of the construction company, or as to the time within which what was done at all by said company, in work and labor or in supplying materials, etc., was performed. It does not appear from the bill whether the debts which the Florence Company owed at the time of contract made, and which thereby the construction company undertook to pay, namely, \$2,200 to the Westinghouse Company and \$2,000 to other creditors, had been paid, or not, by the construction company, or otherwise. The leading prayer of the bill is for the enforcement of the debt claimed to be due the construction company, about \$24,000, as a mechanic's and material man's lien against the Florence Company, and on certain property of that company. There is also an alternative prayer for specific performance of the contract, through a decree compelling the defendant corporation to issue to complainant, as receiver, etc., the bonds stipulated for in the contract. All demurrers to the bill, except the two referred to above, were overruled, and from the decree in that behalf this appeal is prosecuted by the respondent company.

1. We may as well say here as elsewhere that there is no merit in the contention that the bill was rendered multifarious by the addition of the prayer for alternative relief. The averments of the bill are not duplex. All of them would have been proper, in respect, at least, to the rule against multifariousness, had there been only one, and either one, of the special prayers we have stated, and multifariousness cannot be predicated solely upon the variant prayers with which a bill may conclude. *Lyons v. McCurdy*, 90 Ala. 497, 8 South. Rep. 52.

2. The dissolution of the Southern District Telegraph & Electric Corporation, and the final appointment of complainant as receiver

thereof, must be referred to section 1683 et seq. of the Code. The section named provides for the filing in the chancery court of a petition by a majority of the stockholders, owning three-fourths of the stock, setting forth the names and residences of all the stockholders, etc., as nearly as practicable all the property of the corporation, and that it is the wish of the petitioners to dissolve the corporation. If no other relief than dissolution is sought, and only this statutory petition is filed, the court is without jurisdiction to grant, by interlocutory or final decree or order, any relief beyond or other than that prescribed by the statute; that is, it could only decree dissolution, and, upon the passing of that decree, appoint a receiver under and with the power prescribed in section 1686 of the Code. But it may be that there is necessity for other relief than this. It may be that pending the proceeding for dissolution it is necessary, on account of the misfeasance or malfeasance of the directors and officers of the corporation, for the power of the court to be exercised to the preservation of corporate property and rights by such interlocutory orders or process as will meet the necessity and conserve the end in view. In such case, should the stockholders be forced to file a bill for the temporary relief to which they are entitled, and at the same time institute in the same court a separate proceeding for the final relief of dissolution to which the interlocutory relief is merely an incident? We think not. To the contrary, we can conceive of no reason why the statutory petition may not be incorporated with a bill alleging the facts authorizing dissolution, and the facts which show a necessity for the intervention of the court pending the proceeding for dissolution, to the end that the property of the corporation may be saved *pendente lite* for administration by the receiver to be appointed on final decree under the statute. Good pleading—indeed, the rule against multiplicity of suits—would seem to absolutely require that these purposes—the dissolution of the corporation and appointment of a receiver under the statute, and the preservation of the property *ad interim* for its final disposition by the receiver—should be sought and accomplished in one and the same bill. The present bill contains averments which show that the bill filed by the stockholders was of this character. That bill, it is alleged, contained averments of special grounds for the appointment of a receiver of the corporation pending the proceeding under the same bill for a dissolution thereof. Upon such a bill the chancery court had jurisdiction, aside from statutory provisions, of the matter of appointing a receiver pending final action on the prayer for dissolution, and consequent appointment of a receiver under the statute. *Meyer v. Johnston*, 53 Ala. 237. And if the appointment was merely irregular and erroneous—it could not have been void in this

state of case—its validity cannot be questioned by the present respondent in this purely collateral proceeding. *Comer v. Bray*, 83 Ala. 217, 3 South. Rep. 554. The assignments of demurrer which sought to impeach the original appointment of complainant to be receiver of the Southern District Telegraph & Electric Company were properly overruled. As to the entire regularity of the second appointment—that made upon final decree of dissolution—the averments of the present bill leave room for doubt.

3. The first appointment, that made "on special grounds" upon the filing of the bill for *ad interim* relief and dissolution, was referable to the general jurisdiction of courts of chancery to appoint receivers *pendente lite*; and in the exercise of this jurisdiction it was clearly within the competency of the court, not only to empower the receiver to execute and perform existing contracts of the corporation, but even to enter into and carry out new contracts in behalf of the company. *Beach*, Rec. § 284; 20 Amer. & Eng. Enc. Law, p. 154.

4. A somewhat more difficult question arises as to the power of a receiver appointed under section 1686 of the Code—the power of this receiver under his final appointment on decree of dissolution—to carry out and perform existing contracts of the corporation. By that section the powers which may be invested in a receiver are to take possession and control of all the property and assets of the corporation; to collect, by suit or otherwise, all the debts due thereto, sell its property, and make conveyances thereof; and to proceed, without suit, to sell any or all of the debts and assets of the corporation at public sale, for cash, or on such terms as, in his judgment, the interest of the parties may require. These statutory provisions mark the limits of the court's competency to confer powers on the receiver of a dissolved corporation. But these powers, when conferred by the decree, involve and carry with them such power as may be implied from the general object and spirit of the statute, or as are incidental to the authority expressly given. *Beach*, Rec. § 434; *Runyon v. Bank*, 4 N. J. Eq. 480; *Embree v. Shideler*, 36 Ind. 423. In the case at bar the receiver asserts the power and authority to perform and discharge the obligations resting on the corporation by the terms of a contract of force at the time its corporate entity was destroyed by the decree of dissolution. That power is not expressly given in the statute, nor is the court thereby expressly authorized to confer it on the receiver. Can it be implied from the general object and spirit of the statute, or as an incident to the powers which are expressly conferred or allowed to be conferred on the receiver? We need not respond to this inquiry in the precise form in which it is put. The facts of the present case do not require it. These are, as has been indicated, that the construction com-



pany had entered into a contract to erect a plant for the Florence Company for \$20,000, and had substantially, in the sense of nearly, completed the erection thereof, when the dissolution was had, but no part of the agreed price therefor had been paid. Upon dissolution it was necessary to the collection of this claim against the Florence Company that the contract to erect and construct the plant should be fully executed, and the plant completed, or to show that an offer so to do had been made in good faith, and declined. Very clearly, in equity and good conscience, especially when reference is had to the fact that the Florence Company had accepted the plant so far as erected, and it was being made to subserve the purposes of its erection, there was a debt, in some amount, owing to the dissolved corporation. This debt the receiver was empowered to collect by suit or otherwise. The performance or offer to perform in full the contract, which had already been nearly completed, was a condition precedent to a demand for the payment of this debt in full. Without it the debt could not be collected. Without it the receiver could not execute the power which the law and the decree expressly gave him, and discharge the duty resting on him. The performance of the unexecuted part of the contract, or a readiness and offer to perform, was clearly within the object and spirit of the statute, and incidental to the power which is thereby expressly vested in the receiver. While not deciding that a receiver, under this statute, has authority to perform all existing contracts of the corporation, we hold that the complainant was empowered to complete the execution of the contract with the Florence Company, such execution being necessary to the discharge of the duties and powers which were expressly imposed and conferred on him, and that his offer so to do, and the declination thereof, must be accorded the same effect in this case as had there been no dissolution, and the offer had been made by the construction corporation itself. *Walt, F. S. Insol. Corp. § 214; Pond v. Cooke, 45 Conn. 130.*

5. The stipulation in the contract for the completion of the work contracted for "as soon as possible" is to be construed to require the erection and construction of the plant complete within a reasonable time, or within such time as was reasonably necessary, under the circumstances, to do what the contract required to be done. 1 *Amer. & Eng. Enc. Law*, p. 777, note 1, and authorities there cited. As we have seen, the bill avers that the construction company, immediately on the making of the contract, undertook and proceeded to perform the work and to erect the plant contracted for; that it had substantially completed said work and erected said plant when the same was turned over to, and accepted by, the Florence Company; and that said company, at the time of filing the bill, was operating the

same in lighting the city of Florence, thus subserving the purposes of its erection. The bill further shows, however, that the plant was not entirely completed according to the specifications of the contract, but that complainant was ready and willing, and had offered, to complete it. It cannot be affirmed, on this state of averment, that the bill shows that there was any violation of the compact in respect of the time in which the work that was done was in fact performed; and, even if there had been unreasonable delay on the part of the construction company in that regard, the fault was condoned, and any right the Florence Company might otherwise have had to rescind the contract was waived and lost by its acceptance of the work done, and of the plant, in its then approximate completed condition, and devoting the same to the objects of its erection. This, we think, gave the construction company a claim for the value of work and labor done and materials supplied prior to, and up to the time of, the acceptance; and whatever damage the Florence Company sustained from a subsequent unreasonable delay on the part of the construction company or this complainant to fully perform the then unexecuted parts of the contract is, at most, matter for recoupment. And this conclusion is aided, in this instance, by reference to that provision of the contract which clearly contemplates that payments were to be made to the construction company from time to time as the work progressed.

6. It is to be conceded that the bill contains no averment that the debts due from the Florence Company to third parties, which were to be paid by the construction company, had been paid, and no averment of an offer, or even a readiness or willingness, to pay the same. It may be taken, therefore, as showing a violation of the contract, in this respect, by the construction company. What is the effect of this infraction upon the relief sought? It is, in our opinion, fatal to the prayer for specific performance. The bonds which the contract stipulates for, and which the prayer for specific performance would involve the issuance of, were to be secured by a mortgage or deed of trust on the property of the Florence Company, which property was to be free from all incumbrances. The debt due the Westinghouse Company was secured by a mortgage on this property, or a part of it. Until this debt was paid, and this mortgage "thereby lifted," the Florence Company could not, even had it desired so to do, have issued the bonds stipulated for, because the property which was to be pledged to secure them was incumbered, and this incumbrance was the result of the fault and failure of the construction company to pay off the Westinghouse mortgage, as it had agreed to do. The prayer for specific performance, therefore, in effect, invokes the jurisdiction of chancery to compel the defendant to do an act which the



failure of the construction company to perform its contract has left impossible of performance. There can be no equity in such a demand.

7. This consideration, however, has no application in respect of the prayer of the bill looking to the enforcement of complainant's claim for work done and materials furnished, etc., as a lien on the property of the defendant corporation. The part performance averred in the bill, and defendant's acceptance thereof, suffice to entitle complainant to recover for the work and labor done and materials furnished, even if it be conceded that the contract was not originally severable, and that but for such acceptance complainant could have recovered nothing except upon full performance of the entire contract, or a part performance, with a readiness and offer to perform in full seasonably made, and declined by the defendant. This upon the principle that "if one party, without the fault of the other, fails to perform his side of the contract in such manner as to enable him to sue upon it, still, if the other party have derived a benefit from the part performance, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise to pay what it is reasonably worth." 3 Amer. & Eng. Enc. Law, pp. 920-922; *Hayward v. Leonard*, 7 Pick. 181; *Kirkland v. Oates*, 25 Ala. 465; *Merriweather v. Taylor*, 15 Ala. 735; *Bell v. Teague*, 85 Ala. 211, 3 South. Rep. 861.

8. On this theory—that partial performance by the construction company, and the acceptance of the plant so partially completed, and the use thereof by the Florence Company, raises up an implied contract on the part of the latter to pay for the work done and the materials furnished—the complainant is entitled to a money recovery, even if it be assumed that the original contract provided for payment in bonds only, against the defendant; and as an incident of the transaction involving the facts alleged in the bill, an inchoate lien attached to such of defendant's property as comes within statutory terms in favor of the complainant, which, if perfected as provided by law, may be enforced by bill in chancery. Code, § 3040.

9. If it were necessary to go into the question at all on this appeal, we should be inclined to hold that the primary obligation of the defendant, under the express contract, was to pay the construction company \$26,000 in money; that the bonds were in the first instance to be issued to the latter company only as collateral security for the payment of this money, or as a means of raising the money for application to the debt; that whether they should ever be taken in payment depended upon an election on the part of the construction company so to do; and that, so far from such election having been made, the present bill, and its leading purpose to enforce a money claim by subject-

ing property to its satisfaction, may be considered an efficacious and binding election—conditioned only on complainant's right to make it (a right which, as has been indicated, we should hold he had)—on the part or in behalf of the construction company not to accept the bonds in payment at all.

10. The contract involved here was entered into, the work and materials for which a lien is sought to be enforced were done and supplied, the lien therefor attached and was perfected, if perfected at all, and the present bill to enforce the lien was filed prior to the act of February 12, 1891, providing for mechanics' and material men's liens, and repealing certain sections of the Code of 1886. Acts 1890-91, p. 578. The right now asserted is not affected by that act. If it existed at all, it was then a vested right, which a repeal of the statute could not destroy or impair, and which it would not be held to impair, if that were within legislative competency, in the absence of an indication of a legislative purpose to give it retrospective operation; and it is now to be worked out and effectuated under the laws in force when the suit was commenced.

11. It is to be assumed, in the absence of any averment to the contrary, that the construction company was authorized by its charter to enter into and perform the contract involved in this case.

What we have said will suffice to indicate the grounds of our conclusion that the decree overruling the several demurrers to the bill, insisted on in argument, is free from error. Affirmed.

(30 Miss. 252)

LEWIS, Sheriff, et al. v. WHITE.

(Supreme Court of Mississippi. Oct. Term, 1891.)

**HOMESTEAD IN PROPERTY IN COMMON—RIGHTS OF CREDITORS AND COTENANTS.**

1. In a contest between a cotenant, in possession of the common property, and his creditors, the consent of the cotenants to his occupancy is not essential to the maintenance of a homestead in it.

2. A claim by a tenant in common to a homestead in the common property should be regulated in extent and value, as in every other case, and whatever estate the debtor has in the property, outside the part claimed as a homestead, may be seized and sold; and, in a contest between the debtor and his creditors, whatever estate the cotenants have in the part claimed as a homestead by the debtor remains unaffected, as between him and them, by the allowance of a homestead in the common property.

Appeal from chancery court, Wilkinson county; Claude Pintard, Chancellor.

Bill by W. N. White against F. D. Lewis, as sheriff, and others, to restrain the sale of land under an execution. A decree was entered, awarding complainant a perpetual injunction, and defendants appeal. Reversed.

On June 15, 1891, F. D. Lewis, as sheriff, levied executions, founded on judgments in

favor of his codefendants, against W. N. White, upon the interest of said White in a certain tract of land. The lands were advertised for sale, and on the 9th day of July, 1891, appellee filed the bill in this case, and was granted an injunction restraining the sale of the land. The bill recites that the complainant is the owner in fee of an undivided one-sixth interest in a tract of land containing about 336 acres, and in another tract containing about 385 acres; that said lands belonged to his mother before her death; that they are now owned by him and her other heirs as tenants in common; that complainant is a married man, a householder, the head of a family, and a citizen of the state, and that he resided upon said land, with the consent of his cotenants, except the heirs of his deceased brother, who are minors; that his one-sixth interest in all the lands is less than 160 acres, the number of acres he is entitled to under the exemption laws now in existence; that partition would have been made but for the minority of some of the cotenants. The bill further recites that the sheriff is about to sell complainant's interest in said lands. The defendants demurred to the bill. Demurrer was overruled, and complainant had a final decree awarding a perpetual injunction, and defendants appealed.

D. C. Bramlett, for appellants. J. H. Jones and H. S. Van Eaton, for appellee.

WOODS, J. It has several times been said by this court, in general terms, that a tenant in common may maintain his claim to his homestead exemption in the common estate. The requirements of the litigation presented in this cause demand of us a fuller and more particular annunciation of the law governing cases of claims of homestead exemptions by one of the tenants in common in the undivided property.

1. The execution creditor has no concern with the title of the tenant in common whose estate he is seeking to subject to his demand. If the debtor has good title to an undivided interest in the common property, and has, united with title, actual occupancy, the creditor cannot assail the homestead rights of the exemptionist. If the debtor has no good title, the creditor cannot be heard to complain that he is not allowed to sell that of which, confessedly, his debtor is not owner. The question of the title of the tenant in common to the exempt homestead is not involved. Whether he has or has not title cannot affect the rights of the tenant in common claiming his homestead in the common property.

2. The consent of the cotenants to the occupancy of the homestead claimed is not essential to the successful maintenance of the homestead exemption in a contest with creditors of the homestead exemptionist. The debtor is found in the occupancy of the

common property, and asserting claim to his homestead exemption in a part of it. If he has or has not the consent of his cotenants, the creditor cannot complain. The want of title, or the want of consent by cotenants to occupancy, in no way possible can affect the rights of the creditor seeking to subject the debtor's property to his demand. The remark in *McGrath v. Sinclair*, 55 Miss. 89, that "perhaps the better rule is \* \* \* that the homestead may be acquired in the common property, with the consent of the cotenant, which will be good against all other persons," contains an intimation which is unsound; and this unsound intimation is perfectly refuted in the reasoning of the court which immediately follows it. Said the court in that case: "It is the occupancy as a residence which the statute had in view, and intended to protect, rather than the title by which he held. The substance thereof is that the creditors shall not break up the home and residence by a sale of such title as the debtor had. If the debtor refers his possession to a tenancy in common with another, and enjoys the occupancy in that right, it is no reason that he should lose his home because, as against his cotenant, he has not an exclusive right, and could be compelled to make partition. These are matters between himself and his cotenant."

3. The claim to the homestead exemption in property in common is to be regulated and bounded, in extent and value, just as in every other case. The debtor may claim and hold, and have spared to him, a homestead not exceeding in quantity 160 acres in the land occupied by him, and in value not exceeding \$2,000. If the claim set up shall appear to the creditor excessive in quantity or value, by proper proceedings he may have such excess, if shown to exist, subjected to payment of his debt. The tenant in common, who claims his homestead exemption in the estate in common, has no floating claim to exemption in the entire estate, as must be seen from what has been already said by us. He is to be protected in his occupancy of the homestead of proper quantity and value, but no further. Whatever interest he may have in the remainder of the common property is salable in satisfaction of demands of creditors, in proper cases. What this undivided interest in the remainder of the common estate may be, or may prove to be worth, is a matter of no concern in the examination of the subject now being considered; and so what the real interest of the debtor in the homestead exemption allowed him may now be worth, or whether it may hereafter prove valueless, comparatively, on partition with the cotenants, are questions not involved. Whatever estate the debtor has in the common property, outside of that part claimed as a homestead, may be seized and sold; and, whatever estate the cotenants have in the part claimed as a homestead by the debtor, their tenant in common, remains

unaffected, as between him and them, by the recognition and allowance of his homestead in the common property, in the contest between him and his execution creditor.

The decree of the court below must be reversed, because by it the appellee had greater relief afforded than he was entitled to ask or receive. The injunction should be made perpetual, in so far as a homestead not excessive in quantity or value may be claimed, and it should be dissolved as to the residue of the lands embraced in the bill of complaint. In order, therefore, that the necessary further proceedings may be had to meet the views herein announced, the decree will be reversed, the cause remanded, and leave given appellants to answer, if they shall desire to do so, within 30 days after mandate filed in the court below.

(39 Miss. 694)

WILSON et al. v. ZOOK.

(Supreme Court of Mississippi. April Term, 1892.)

CONTINUANCE—EVIDENCE—EXCEPTION TO INSTRUCTIONS.

1. A continuance asked because of the absence of a book left with a certain person is properly refused where such person testifies to having searched for the book without effect, and to the finding only of another book, not desired, and where, for aught that appears, a subpoena duces tecum to such person, or inquiry in other directions, also would have been unavailing.

2. A party who has asked and obtained an instruction announcing a certain rule cannot assign for error an instruction for the opposite party, announcing a similar rule.

Appeal from circuit court, De Soto county; James T. Fant, Judge.

Suit by W. T. Zook against John D., George, and Marlin Wilson, as partners in trade under the firm name of Wilson Bros., on an open account. The defendants George and Marlin Wilson pleaded the general issue, and gave notice by special plea that they would prove that no partnership existed between them and John D. Wilson. They also filed an affidavit denying the correctness of the account. Defendants made application for a continuance on account of the absence of the account book showing the transaction sued on. The case was discontinued as to John D. Wilson. The application for continuance was overruled. There was verdict and judgment against George and Marlin Wilson, and they appeal. Affirmed.

Morgan & Buchanan, for appellants.  
Powell & Powell, for appellee.

COOPER, J. The application for a continuance by the defendants was properly refused. The book desired by the defendants to be used in evidence, and because of the absence of which the continuance was asked, was last in possession of John D. Wilson, who, on leaving the state, left it, as he thinks, in his room at Mrs. Jones'. Mrs. Jones was

introduced as a witness on the hearing of the application, and stated that she had made search for it, and it could not be found. One book was found by her after Wilson left the state, which was delivered to one McNeely, but it was not the book the defendants desired to have. A subpoena duces tecum to McNeely or to Mrs. Jones would have been unavailing, since it does not appear that either of them had the book, and it was not suggested that inquiry in any other direction would discover it.

We cannot affirm that the verdict of the jury is for too large a sum. The account sued on shows a balance due the plaintiff of \$480.21, and the plaintiff testified that it was made up and delivered to him by an employee of the defendants, by direction of John D. Wilson. He further stated that all the items credited to him thereon prior to June 20, 1888, were correct, to his personal knowledge. If all credits claimed by the plaintiff after that date were disallowed by the jury, the amount remaining due to him on the face of the account, with interest thereon to the date of the judgment, was in excess of the sum awarded him by the verdict.

The principal error assigned by the defendants is as to the instructions given by the court for the plaintiff. The real controversy between the parties was upon the question whether the appellants were members of the firm of Wilson Bros., or, if they were not, were, nevertheless, liable to the plaintiff by reason of having permitted John D. Wilson to hold them out as such for the purpose of giving credit to the firm. There was evidence offered by the plaintiff tending to prove that appellants were, in fact, members of the firm, and also evidence tending to prove that if, in fact, they were not partners in the firm, they had permitted John D. Wilson to hold them out as such. For the defendants there was evidence tending to disprove these facts. The plaintiff admitted that he did not know that appellants were, in fact, members of the firm, or had been so held out by John D. Wilson, and that he gave no credit to the firm on account of their supposed membership. At the instance of the plaintiff, the court instructed the jury that "a man may become liable to the debts contracted in the name of the firm, although, in point of fact, he was not a member of the firm, and no such firm existed. If a man knows that another is using his name in a firm as a basis of credit, and he permits him to use it to help along the party, then the party so permitting his name to be used becomes liable for the debts of the firm." The appellants contend that this instruction is not correct, and that a party permitting his name to be used in a firm of which he is not a member is liable only to those who extend credit to the firm on the faith of the membership of such person. We cannot distinguish the rule announced in this instruction from that announced in the concluding

paragraph of the fourth instruction asked and secured by the defendant. By the fourth instruction the jury was told that, if it was satisfied from the evidence that appellants were not, in fact, members of the firm of Wilson Bros., the verdict should be for them, "unless they are satisfied by a preponderance of the evidence that the plaintiff was induced to make the contract, and to do the work on which he sues in this cause, by reason of such representation by said defendants, or that the names of George and Marlin Wilson were used by J. D. Wilson in the firm name of Wilson Bros. by their knowledge and consent, and in the interest of said firm of Wilson Bros., in which event defendants would be liable to plaintiff for the debt sued on." The appellants cannot assign for error the action of the court in giving an erroneous instruction for the plaintiff, when they themselves prayed and received the same as announcing the law by which the jury should be guided. *Insurance Co. v. Van Os*, 63 Miss. 431. Affirmed.

(69 Miss. 683)

STATE ex rel. ADAMS, State Revenue Agent, v. THIBODEAUX.

(Supreme Court of Mississippi. April Term, 1892.)

INTOXICATING LIQUORS — COLLECTION OF TAXES—  
ACTION BY REVENUE AGENT.

Code 1880, § 1109, provides that merchants who sell or give away intoxicating liquors in less quantities than one pint shall pay the regular retail tax, which the sheriff shall assess and collect. *Held*, that though Act Feb. 24, 1891, makes privilege taxes due by liquor dealers debts for which an action will lie by the state revenue agent, the latter cannot recover, from a merchant who sold liquor prior to its passage, the tax which was not collected, since, under section 1109, assessment by the sheriff was essential to liability, and he alone could collect.

Appeal from circuit court, Yazoo county; J. B. Chrisman, Judge.

Action by the state, at the relation of Wirt Adams, the state revenue agent, against J. L. Thibodeaux, to recover a privilege tax. Judgment for plaintiff, and defendant appeals. Reversed.

In 1888 and 1889, and prior thereto, J. L. Thibodeaux was a merchant residing in Warren county, and dealing in dry goods, groceries, etc. He had been at one time a retail dealer in vinous and spirituous liquors, but, having failed to renew his license at the date of its expiration, he continued to sell intoxicating liquors, in less quantities than one gallon, without license, from June, 1888, to April 1, 1889. On December 7, 1891, the state revenue agent instituted suit against Thibodeaux, in the circuit court of Yazoo county. A demurrer to the declaration was overruled, and a plea of *res judicata* was disallowed. The revenue agent averred in his declaration that the sheriff and tax collector had full knowledge and notice of the fact that said Thibodeaux was selling at retail said liquors,

without license, and willfully and knowingly failed, omitted, and neglected to collect the privilege tax prescribed by law. From a verdict against him for \$167.67, Thibodeaux appealed. Section 1109, Code 1880, under which, it is claimed, defendant is liable, is as follows: "Merchants, and others carrying on any business or trade, who may sell or give away liquors, either vinous or spirituous, at their places of business, in less quantities than one pint, for any purpose whatever, shall be subject to pay the regular retail tax fixed by the county or corporate authorities of the place where such business is conducted, and it shall be the duty of the sheriff to assess and collect such tax whenever he is informed that such sales or gifts have been made; and such persons, on conviction, shall be fined in a sum not exceeding one hundred dollars."

E. E. Baldwin, Murray F. Smith, and J. Hirsch, for appellant. Barnett & Thompson, for appellee.

CAMPBELL, O. J. There was a failure to maintain by evidence the averment of the declaration that the tax collector of Warren county had knowledge of the liability of the defendant to pay the retail tax, and for that the verdict should be for the defendant; but if that averment was maintained the action could not be sustained, under the former decisions of this court, because the essential prerequisites, the indispensable thing,—a due assessment of the tax as prescribed by law for the imposition of the tax,—did not exist. As held in *State v. Adler*, 68 Miss. 487, 9 South. Rep. 645, whenever a tax is according to value, or depends on ascertainment of person or value by some designated official, assessment, as prescribed, is necessary. This is no new doctrine, or one calculated to excite surprise. It is as old as the law of taxation, and is the one proposition on which all courts and writers are agreed. It is upheld by all courts, state and federal, as that without which there cannot be a valid charge for a tax. It was distinctly announced in this state a third of a century ago, and must be adhered to as a cardinal rule in taxation. Whenever a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax. This does not apply to that large class called "privilege taxes," or taxes imposed on various callings or pursuits. There assessment is not essential, from the nature of the case, and if the law does not require it a demand for the tax may exist without it. It is competent for the legislature to make privilege taxes debts, and recoverable without assessment, as was done by the Code of 1880, and as was done, as to dealers in liquors, by the act of 1890; but, even as to these taxes, where the act imposing the tax requires assessment in order to fix liability, there cannot be a substitute for it. Prior to the act of February 24, 1890, there was no provision

for suit for the sum alleged to be due by a liquor dealer because it should have been paid by him; no subjection to liability to an action for the sum required to procure a license because of having carried on the business without license, as held in *State v. Piazza*, 66 Miss. 426, 6 South. Rep. 316.

Section 1109 of the Code of 1890 was designed to meet the case of merchants and other dealers who gave away liquors. It speaks of selling in order to prevent evasion, but its manifest purpose was to deter from giving away liquors by dealers, by subjecting them to the liability of having the tax imposed on retail liquor dealers assessed upon and required of them by the sheriff and tax collector of the county. He alone could fix the liability. He could not sue, but could proceed as prescribed for him in other cases where he collects taxes. In no other way could liability be imposed, under that law. It was part of the system regulating the liquor traffic, and to be carried out according to its specific provisions, or not at all. The offender against this section, besides incurring liability to a fine for each act violating the law, ran the risk of being assessed by the sheriff, and compelled to pay, as a tax, what licensed dealers were required to pay. This was the whole of it. It may be cause for regret that an action was not given for this tax, so that the state or its appointee might collect by suit, but that is not ground for maintaining an action where no right of action exists. We cannot disregard settled legal rules, in which all find their protection, in order to reach those who deserve no sympathy, and in morals should be held liable for all their misdeeds. It would give us pleasure to enforce the law against them, if we had it applicable, but we declare it as we find it. It was distinctly declared in *State v. Thibodeaux*, 69 Miss. 92, 10 South. Rep. 58, upon the same facts as now appear, that this action is not maintainable. Some general observations in the opinion, leading to the conclusion announced, served to mislead counsel, and court, too. It seems, and resulted in a new action. In our opinion it cannot be sustained.

Reversed and remanded.

(32 Fla. 248)

#### HAWKINS et al. v. STATE.

(Supreme Court of Florida. July 15, 1893.)

CRIMINAL LAW — WRITTEN INSTRUCTIONS —  
"GUILTY" WRITTEN ON MARGIN.

Where the judge inadvertently writes the word "Guilty" on the margin of an instruction given to the jury, and permits the instruction thus written upon to be taken by the jury to their room, *held*, (1) that the presumption is that the extraneous word was read by the jury, unless the contrary was clearly shown; (2) that, as the writing of such word by the judge was capable of and tended towards influencing the jury detrimentally to the defendants, the presumption was that it did so influence them, unless the contrary was clearly shown, and that the burden was upon the

state to show beyond a reasonable doubt that such writing upon the charge was not read by the jury, or, if read by them, that it did not result in injury to the defendants; and (3) that such word written upon the charge, and sent with the jury to their room, was reversible error, unless it clearly appeared that no injury resulted to the defendants therefrom.

(Syllabus by the Court.)

Error to circuit court, Polk county; Barron Phillips, Judge.

Samuel Hawkins was convicted of murder in the second degree, and Howard Hawkins as accessory, and, from a denial of their motion for a new trial, they bring error. Reversed.

J. W. Brady, for plaintiffs in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. The plaintiffs in error were tried and convicted at the spring term, 1893, of the circuit court for Polk county, Samuel Hawkins for murder in the second degree, and Howard Hawkins, as accessory, of the same crime, and both were sentenced to the state prison for life. Upon the refusal of their motion for new trial, they bring writ of error here. Various errors are assigned, but we deem it unnecessary to notice any of them except the fifth, which is that the court erred in writing the word "Guilty" on the margin of one of the instructions given to the jury, and then permitting the charges, thus written upon, to be taken by the jury to their room. This error was also one of the grounds of the motion for new trial. It is conceded here that the writing of the word "Guilty" by the judge below upon the margin of the instruction was done entirely through inadvertence, and that the word intended to be written was "Given," as the instruction opposite to which the word "Guilty" was written was in fact given by the court to the jury, at the request of the defendants' counsel. But, however absently or unintentionally it was written upon the charge, the question for our consideration is, was it, in the hands of the jury in their room, calculated to injuriously affect the defendants? We think that it was. There are but two words—"guilty," "innocent"—that we know of in the English vocabulary that, when put singly and alone before the eyes of the jury, can so completely and effectually sum up and convey to their minds the conclusions of the judge upon the entire testimony in the case. Had he written the one word "Innocent" on the charge, the thought conveyed thereby would have been, "These people are innocent. The proofs are insufficient to establish their guilt;" on the other hand, the writing of the word "Guilty" was tantamount to saying, "The proofs are ample to establish their guilt. In my judgment, they are guilty,"—either of which declarations would have been an unwarranted invasion by the court of the exclusive province of the jury to pass upon the facts. Though the jury may have been im-

pressed with the idea that the writing of the word was unintentional on the judge's part, and due to absent-mindedness, even then it was calculated to convey to their minds the idea that the judge inadvertently gave expression to that which was uppermost in his mind. All of which was seriously harmful to the defendants. The writing of this word by the court upon the margin of the charge, and then sent with the jury to their room, to say the least, was so wide a deviation from the ordinary proceedings and forms provided by law for the securement to the defendants of a fair and impartial trial that they were entitled to require at the hands of the state satisfactory evidence that they had not been injured by reason of such departure from the usual forms, and the burden was not upon them to show affirmatively that such departure had been the probable cause of their conviction. As it is expressed by Judge Parker, in *State v. Prescott*, 7 N. H. 287: "The shield which the law has provided would fall far short of affording him the protection intended if it might be thrown aside at pleasure, and he have no right to complain unless he could prove that the want of it had been actually prejudicial to his case,—a matter which it might in many cases be very difficult to prove, notwithstanding such was the fact. He has the right, therefore, to call upon the officers of the government, in such case, before they demand judgment, to show that the irregularity in the trial has not been the means of injustice in the verdict. As the law humanely presumes his innocence, in the first instance, until his guilt has been proved beyond a reasonable doubt, so it will presume that a departure from the mode prescribed by the law for his trial has been to his prejudice, until the contrary is shown by the same degree of evidence." *Jumpertz v. People*, 21 Ill. 375; *Sims v. State*, 43 Ala. 33. The fact being admitted that the charges, with this indorsement on the margin thereof, were in the hands of the jury during their deliberations, the presumption is that it was read by them, in the absence of proof to the contrary. *Clark v. Whitaker*, 18 Conn. 543; *Durfee v. Eveland*, 8 Barb. 46. From these conclusions the judgment of the court below is reversed, and a new trial ordered.

(32 Fla. 277)

**BOSWELL et al. v. CUNNINGHAM.**

(Supreme Court of Florida. June 15, 1893.)

**PRINCIPAL AND AGENT — AGENT FOR PURCHASER TAKING TITLE TO SELF HOLDS AS TRUSTEE FOR PRINCIPAL.**

1. Where the relation of principal and agent exists, the utmost good faith is exacted in all of the transactions of the agent towards his principal in all matters connected with the subject of the employment.

2. Where an agent is employed to make a purchase of land, the principal is entitled to all the skill, ability, and industry of such agent to make the purchase on the best terms that

can be had, and is entitled to the property at the price which the agent pays.

3. An agent is not permitted, without the assent of his principal, to acquire an interest in the subject-matter of the agency adverse to his principal. During the continuation of the agency the agent cannot put himself in a position adverse to that of his principal.

4. Where the agent employed to purchase for his principal purchases for himself, all the profits and advantages gained in the transaction belong to the principal, and the agent will be held to have taken the property as trustee for his principal. Such a trust comes within the exception provided for in the statute of frauds, (section 2, p. 214, McClell. Dig.; section 1951, Rev. St.) as it arises out of the construction and operation of law, and may be established by parol.

5. C. employed the firm of B. & R., copartners in real-estate business, as her agents to purchase for her a certain block of land. They effected the purchase at a certain price satisfactory to C., and obtained a deed to C. for the premises, that was delivered to them in escrow by the vendor until the purchase money was paid. C. paid \$100 of the purchase money, and left immediately for Ohio, with the knowledge of B. & R., for the purpose of there obtaining the balance of the purchase money, and on arriving there and securing the requisite funds at once notified B. & R. by telegram that the money was ready to be paid as soon as they should furnish to her lawyer an abstract of the title to the premises. Two days after receiving this notification, B., one of said firm, purchased the property for himself at considerably less than the price that C. was to have paid, and used C.'s \$100 payment in the purchase for himself, and on same day notified C. by letter, not of his purchase for himself, but that the vendor had then demanded immediate payment of the balance of the purchase money, and, not being able instantly to get it, had taken back the deed to C., left in escrow, and had declared the trade off. Within a few days thereafter, upon C.'s arrival from Ohio, on learning of B.'s purchase of the property for himself, she promptly tendered the balance of the purchase money that she had agreed to pay for the property, which B. refused to accept. Under these circumstances, *held*, (1) that B. took the property in trust for C., and that, upon C.'s paying the price at which B. purchased it, B. would be required to convey to C.; (2) that C., after refunding the money paid by B. for the property, was entitled to all the moneys, with interest, for which B. had sold and conveyed portions of the property to others.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Bill by Carrie H. Cunningham against William Boswell and others. From the final and supplemental decrees for complainant, defendants appeal. Affirmed.

Beggs & Palmer and C. F. Akers, for appellants. Foster & Gunby, for appellee.

TAYLOR, J. Carrie H. Cunningham, the appellee, on the 27th of April, 1886, filed her bill in equity in the circuit court for Orange county against William Boswell and A. J. Rose, as copartners under the firm name of Boswell & Rose, and against Rosa A. Rose, wife of A. J. Rose, and John M. Bryan.

The substantial allegations of the bill were as follows: That on the 19th of March, 1886, the complainant, being desirous of purchasing a certain parcel of land containing two acres,

situated in Kissimmee city, in (what was then the territory of) Orange county, and known as "Block M," in Patrick's addition to said Kissimmee city, employed the defendants William Boswell and A. J. Rose, as copartners in the business of real-estate agents, to effect the purchase. That the defendant Bryan was then the owner in fee of said land. That Boswell & Rose, as her agents, duly authorized by her, purchased said land of said Bryan for her for the sum of \$2,150, upon the following terms: \$100 to be then and there paid, and the remainder within 30 days from said 19th of March. That Boswell & Rose then and there advanced for her to Bryan the \$100 payment, she reimbursing them three days thereafter. That Bryan then and there delivered to said firm a deed to said land, duly executed by himself and wife, which deed was to the complainant as grantee. That said deed was left with said firm to be delivered to complainant upon the payment by her of the remainder of the purchase money within 30 days. That said firm then agreed with her to examine the title of said land, and to furnish an abstract thereof for examination before she should make final payment. That on the 22d of March, 1886, with the knowledge of said firm, she started for Cincinnati, Ohio, for the purpose of procuring the money to pay for said land. That upon her arrival in Cincinnati she at once procured the necessary funds, and on the 27th of said March caused said firm to be notified that she was ready and willing to pay for said land whenever the title should be examined. That on the 29th day of said March, Bryan, desiring to obtain \$1,000, called upon said firm to obtain that sum for and on account of her said purchase, but in no manner to rescind said sale to her. That said firm then and there advanced to said Bryan about the amount that he requested. That on the same day, the said firm, with the intent and purpose to deceive and defraud her, wrote her the following letter: "Kissimmee City, Fla., March 29th, 1886. Mrs. Carrie H. Cunningham, Cincinnati, Ohio—Dear Madam: We regret to inform you that, on account of not having a remittance from you as arranged, the negotiations for the purchase of that two-acre block has fallen through. Mr. Bryan called at our office this morning, and demanded payment of purchase money. We applied to Mr. Murphy, who informed us that he was in communication with you in regard to the business; but he was unable to give us any other information except that he expected your arrival some time this week. However, as no funds were in hand, Mr. Bryan refused to wait, stating that he must have the money at once; that the purchase was to be in cash. Under the circumstances, we had no alternative but to declare off. We hold \$100 to your order. Respectfully yours, Boswell & Rose." That the assertion in said letter that Bryan had refused to wait, and that they, the said

firm, had declared the trade off, was false. That in truth and in fact the said Bryan had not refused to wait. That he understood that the sum then paid him by said firm was on behalf of her purchase, and that upon her return within said 30 days she would be entitled to the delivery of said deed upon payment of said balance of purchase money. That said firm, neglecting their promise and duty, did not and have not at any time furnished an abstract of the title of said land for examination by or on her behalf. That on the 31st day of said March she wrote a letter to said Boswell, that was duly received by him, calling his attention to the abstract to be furnished. That on the 30th day of said March, in pursuance of said intent to defraud her, the said firm procured from said Bryan the execution of a deed to said land, with the name of the grantee left blank therein, upon the pretense that, if she did not return, the said blank deed would enable them to sell said land. That they then assured said Bryan that upon her return she should have the deed to her of the land if she desired. That on the said 30th of March the said firm, in pursuance of the fraudulent design aforesaid, caused said blank deed to be filled out with the name of said Boswell as grantee therein. That in furtherance of said fraud the said Boswell on the same day executed a deed to Rosa A. Rose, wife of his copartner, A. J. Rose, conveying to her one-half of said land. That Rosa A. Rose paid nothing therefor, and had notice of complainant's rights and interests in the premises. That she received said deed by the request of her husband, and for his benefit, and that she was not a bona fide purchaser for value. That said Boswell & Rose, in furtherance of said fraud, have caused the said two last-mentioned deeds to be recorded. That on or about the 12th of April, 1886, she returned to Kissimmee, and called upon said firm, who informed her that they had purchased said land, and had sold a part thereof. That on the 15th of said April she tendered to said firm the sum of \$2,050, being the balance of the amount of the purchase money she was to have paid, and then and there tendered them the further sum of \$10 for interest on the sum advanced by said firm to said Bryan, and any expense connected therewith, and at the same time demanded of them a good and sufficient deed to the premises, which demand they refused to comply with. That at some time unknown to her the said firm have paid to Bryan the balance due him. The bill makes profert of all sums justly due from the complainant in the premises, and prays that the defendants, Boswell & Rose and Rosa A. Rose, may be required to convey and release to complainant all interests that they have acquired in the land, and that they, and each of them, be decreed to account to her for any sums received from any parts of said land sold, and that they be

enjoined from setting up any claim adverse to the complainant in the premises.

The defendants Boswell & Rose jointly answered the bill, but their answer was verified by Boswell alone. They admit their agency for the complainant for the purchase of the land, but deny that 30 days, or any time whatever, was given by Bryan for the completion of the purchase; but, on the contrary, aver that it was expressly declared by Bryan that the sale should be for cash, and that the purchase money should be paid at once, and that the transaction being a cash one was made the essence of the sale, and that the complainant well understood such to be the case; that she left Kissimmee for Cincinnati without making any arrangements to pay for the land. The taking of the deed from Bryan to Boswell is admitted, with this explanation: That shortly after the complainant's departure for Cincinnati, to wit, on the 29th of March, 1886, Bryan came to their office, and demanded payment of the whole purchase money at once, or that he would declare the sale off. That they then made inquiry of one Murphy, whom they knew had some business transactions with complainant, as to when she would return, or what information he could give as to her intentions, etc.; but Murphy in reply stated that he could give no other information than that he expected her to return that week. That they informed Bryan of this fact, and stated also that they had no funds on hand belonging to complainant, and had not heard from her since her departure, but that they were informed that she would return soon. Bryan then refused to wait, and demanded his deed, which defendants gave up. Defendant Boswell then purchased the land from Bryan, and upon the same day wrote the letter to Mrs. Cunningham that is copied above. The answer further avers that the complainant led them to believe that she had the money ready to pay for the land; and, laboring under this information, defendants informed Bryan, with complainant's knowledge, that the money was ready; and that on the same afternoon, i. e. the afternoon of the day of the purchase, Bryan came into the office of defendants, and demanded payment of the entire amount, but defendant Rose prevailed on him to accept \$100 in part payment, which he accepted with the understanding that the balance was to be paid on the following Tuesday. The answer denies that any abstract of title had ever been agreed to be furnished by either Bryan or said firm. The answer also avers that the sale from Bryan to Boswell was bona fide, and that the sale from Boswell to Rosa A. Rose was made in good faith for a valuable consideration, and that the deed made to her to an undivided one-half interest in the same was made in good faith. It further avers that after the sale from Bryan to the complainant was abandoned by Bryan, they (the

said firm) offered to refund to complainant the \$100 that she had previously paid them on said purchase, but that she refused to receive it. The answer further avers that the letters and telegrams written and sent by complainant were all written subsequent to the date upon which Bryan demanded and obtained his deed that had been left in their hands. All the allegations of the bill charging fraud are denied in general terms; and it also denies that they gave Bryan to understand that the money they paid him on the 29th of March, at the time of Boswell's purchase for himself, was for complainant's benefit; and it also denies that they obtained from Bryan a deed in blank, to be used only in case complainant did not return to Kissimmee within 30 days; and it is averred that Boswell made no effort to purchase the land for himself until after Bryan had declared the sale rescinded, and had told defendants he intended to sell to another party. The defendant Bryan filed an unverified answer in which he adopted as his own the answer put in by the defendants Boswell & Rose. The defendant Rosa A. Rose, though regularly served with process of subpoena, did not answer at all. The cause was referred to a master to take testimony, and upon the reporting of the evidence taken by the master, upon final hearing, the court rendered a final decree in the cause, requiring the defendants Boswell & Rose and Rosa A. Rose to convey to the complainant all of the lot in controversy which they had not already disposed of, upon her paying to them the sum of \$1,950, shown by the proofs to have been the amount at which Bryan sold said lot to Boswell, and requiring the defendants Boswell & Rose and Rosa A. Rose to account for and pay to the complainant the amounts received by them for various parcels of the lot sold and conveyed by them. A supplemental decree was also rendered, authorizing a master to convey to the complainant the unsold portions of the lot that remained in the defendants' hands. From these decrees the defendants appeal to this court.

That the defendants Boswell & Rose were in the employ of the complainant, Mrs. Cunningham, as her agents for the purchase of the property in controversy, there is no dispute. That one of them, before notifying her of any intention upon their part to terminate such agency, and without her consent, purchased the property in his own name that they were employed to buy for her, and used \$100 of her money in paying for same, there is also no dispute. These facts being admitted, the law applicable to them is well settled, and sustains the decree appealed from. Where the relation of principal and agent exists, the utmost good faith is exacted in all of the transactions of the agent towards his principal in all matters connected with the subject of the employment; and where an agent is employed



to make a purchase of land the principal is entitled to all the skill, ability, and industry of such agent to make the purchase on the best terms that can be had, and is entitled to the property at the price which the agent pays; and the agent is not permitted, without the assent of his principal, to acquire an interest in the subject-matter of the agency adverse to that of his principal. The agent, during the continuation of the agency, cannot put himself in a position adverse to that of his principal; and where the agent, employed to purchase for his principal, purchases for himself, all the profits and advantages gained in the transaction belong to the principal, and the agent will be held to have taken the property as trustee for his principal. Such a trust comes within the exception provided for in our statute of frauds, (section 2, p. 214, McClell. Dig.; section 1951, Rev. St.,) as it arises out of the construction and operation of law, and may be established by parol. In the case of *Rose v. Hayden*, 35 Kan. 106, 10 Pac. Rep. 554, where the principles announced above were carefully considered and the authorities exhaustively reviewed by Justice Valentine, delivering the opinion for the court, it was held that, where a person employs a firm of land agents by parol to negotiate for the purchase of land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name, and afterwards the principal tenders to the agent an amount of money equal to the purchase money, and an additional amount sufficient to compensate the agent for all his services, and demands of the agent that he shall execute a deed to him of the property, but the agent refuses, and claims to own the land himself, under these facts, and by operation of law, the agent holds the legal title to the land in trust for his principal. The general principles announced will be found to be sustained by the following authorities: *Cottom v. Holliday*, 59 Ill. 176; *McMurry v. Mobley*, 39 Ark. 309; *Firestone v. Firestone*, 49 Ala. 128; *Wellford v. Chancellor*, 5 Grat. 39; *Wolford v. Herrington*, 74 Pa. St. 311; *Church v. Sterling*, 16 Conn. 388; *Switzer v. Skiles*, 3 Gilman, 529; *Reed v. Warner*, 5 Paige, 650; *Lees v. Nuttall*, 5 Eng. Ch. 54; *Sweet v. Jacocks*, 6 Paige, 355; *Benson v. Heathorn*, 20 Eng. Ch. 326; *Eldredge v. Jenkins*, 3 Story, 181; *Taylor v. Salmon*, 18 Eng. Ch. 134; 1 Amer. & Eng. Enc. Law, 378 et seq.

In this case it is admitted that the complainant employed Boswell & Rose as her agents to buy the land in controversy; that they did purchase it for her benefit on the 19th of March, 1886; that she paid them \$100 of the purchase money; that she left immediately for Cincinnati, with their

knowledge, for the express purpose of obtaining the balance of the purchase money from resources which they had knowledge of; that as soon as she arrived in Cincinnati, on the 27th of March, two days prior to their purchase for themselves, she notified them by telegram of having there obtained the requisite money, and demanded of them an abstract of the title, which they promised to supply. While she was absent, on the 29th of March, only 10 days after she thought that she had secured the property, and while she was going to great trouble and expense to make good her purchase, the defendant Boswell purchased the property, taking the title to himself, and used her \$100 payment in making such purchase. It is also proven and admitted that upon her return to Kissimmee, on or about April 12, 1886, she was then informed for the first time that her agent Boswell had purchased the property for himself. It is also admitted that she at once made a tender to them of the sum of \$2,050, that, added to the \$100 already paid by her, was the amount she had agreed to pay for the property, besides \$10 to cover any expense, and interest on the amount paid out by them. The proof shows that she has acted promptly throughout, and in all good faith. The defendants Boswell & Rose refused her tender of the agreed price, and persisted in keeping and claiming the property as their own. In their letter to her, written on the 29th of March,—the day Boswell purchased the property,—they fail to give any hint to her that they, her agents, had purchased the property; and they fail also to state that they had bought it at considerably less than the price she was to pay. There is no pretense, even, that they had severed their relation towards the complainant as her agents before they dealt for the property for their own benefit; nor is there any pretense that their purchase for themselves was done with her sanction or consent. Under these circumstances, and under the well-settled principles of law above announced, they were properly held to have taken the property in trust for her benefit; and the decree was proper also in requiring her to pay only the amount that they had paid for the property, and in requiring them to account for and render to her the sums for which they had sold portions of the property. It is contended that the decree was erroneous because it requires the defendant Boswell to account for and pay over to the complainant profits that were made by the defendant Rosa A. Rose from sales of portions of the property disposed of by her. The bill charges that the conveyance to one-half of the property made by Boswell to Rosa A. Rose on the same day or the next day after the conveyance by Bryan to him, and, as it turns out in the proofs, for just one-half of the consideration paid to Bryan for the whole, was made for the purpose

of furthering the fraud upon complainant; that said conveyance was a mere pretense, and was made for the benefit of A. J. Rose, the husband of Rosa A. Rose, who, as Boswell's partner, was also the complainant's agent. Rosa A. Rose falls entirely to answer the bill; and her husband, A. J. Rose, when testifying as a witness in the cause, admitted that she obtained the money from her husband to buy her interest in the property. From these circumstances, we think the court below was justified in dealing with Rosa A. Rose's connection with the matter just as though her husband alone, as Boswell's partner, were the real actor in her stead. We are much impressed, from the proofs in the case, that the actions of the defendants Boswell & Rose throughout the entire transaction were not what they should have been from the standpoint of good faith, and that taking the title to Boswell, at the time and under the circumstances disclosed in the proofs, was a fraud upon the complainant, not only in law, but in fact.

The decrees appealed from are affirmed.

(32 Fla. 304)

#### ROBERTSON v. BIDDELL.

(Supreme Court of Florida. June 15, 1893.)

LANDLORD AND TENANT — ACTION FOR RENT — WHEN TENANT MAY DISPUTE TITLE IN LANDLORD.

1. The general rule is that in actions for rent the tenant will not be permitted to question or impeach the landlord's title so long as he holds the possession originally derived from him; but this principle does not forbid the tenant from showing, by way of defense in such cases, that the landlord's title has expired, or has been terminated or extinguished by his own act or by operation of law. The tenant cannot dispute the title of the landlord so long as it remains as it was at the time the tenancy commenced; but he may show that the title under which he entered has expired or been extinguished.

2. Where the plaintiff, in a few days after putting the defendant, as tenant, in possession of the premises, and receiving a month's rent in advance, sells the property to the defendant tenant's wife, delivering a well-defined contract of sale, and, after receiving part of the purchase price, refunds to the defendant, because of such sale, most of the rent paid in advance, and notifies another cotenant on the premises to attorn to the defendant's wife, such acts are tantamount to a surrender by the landlord of his possession to the defendant's wife as his vendee, and he cannot reassert himself with the right to such surrendered possession against his vendee's consent, and without default on the vendee's part, without first getting rid, in some legitimate way, of his contract of sale. His arbitrary revocation of such contract of sale, or refusal to carry it out, and demand for possession or rents, could not of itself, in the absence of default on the vendee's part, reclothe him with the right to the possession of the premises or to rents therefrom, until the rights of his vendee under such contract of purchase had been properly disposed of and determined; and, in a suit by such landlord against his vendee's husband for rents accruing after such sale, the defendant husband can properly set up such sale to his wife by way of defense.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Action by Virginia P. Robertson against George W. Biddell to recover rent. Defendant had judgment, and plaintiff appeals. Affirmed.

William H. Jewell, for appellant. C. F. Alars, for appellee.

TAYLOR, J. The appellant sued the appellee in the circuit court for Orange county by the summary remedy provided in sections 2, 3, 4, pp. 701, 702, McClel. Dig., in distress for rent, in which no written pleadings are necessary under the statute.

It was developed at the trial on the part of the plaintiff that she, through her authorized agents, by written instrument, under seal, dated the 15th of August, 1887, leased the lower story of a certain house in the city of Orlando to the defendant, Biddell, for the period of one month, at a rental of \$15 per month, payable in advance, the lease to continue from month to month for the term of one year, unless the lessor should sooner sell said premises, in which event Biddell was to surrender the premises at any time on 30 days' notice. That Biddell took possession of the premises under said lease, and paid one month's rent in advance. That during the latter part of the month of September, 1887, she made demand upon Biddell for the rent then overdue, and, on default of payment thereof, then demanded possession of the premises, all of which Biddell refused to do, persisting in retaining possession of the premises, and refusing to pay rent therefor. The plaintiff claimed that she was entitled to \$360 for rents from October 1, 1887, to October 1, 1888, the same being double the rent due as per the contract, but allowed as a penalty under our statute where the tenant refuses to deliver possession of premises at the expiration of his lease. Section 15, p. 703, McClel. Dig. That the defendant had paid no rent for any part of that period.

On the part of the defendant, George W. Biddell, it was shown that on or about the 20th of August, 1887, a few days after he took possession of the premises as the tenant of the plaintiff under the above-mentioned lease, his wife, Elgiva A. Biddell, purchased the premises from the plaintiff, one M. O. Crumpler acting as his wife's agent in making said purchase. That he first went into possession under the lease as a renter, but that, after the purchase by his wife, he held the possession by virtue of the sale to his wife. That soon after buying the property he met the plaintiff, who stated to him that she wanted some flowers that were growing on the place, but that now, since she had sold to his wife, she did not feel authorized to take them unless Mrs. Biddell was disposed to give them to her, upon which he told her, if she would send for them, he would give them to her. The plaintiff also

told him that, as they had bought the place before the end of the month for which rent had been paid, she would refund to him the month's rent paid, less the amount that had accrued up to the time of the purchase, and instructed him to call on her agents, Curtis, Fletcher & O'Neal, who would, for her, refund him the money, which he did. That ever since that time he and his family have been in possession of the premises under the purchase. That one De Witt Carter and family occupied the upper part of the building, and, after his wife's purchase, Carter paid rent to him, by instruction from the plaintiff, for some time.

De Witt Carter, for the defendant, testified that he was occupying the upper part of the building at the time it was sold by the plaintiff to Mrs. Biddell, and that, soon after the sale, the plaintiff told him she had sold the place to Mrs. Biddell, and that he should thereafter pay his rent to Mrs. Biddell; that he had consequently paid rent to Mrs. Biddell until the plaintiff, through her attorney, forbade it, and demanded the same to be paid again to her.

Ingram Fletcher, for the defendant, testified that he was a member of the firm of Curtis, Fletcher & O'Neal, who were agents for the plaintiff in renting her property; that he rented the lower story of the premises in question to G. W. Biddell on August 15, 1887, Biddell paying him \$15 for one month's rent in advance; that, about a week after this, Biddell came to his office, and asked that a part of the month's rent that he had paid should be refunded to him, as he had bought the property; that he thereupon saw his principal, the plaintiff, who told him she had sold the place to Mrs. Biddell, and that, if it was right, he might pay back a part of the rent received, upon which he refunded to Biddell all the rent he had paid, except the rents for five days, and 75 cents for commission.

The plaintiff herself was then called as a witness for the defendant, and admitted that the following instrument was signed by her, and was the agreement made between herself and M. O. Crumpler, as agent for Mrs. Biddell, for the sale of the property, to wit:

"Orlando, Fla., August 20th, 1887. Received of Elgiva A. Biddell one hundred dollars, as part payment and earnest money for house and lot described as follows: Beginning at the N. W. corner of block 11, Summerlin's addition to Orlando; running east 150 feet; thence south 75½ feet; thence west 150 feet; thence north 75½ feet, to place of beginning. Consideration to be \$3,300, in payments as per agreement,—\$400 in cash, bal. \$50 per month. [Signed] Mrs. V. P. Robertson."

That she had received \$100 under said agreement on account of the purchase money; and M. O. Crumpler, as Mrs. Biddell's agent, had tendered her \$300 more, which she declined to accept. That there was now pend-

ing in said circuit court of Orange county a bill filed by Mrs. Biddell against her for specific performance of that agreement.

The plaintiff, on her own behalf, was recalled as a witness, and testified that she had signed said agreement of sale under a mistake as to its terms and effect as understood and interpreted by the said Mrs. Biddell and her husband, the defendant, and that, when she discovered that a misunderstanding existed as to the terms and effect of said agreement of sale, she at once tendered back to Mrs. Biddell the \$100 already paid, and subsequently declined to receive the further sum of \$300 when tendered by Crumpler, as agent for Mrs. Biddell, and then notified him, as such agent, that she declined to carry out said agreement of sale because of such misunderstanding, and thereupon, in September, 1887, demanded possession of said premises, which was refused, and also notified De Witt Carter, who occupied the upper story, to pay rent to her. She denied ever having told said Carter to pay rent to Mrs. Biddell. She also denied ever having agreed verbally or otherwise that defendant and wife, or any one else, should have possession of said premises, or any part thereof, under and by virtue of said agreement of sale, or otherwise than under said lease. That, immediately prior to bringing her suit, the possession of the premises and the payment of the rent claimed had been demanded of the defendant, and had been refused by him. That she did consent that her agents, Curtis, Fletcher & O'Neal, should refund a part of the rent paid for August, 1887, but it was done at Mr. Fletcher's suggestion, both of them then supposing the sale of the premises was made on terms fully understood.

Upon this testimony the cause was submitted to the jury, who found for the defendant, upon which judgment was rendered in favor of the defendant, and against the plaintiff, for costs, from which judgment the plaintiff appeals.

At the trial the plaintiff moved that all of the testimony given on behalf of the defendant relating to a sale of the premises, and a change of the right of possession and use thereof under any such sale, be stricken out, on the following grounds: (1) The evidence offered to prove such a sale is an executory contract of sale, which defendant admits has not been carried out, and which he also admits that the plaintiff refuses to carry out, and which contract contains no agreement that the vendee should have possession thereunder. (2) Because, if there was any such possession of said premises granted to defendant by plaintiff, the defendant admits that such possession was revoked prior to the date for which rent is claimed in this suit and possession demanded by plaintiff. The refusal of the court below to grant this motion is assigned as error.

There was no merit in this motion, and no

error in the refusal of the court to sustain it. The entire motion seems to be predicated upon the mistaken idea that a vendor of land can enter into a solemn contract for its sale, put the vendee in possession under such contract, receive part of the purchase money, and then arbitrarily revoke such contract without the consent of the vendee. Neither a court of law or equity can admit any such unilateral right on the part of one party to a contract that takes two to enter into. The evidence sought to be stricken out here was pertinent and material, and established a perfectly legitimate and proper defense in bar of the relief sought. The well-established general rule is that, in actions for rent by landlords against tenants, the tenant will not be permitted to question or impeach the landlord's title so long as he holds the possession originally derived from him; but it is equally well settled that this principle does not forbid the tenant from showing, by way of defense in such cases, that the landlord's title has expired, or has been terminated or extinguished by his own act or by operation of law. The tenant cannot dispute the title of the landlord so long as it remains as it was at the time the tenancy commenced; but he may show that the title under which he entered has expired or been extinguished. *Jackson v. Rowland*, 6 Wend. 667; *Lancashire v. Mason*, 75 N. C. 455; *McGuffie v. Carter*, 42 Mich. 497, 4 N. W. Rep. 211; *Elliott v. Smith*, 23 Pa. St. 131; *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Palmer*, 50 Ill. 202; *Wolf v. Johnson*, 30 Miss. 513; *Otis v. McMillan*, 70 Ala. 46; *Stout v. Merrill*, 35 Iowa, 47; *Shields v. Lozeau*, 34 N. J. Law, 496; 2 *Taylor Landl. & Ten.* (8th Ed.) § 708; *Sedg. & W. Tr. Title Land*, § 358; 1 *Washb. Real Prop.* c. 10, § 8.

In this case, within a week after the defendant was put into possession of the premises under a lease, as the tenant of the plaintiff, the latter sells the property to the defendant's wife, refunds the rent paid in advance, and notifies another cotenant of the premises to attorn to the defendant's wife. These acts upon the plaintiff's part were tantamount to a surrender of her possession as landlord to her vendee, the defendant's wife, and she could not re-vest herself with the right to such surrendered possession, against her vendee's consent, and without any default on the vendee's part, without first getting rid, in some legitimate way, of her contract of sale. Her arbitrary revocation of such contract, or refusal to carry it out, and demand for possession or rents, could not of itself, in the absence of default on the vendee's part, re-clothe her with the right to the possession of the premises or to the rents therefrom, until the rights of her vendee under such contract of purchase had been properly disposed of and determined in some legitimate manner. Under the proofs in the case, we think the verdict of

the jury was proper, and the court's denial of the motion for new trial was proper also.

There are other exceptions and assignments of error thereon in the record, but we deem it unnecessary to notice them further than to say we discover no reversible error in the record, and the judgment appealed from is therefore affirmed.

(32 Fla. 231)

#### PACE v. LANIER.

(Supreme Court of Florida. June 15, 1893.)

##### APPEAL—VERIFICATION OF RECORD.

A bill of exceptions, or that which is tantamount thereto, properly signed and sealed by the judge presiding, is necessary to give verity and authenticity to any exposition of the happenings and proceedings in pais at the trial below, in order that alleged errors at such trial can be considered upon appeal.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Action by Isaac M. Lanier, administrator of John Lanier, deceased, against J. E. Pace, administrator of M. J. Doyle, deceased. Plaintiff had judgment, and defendant appeals. Affirmed.

C. F. Akers, for appellant. W. R. Anno, for appellee.

TAYLOR, J. John Lanier sued M. J. Doyle, in the circuit court of Orange county, in an action of covenant for alleged breaches of covenants contained in a warranty deed to lands sold by Doyle to Lanier. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$3,266.66, besides costs. From this judgment, Doyle appealed to this court. Since the pendency of the appeal here, both the appellant and appellee have died, and, upon the suggestion here of such deaths, J. E. Pace, as administrator of Doyle, has been substituted as appellant, and Isaac M. Lanier, as administrator of John Lanier, has been substituted as appellee.

The record before us upon appeal contains a voluminous amount of what purports to be the evidence of divers witnesses who deposed orally at the trial below, together with various deeds, contracts, and certified copies of records purporting also to have been introduced at the trial below. Copied also in the record before us are various charges purporting to have been given to the jury at the trial. There is also copied into the record a motion for new trial that purports to have been made. But we cannot consider any of this evidence, nor the charges, nor the motion for a new trial, as there is no bill of exceptions signed and sealed by the judge presiding, nor anything tantamount to or resembling a bill of exceptions, to make any of this mass of matter a part of the record in the cause, or that gives to it such authenticity as to enable us to treat or regard

it as any part of the proceedings had at the trial below. In view of this condition of the record before us, there are but two assignments of error that we can consider, and they are as follows: (1) "That the court erred in sustaining demurrer to the plaintiff's (defendant's) plea." (2) "That the court erred in striking plea of abatement." And even these assignments we would be justified in treating as abandoned, since they are not insisted upon in the briefs for the appellant filed here, and we are cited to nothing therein wherein the alleged error exists.

But, as to the first assignment above, we find from the record that the plaintiff, in fact, filed three different declarations at different times; the last two being designated as "amended declarations," but were, each of them, complete within themselves, without reference to the declaration that preceded them respectively in the cause. To each of these declarations the defendant pleaded and demurred at the same time. The defendant's demurrer to the first declaration filed seems to have been voluntarily admitted by the plaintiff, because, without any ruling of the court thereon, the plaintiff, after the filing of such demurrer, filed another declaration curing the principal defect, pointed out by the demurrer, in the first. To this second declaration the defendant again demurred and pleaded at the same time. This demurrer to the second declaration was sustained by the court, and leave granted to the plaintiff to file an amended declaration. The plaintiff then filed his third declaration, and to this third and last declaration the defendant again demurred and pleaded at the same time; the pleas being a substantial reproduction of those filed to the second declaration, and which pleas to the second declaration were demurred to by the plaintiff, and the demurrer thereto sustained. Though these pleas had been held bad upon demurrer when filed as a defense to the second declaration in the case, yet, when reproduced and refiled as a defense to the third and last declaration in the cause, the plaintiff joined issue thereon, and the parties went to trial before a jury upon the issues thus presented and joined. The defendant, therefore, got the full benefit of his pleas, and, though the court may have erred in sustaining the plaintiff's demurrer thereto when interposed as a defense to the second declaration, such error, if there was any, could not have injuriously affected the defendant, for the reason that he got the full benefit of the same pleas by way of defense to the last declaration filed, upon which the trial seems to have been had.

Upon the defendant's demurrer to the last declaration there appears no ruling of the court, and no disposition thereof seems to have been made. The parties, however, seem voluntarily to have gone to trial without such disposal of this demurrer of the defendant, which action upon the defendant's part, under the ruling of this court in Judge v.

Moore, 9 Fla. 269, must be held to be a waiver of such demurrer.

To the second declaration the defendant, as before stated, demurred, and, by a separate plea, pleaded in abatement thereto, and, besides, filed other separate pleas, that were afterwards refiled as defenses to the last declarations filed. This second declaration, to which this separate plea in abatement spoke, was held bad on the defendant's demurrer thereto. After this, when the plaintiff filed his third and last declaration, the defendant did not again interpose thereto the former plea in abatement, or connect such plea in any way with his defenses to the last declaration. The plea in abatement spoke only to the second declaration, so that, even if there was any error in the striking of such plea, the defendant was not injured thereby, since the declaration to which it was intended as a defense was held bad on the defendant's demurrer thereto.

For the reasons already stated, the other errors assigned, based upon the evidence in the cause and the charges of the court, cannot be considered; and, finding no errors apparent upon such portions of the record as can be considered by us, the judgment appealed from is affirmed.

(32 Fla. 344)

#### NELSON v. STATE.

(Supreme Court of Florida. July 15, 1893.)

MURDER—VERDICT—FAILURE TO SPECIFY DEGREE—CHARACTER, HOW PROVED.

1. Under section 2383, Rev. St., a verdict that fails to specify the degree of homicide of which it finds the defendant guilty is a nullity, and no sentence can legally be pronounced thereon.

2. Where a witness, by whom it is designed to impeach the character of another for veracity, testifies that he knows the general reputation of the party to be impeached in the neighborhood in which such party lives for truth and veracity, the foundation for proving what that reputation is has been sufficiently laid, and the witness thus laying such foundation should be permitted to go on and testify as to what the reputation is, and whether he would believe such party under oath, without being interrupted by a cross-examination to test the extent and sources of his information as to such character. The proper practice in testing, by cross-examination, the extent and sources of the knowledge or information of such impeaching witness is to defer it until the witness has been turned over in regular order for cross-examination in general at the close of the examination in chief.

3. When character for peacefulness or turbulence is put in issue, the general rule is that it must be established by evidence of the general reputation of the party in the community for such character, and not by evidence of specific acts or conduct on particular occasions; and the proof in rebuttal in such cases should be confined also to general reputation, and not be allowed to go into specific acts or conduct on particular occasions.

(Syllabus by the Court.)

Error to circuit court, Marion county; Jesse J. Finley, Judge.

John Nelson, Jr., was convicted of murder in the first degree, and brings error. Reversed.

Miller & Spencer, for plaintiff in error.  
William B. Lamar, Atty. Gen., for the State.

**TAYLOR, J.** The plaintiff in error was indicted and tried at the fall term, 1892, of the circuit court for Marion county, for murder in the first degree of one Charles Davis, the trial resulting in the following general verdict, viz: "We, the jury, find the defendant guilty." Upon the refusal of the court below to grant his motion for a new trial, the defendant was sentenced to die, and brings his case here by writ of error.

The insufficiency of the verdict in not specifying the degree of murder of which it finds the defendant guilty is assigned as error. This court, at its last term, in the cases of *Hall v. State*, 31 Fla. —, 12 South. Rep. 449; *Lovett v. State*, 31 Fla. —, 12 South. Rep. 452; and *Murphy v. State*, 31 Fla. —, 12 South. Rep. 453,—held that under the provisions of section 2383, Rev. St., such a verdict is a nullity, and that no judgment or sentence could legally be pronounced thereon. This error is fatal to the judgment and sentence appealed from, and necessitates its reversal.

At the trial the defendant introduced several witnesses for the purpose of impeaching the character for truth and veracity of one of the witnesses for the state, by proof that such witness' reputation for truth and veracity in the community in which he lived was bad, and that no credence would be given to his evidence under oath. After the defendant's witnesses, introduced for this purpose, had testified that they knew the state's witness, and knew his general reputation in the neighborhood in which he lived for truth and veracity, the court, over the defendant's objection, permitted the state attorney to break into the examination in chief by a cross-examination as to the sources and extent of the knowledge of the parties as to the reputation and character of the witness to be impeached, which ruling of the court was excepted to, and is assigned as error. The case of *Robinson v. State*, 16 Fla. 835, settles the practice in such cases. When the impeaching witnesses had answered that they knew the party to be impeached, and knew his general reputation for truth and veracity in the community where he lived, the foundation for proving what that reputation was had been sufficiently laid, and the court should not, at this juncture, have permitted the state attorney to interfere with the examination in chief by a cross-examination as to the sources and extent of their knowledge and information as to such reputation, but should have permitted the defendant to proceed with his examination in chief, and should have allowed the witnesses to state what that reputation was, and whether from that repu-

tation they would believe the party under oath. When turned over for general cross-examination in regular order, at the close of the examination in chief, the state attorney could then, by cross-examination, test the extent of the information of the witnesses and the sources of their knowledge. This departure, however, from the proper practice in such cases, we do not now decide to be reversible error, as the court below necessarily has a wide discretion in all matters touching the order in which evidence shall be admitted.

On the cross-examination of one of the defendant's witnesses, by whom the general reputation and character of the defendant as a peaceful and law-abiding citizen had been put in proof, the state attorney was permitted by the court, over the defendant's objection, to put the following question to the witness: "Did you not hear or know, about one week or ten days before the shooting of which the defendant is now charged, that he was charged in your neighborhood with shooting into a house with a lot of women in it, and that the pistol was taken away from him?" Exception was taken, and this ruling was assigned as error. The court erred in permitting this question. When character for peacefulness or turbulence is put in issue in such cases, the general rule is that the proof thereof must be made by evidence of the general reputation of the party in the community for such character, and not by evidence of specific acts or conduct on particular occasions, (*Garner v. State*, 28 Fla. 113, 9 South. Rep. 835;) and, when such character is put in issue, the proof interposed in rebuttal must be confined also to general reputation, and not allowed to go into specific acts or conduct on particular occasions.

For the error in the verdict rendered, the judgment and sentence of the court below are reversed. and a new trial ordered.

(30 Ala. 231)

#### STATE v. HARTFORD FIRE INS. CO.

(Supreme Court of Alabama. June 22, 1893.)  
STATUTES—PROVISIONS GERMANE TO TITLE—FOREIGN CORPORATIONS—LICENSES.

Act Feb. 18, 1893, § 4, (Acts 1892-93, p. 690,) providing that no foreign corporation "shall hereafter carry on any business in this state without first having paid into the treasury of the state" like fees as those required by corporations created under the laws of the state, applies only to such corporations as may commence business after the passage of the act, and, thus construed, is germane to the title, which is "to require all corporations to pay a fee or license for the use of the state before commencing business" therein.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Action by the state of Alabama against the Hartford Fire Insurance Company to recover a license fee of \$250 for the privilege of doing business within the state. Defendant

had judgment, and the state appeals. Affirmed.

The act under which this action was brought is as follows: "An act to require all corporations to pay a fee or license for the use of the state before commencing business in this state. Section 1. Be it enacted by the General Assembly of Alabama, that hereafter, before any commission shall be issued to any corporation organized under the general incorporation laws of this state, authorizing such corporation to do business, the parties to whom the same is issued shall pay to the judge of probate or other officer issuing the same the following fees, for the use of the state: Where the proposed capital stock of such corporation does not exceed fifty thousand dollars, a fee of twenty-five (\$25) dollars; where it exceeds fifty thousand dollars, but does not exceed one hundred thousand, a fee of fifty (\$50) dollars; where it exceeds one hundred thousand dollars, but does not exceed two hundred and fifty thousand, a fee of seventy-five (\$75) dollars; where it exceeds two hundred and fifty thousand dollars, but does not exceed five hundred thousand, a fee of one hundred (\$100) dollars; where it exceeds five hundred thousand dollars, but does not exceed one million, a fee of two hundred (\$200) dollars; where such proposed capital stock exceeds one million dollars, two hundred and fifty (\$250) dollars. Sec. 2. Be it further enacted, that all fees so paid shall be paid by the officer receiving the same into the state treasury in the same manner as licenses and other fees belonging to the state are now required to be paid by such officer. Sec. 3. Be it further enacted, that before any bill for the creation of any corporation by any special act of the general assembly of this state shall be introduced, there shall be paid into the treasury of the state, by the parties seeking the same, double the amount of fees herein above required to be paid by corporations organized under the general incorporation law of the state: provided, if such charter should not be granted by the legislature, the money so paid shall be refunded to the person paying the same. Sec. 4. Be it further enacted, that no corporation created by the laws of any other state or of any foreign country shall hereafter carry on any business in this state without first having paid into the treasury of this state, for the use of the state, like fees as those required of corporations organized under the general incorporation laws of this state by the first section of this act. Sec. 5. Be it further enacted, that all contracts made in this state after the first day of July, 1893, by any corporation which has not first complied with the provisions of this act, shall be wholly void. Sec. 6. Be it further enacted, that it is the intention of this act that the fee or license hereby required shall be paid once only, and that such payment does not relieve any corporation from the duty of complying with the requirements of

existing laws. Approved February 18, 1893." The defendant demurred to the complaint on the ground that the statute on which it was founded was unconstitutional. This demurrer being overruled, the defendant set up by special plea the defense which is shown in the opinion. The plaintiff demurred to this special plea on the ground that the matters and things alleged in said plea constituted no defense to the action, which was stated in various forms. The demurrer was overruled, and, issue being joined, there was verdict and judgment for the defendant.

Wm. L. Martin, Atty. Gen., for the State.  
Tompkins & Gray, for appellee.

STONE, J. This is a suit by the state against a foreign insurance company, and is sought to be maintained under the act approved February 18, 1893, (Acts 1892-93, pp. 690, 691.) The sole question presented for our consideration is the judgment of the city court overruling plaintiff's demurrer to defendant's plea in bar. The suit was commenced in May, 1893, and it is averred in the complaint that the defendant, a corporation created by the laws of Connecticut, with a capital stock of \$1,250,000, and "authorized by its charter to engage in the business of issuing policies of fire insurance, did engage in said corporate business, and did issue policies of fire insurance, within the state of Alabama after the 18th day of February, 1893, and has continued to engage, and is now engaged, in said business within said state, without having first paid into the treasury of said state, for the use of the state, a fee or license of two hundred and fifty dollars, as required by law." This complaint corresponds with section 4 of the act approved February 18, 1893, if we consider that section without reference to other parts of the statute.

The defense pleaded may be thus stated: That before the enactment of that statute the defendant, having been previously incorporated and organized under the laws of Connecticut, did comply with all the provisions of section 1200 of the Code of 1886, (they are set out in detail in the plea,) did pay the license fee, \$100, into the treasury of Alabama, and obtained a license from the state auditor, authorizing it to conduct and transact the business of fire insurance in this state until January 15, 1894; and that thereupon, and before February 18, 1893, to wit, January 1, 1893, "this defendant commenced doing business in the state of Alabama, and was and continuously did business in the state of Alabama up to the said 18th day of February, 1893; and was on said 18th day of February, 1893, doing business in the state of Alabama, and had been for many years prior to said 18th day of February, 1893, carrying on its business in said state of Alabama, and did not commence carrying on such business after said

date." The precise point of the plea and defense is that the statute of February, 1893, has reference alone and exclusively to corporations which should thereafter commence doing business in the state of Alabama, and that it does not and cannot apply to corporations which had commenced business before the statute was enacted, and were engaged in business at the time of the enactment. This defense is rested on the title of the act of February 18, 1893, which is in the following language: "An act to require all corporations to pay a fee or license for the use of the state before commencing business in this state."

The constitution of Alabama (article 4, § 2) declares that "each law shall contain but one subject, which shall be clearly expressed in its title," with certain exceptions, not pertinent to this case. That section has been many times considered and very fully discussed by this court. Our uniform interpretation has been that the clause is mandatory; and that, if a statute embodies any matter which is not germane to and embraced in the title, such clause must be pronounced unconstitutional. We deem it unnecessary to repeat the arguments. They are fully set forth in the following decisions, and in the many authorities therein referred to: *Ballentyne v. Wickersham*, 75 Ala. 533; *Lowndes County v. Hunter*, 49 Ala. 507; *Stein v. Leeper*, 78 Ala. 517; *Miller v. Jones*, 80 Ala. 89; *Ramagnano v. Crook*, 85 Ala. 226, 3 South. Rep. 845; *Ex parte Reynolds*, 87 Ala. 138, 6 South. Rep. 335; *Montgomery v. State*, 88 Ala. 141, 7 South. Rep. 51; *Ex parte Cowert*, 92 Ala. 94, 9 South. Rep. 225.

It will be observed that the title of this act uses the word "commencing," present participle of the verb "to commence." The definition of the verb "to commence" is: "To cause to begin to be; perform the first act of; enter upon; begin." Cent. Dict. "To begin; to originate; to do the first act in anything; to take the first step." Webst. Dict. Each of these definitions shows that the title of the statute we are considering is clearly inappropriate to a business already begun and in continuing operation. It must and does relate to a business thereafter to be entered upon. The first three sections of the act of February 18, 1893, refer in terms to Alabama corporations to be organized after the enactment of the statute. They could not by any straining be made applicable to corporations then existing. These are clearly within both the letter and the spirit of the title of the act. The fourth section of the statute is in the following language: "No corporation created by the laws of any other state or any foreign country shall hereafter carry on any business in this state without first having paid into the treasury of this state, for the use of the state, like fees as those required of corporations organized under the general

incorporation laws of this state by the first section of this act." The natural import of this language, considered by itself, is that it embraces foreign corporations then doing business in the state, and proposing to continue to do such business. This, however, would make this clause of the statute unconstitutional, because neither expressed nor embraced in the title of the act. It is our duty, in interpreting legislative enactments, to presume there was an intention to conform to the constitution; and to so construe any doubtful word or clause as to make it constitutional, rather than make it unconstitutional by a contrary interpretation. Thus construing section 4 of the act under consideration, we hold that the intention was to make it operative upon foreign corporations thereafter to commence business in Alabama, and not to such as were already doing business within the state. To thus construe it brings section 4 clearly within the purview of the title of the act, while the construction contended for by appellant would make it unconstitutional. The judgment of the city court is affirmed.

(38 Ala. 440)

## HUBBARD et al. v. BUCK.

(Supreme Court of Alabama. May 23, 1893.)

## VENDOR'S LIEN—WHEN EXISTS.

Complainant conveyed to his brother land held by them in common. The brother, who was about to form a partnership with a third person, desired to put the whole of said land into the firm, as his contribution to the capital. He and complainant both testified that the conveyance was made to enable him to do this. Complainant said he knew nothing of a vendor's lien. *Held*, that no such lien was reserved, but that reliance was placed solely on the credit of his brother.

Appeal from chancery court, Mobile county; William H. Tayloe, Chancellor.

Bill by John E. Buck against Hubbard Bros. Decree for complainant. Respondents appeal. Reversed.

Pillans, Torrey & Hanaw, for appellants. Faith & Erven, for appellee.

COLEMAN, J. John E. Buck filed the present bill to enforce a vendor's lien upon certain land described in the bill of complaint. John E. Buck and William J. Buck owned the lands in fee, as tenants in common; and by deed absolute in its terms, dated November 17, 1890, John E. Buck conveyed the land to his cotenant, William J. Buck, and in the deed acknowledged payment of the consideration. On the 14th of November, 1890, W. Otis McMahon and William J. Buck, copartners doing business as McMahon & Buck, executed a mortgage upon the lands to appellants, Hubbard Bros., the consideration of the mortgage being the extension of a past due debt for \$2,700, and a cash loan of \$1,500. At the time of the execution of the mortgage, Hubbard



Bros. had knowledge that the legal title to a half interest in the lands was in John E. Buck, the complainant. On the 28th of November, 1890, the grantee, William J. Buck, conveyed the same lands, in fee, to the copartnership of McMahon & Buck. McMahon knew that his copartner, William J. Buck, made no payment of the purchase money for the half interest in the land to his vendor, John E. Buck, the complainant. Whatever interest McMahon & Buck held in the land by virtue of the conveyance from John E. Buck to William J. Buck, and from William J. Buck to the copartnership of McMahon & Buck, inured to Hubbard Bros., under and by virtue of the mortgage executed to Hubbard Bros. on the 14th of November, 1890. *Chapman v. Abrahams*, 61 Ala. 114. The evidence satisfactorily shows that, when John E. Buck executed the deed to William J. Buck, he had no knowledge that Buck & McMahon had mortgaged the land to Hubbard Bros.

The sole question, then, is whether John E. Buck waived the vendor's lien when he conveyed the land to his brother, William J. Buck. There is no material conflict in the evidence upon which the determination of this question depends. In every sale and conveyance of lands, when the purchase money is not paid, although the deed may recite the payment of the purchase money, without any special contract to that effect, upon principles of equity and good conscience, the law presumes the reservation of the vendor's lien, unless the terms of the contract of sale, or the attendant circumstances of the transaction, satisfactorily show it was purposely excluded, and the vendor relied upon the personal credit of the vendee, or other security was taken and relied upon by the vendor. The testimony of the vendor, John E. Buck; and his vendee, William J. Buck, satisfactorily shows the following facts, which led to the conveyance of the deed to William J. Buck: J. Otis McMahon and William J. Buck formed the copartnership of McMahon & Buck, the purpose of which was to engage in the lumber business. McMahon agreed to put in the firm \$8,000 in cash, and William J. Buck agreed to put in 4,000 acres of land, at a valuation of \$2 per acre. John E. Buck knew of this copartnership, and its terms, and the undertaking of his brother to put in the firm 4,000 acres of land. William J. Buck testifies that his brother, John E. Buck, had promised to make him a deed in fee to the land, whenever he would request it, in order to enable him to comply with his agreement with McMahon to put in the firm 4,000 acres of land. William J. Buck further testifies that his confidence in his ability to get this deed from John E. Buck at any time was his reason for mortgaging the lands to Hubbard Bros. absolutely before he received the conveyance from his brother. He says that, upon his

promise to pay his brother for the land at the valuation as put into the firm of McMahon & Buck, his brother agreed to let him treat the land as his own. "We treated the land as assets of McMahon & Buck in making the mortgage to Hubbard Bros." "The land was put in as my contribution of capital to the firm of McMahon & Buck." John E. Buck testifies as follows: "I did fully know when I signed the deed of my half interest in the lands described in the bill that I did so to enable William J. Buck to keep good his promise to his partner, McMahon, to put the whole of said lands into the firm of McMahon & Buck, as a part of his contribution to the firm." "I made the deed to W. J. Buck without any knowledge of what he anticipated, except that he wanted to make deed of said land to McMahon & Buck. \* \* \* I knew nothing of a vendor's lien." These facts are conclusive to show that no vendor's lien was reserved, or intended to be reserved, as against the firm of McMahon & Buck. If McMahon agreed to put in \$8,000 in cash, and William J. Buck 4,000 acres of land at \$2 per acre, as an equivalent contribution, and John E. Buck conveyed this land to William J. Buck "to enable him to keep good his promise to his partner, McMahon, and that he might make the deed to McMahon & Buck as a part of his contribution to the firm," such a purpose is utterly inconsistent with a reservation of a vendor's lien upon the land. He could not enforce the lien against McMahon & Buck. Their mortgagees, Hubbard Bros., succeeded to whatever right they possessed and owned. Testing the question by complainant's testimony and that of his brother, the vendor, leaving out altogether the evidence of McMahon, which corroborates them in all respects, as far as admissible, there is but one legitimate conclusion, and that is that complainant relied entirely upon the credit of his brother, when he conveyed to him the land. This is the effect of the direct testimony of William J. Buck and complainant. The court erred in holding that complainant had not waived his lien, and that he was entitled to a vendor's lien upon the land. *Carver v. Eads*, 65 Ala. 190; *Jackson v. Stanley*, 87 Ala. 270, 6 South. Rep. 193; *Crampton v. Prince*, 83 Ala. 246, 3 South. Rep. 519; *Kelly v. Karsner*, 81 Ala. 500, 2 South. Rep. 164. The decree of the chancellor is reversed, and a decree will be here rendered, dismissing complainant's bill.

(36 Ala. 315)

STEINER et al. v. TRANUM.

(Supreme Court of Alabama. May 25, 1893.)  
TROVER AND CONVERSION—EVIDENCE—DOCUMENTS  
—EXCHANGE OF WIFE'S PROPERTY—VALIDITY.

1. In trover for a horse, on an issue as to whether R., under whom defendants claimed, or R.'s wife, under whom plaintiff claimed, was the owner of the horse, plaintiff testified

as to his purchase from R.'s wife, and gave in evidence his purchase-money note. *Held* that, as the note was not a muniment of title, but merely incidental to the main issue, its execution need not be proved by the subscribing witness.

2. In such case, a question asked of R.'s wife as to what became of another horse obtained at the same time from the same person was rightly excluded.

3. Plaintiff's rights under his purchase from R.'s wife could not be affected by the fact that in a settlement subsequently made between R. and his wife and defendants the latter gave credit for the horse, and that R. claimed the horse in his wife's presence, and got credit for it.

4. Ownership of personal property is a fact to which a witness may testify.

5. In trover for a horse, what the horse sold for on a sale under defendants' mortgage, after it had been taken from plaintiff, and while the title was in dispute, is not evidence of its value as against plaintiff.

6. A sale of the entire property in a chattel by one tenant in common is a conversion as against his cotenant.

7. An objection that a question is "illegal" does not raise the point that it calls for a legal conclusion.

8. Under Act Feb. 28, 1887, providing that personal property of the wife may be sold, exchanged, or otherwise disposed of by the husband and wife by parol or otherwise, an unauthorized exchange of the wife's property by the husband is validated by her ratification thereof.

Appeal from circuit court, Butler county; John P. Hubbard, Judge.

Trover by G. L. Trantum against Steiner Bros. & Co. for the conversion of a horse. Judgment for plaintiff, and defendants appeal. Affirmed.

The defendants requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If you find from the evidence that after the law day of the Jordan mortgage Russell and wife traded the horse to Trantum, the title so derived by Trantum would not enable him to recover of the defendants in this action." (2) "That if Russell traded two mules, and gave \$40 for two horses, and one of which horses was the one in controversy, and you further find that one of the mules so traded was acquired by Russell from Dr. Jones for corn raised by Russell in the year 1889, then Mr. and Mrs. Russell would be joint owners of the horse in controversy, and the plaintiff cannot recover." (3) "That if you find from the evidence that Mr. Russell obtained one of the mules from the stock derived from Dr. Jones, for which he paid corn raised by him, (Russell,) and the other mule was derived from stock traded or derived from a yoke of oxen of Mrs. Russell; and you further find that Mr. Russell paid \$40 in money and the two mules for the two horses,—then Mr. and Mrs. Russell would be the joint owners of the two horses, and the plaintiff cannot recover." (4) "If you find that the property of Mr. and Mrs. Russell paid for the cream horse, your verdict should be for the defendants."

J. C. Richardson, for appellants. M. W. Rushton, for appellee.

HEAD, J. Trover by appellee, Trantum, against appellants, Steiner Bros. & Co., for the conversion of a horse. Appellants, Steiner Bros. & Co., took the horse from the possession of appellee, Trantum, under a mortgage executed to them by M. A. Russell. Trantum claimed to have purchased and acquired possession from Mrs. M. A. Russell, the wife of said M. A. Russell. His purchase was subsequent to the execution and registration of Steiner Bros. & Co.'s mortgage. The sole controversy was whether the horse, when the mortgage was executed, was the property of M. A. Russell or of his wife. We will dispose of the assignments of error as they are presented and insisted upon in the brief of appellant's counsel.

1. The plaintiff testified that about the middle of January, 1892, he traded a mule to M. A. Russell for the horse in controversy, and was to give \$25 to boot; that five or six days after the trade he executed his note to Mrs. Russell for \$25. The defendants' objections to secondary evidence of this note, if well taken, were obviated by the subsequent introduction of the note itself.

2. The defendants objected to the introduction of the note, because its execution was not proved by the subscribing witness, that proof being made by the testimony of Mrs. Russell and the plaintiff. The plaintiff's alleged purchase and acquisition of title from Mrs. Russell rested in parol. The note he executed to her was not a muniment of his title, but was a mere circumstance of the purchase, showing, in connection with the other evidence, the consideration of the purchase, and how it was evidenced or paid. The note was incidental merely to the main issue, and it was not necessary to call the subscribing witness to prove its execution.

3. Ownership of personal property is a fact to which a witness may testify. On cross-examination such witness can be required to state the particular facts on which the claim of ownership rests. *Daffron v. Crump*, 69 Ala. 77; *Nelson v. Iverson*, 24 Ala. 9. There was no error, therefore, in permitting Mr. and Mrs. Russell to testify to the latter's ownership of the horse in controversy, or of the property traded for the horse.

4. The horse sued for was acquired by an exchange of other stock, effected by M. A. Russell, with one Scott. The plaintiff introduced evidence tending to show that the property so given in exchange belonged to Mrs. Russell. M. A. Russell was permitted to testify that his wife consented to the trade when he came home. Mrs. Russell was also asked, "When your husband brought the horse home from Montgomery that he got from Scott, did you ratify his trade?" The defendants objected to this question on the following grounds: (1) Because it is illegal; (2) because it is irrelevant; (3) because her ratification could not vest title in her; (4) because her ratification could not effect title; (5) because her ratification could not effect

plaintiff's title. The court overruled these objections, and defendants excepted. The witness answered that she did ratify the trade. It will be observed that neither of these specific objections raises the point that the question called for the legal conclusion of the witness. The objection that it was illegal was general, and insufficient to apprise the court of the particular cause or ground of illegality. The court was, therefore, in ruling on the objections, justified in considering only those grounds specifically pointed out. The question then presented is whether the wife's subsequent consent to and ratification of her husband's unauthorized barter or exchange of her separate personal property for other property is effective to legalize the barter, and vest title in her to the property received in exchange. Under our former system of laws regulating the separate estates of married women, this question was answered in the negative. Nothing less than the joint deed, in writing, of husband and wife, was efficient to divest her of title. She could not ratify a sale or exchange of her statutory separate property made by the husband. *Williams v. Auerbach*, 57 Ala. 90; *Reeves v. Linam*, Id. 565; *Evans v. English*, 61 Ala. 416; *Pollak v. Graves*, 72 Ala. 347; *De Bardelaben v. Stoudenmire*, 82 Ala. 574, 2 South. Rep. 488. If the husband made an exchange of his wife's statutory separate property for other property, the title to that acquired vested in him, and passed to his mortgagee. *Evans v. English*, *supra*. Was this rule modified by the new married woman's law of February 28, 1887, so as that the wife's ratification of an unauthorized exchange made by the husband has the effect of validating the exchange? We think it was. Section 2348 of the Code of 1886, comprising a part of the act of February 28, 1887, provides that the personal property of the wife, or any part thereof, may be sold, exchanged, or otherwise conveyed or disposed of by the husband and wife, by parol or otherwise. Manifestly all that is required by this statute is the assent of both husband and wife to the sale or exchange. And it is not essential that such assent be manifested by any writing or other particular mode. A fair construction of the statute does not require that both shall be actually present, and jointly express their assent, at the time and place the sale or exchange is made. If one authorizes the other to make the contract, and it is done in pursuance of that authority, there is the necessary assent of both. What may be authorized may be ratified. We hold, therefore, that it was competent for the plaintiff to prove the wife's subsequent consent to and ratification of the exchange made by her husband.

5. The defendants, on cross-examination of Mrs. Russell, asked her what became of the other horse obtained from Scott. On objection by plaintiff, defendants' counsel stated that he expected to prove that the witness

made claim to that horse just the same as she did to the horse in controversy. We are unable to see the legality or relevancy of the proposed testimony, and counsel do not indicate to us on the brief wherein it was legal or relevant.

6. It was clearly not competent to prove against plaintiff, who had purchased long before, that defendants made a settlement with M. A. Russell and wife, and gave them credit on their demand for the horse, and that M. A. Russell then claimed the horse as his own, in the presence of his wife, and got credit for it. Plaintiff was not present, and his rights could not be affected by such acts and declarations.

7. What the horse sold for at forced public sale under a mortgage, in accordance with terms prescribed by other parties, and with which the plaintiff had no connection, is no legal criterion of value as against the plaintiff. The horse had been taken by the mortgagee from plaintiff's possession, and the title was in dispute. Whether a purchaser at such a sale would acquire a title depended upon the determination of that dispute. It would be an unsafe rule which would permit the price at which the property sold at such a sale to be considered as evidence of its value. It appears that M. A. Russell and wife executed a mortgage on the horse to one Jordan on November 17, 1890, but it was not recorded, and plaintiff had no notice of it at the time of his purchase. It was, subsequently to the conversion complained of, transferred to the defendants. It is too obvious for discussion that this mortgage exerts no influence whatever upon this case. The first charge requested by defendants was, therefore, properly refused. The facts hypothesized in the second, third, and fourth charges requested by the defendant, if true, do not constitute a bar to this entire action. If M. A. Russell owned an interest in the horse in common with his wife, or jointly with her, his mortgage to defendants passed that interest to them, and they thereby became, in effect, tenants in common with Mrs. Russell; and, she having sold to plaintiff, which sale passed to him her interest, defendants became, in effect, tenants in common with plaintiff. A sale of the entire property in a chattel by one tenant in common is a conversion, for which trover may be maintained by his cotenant. *Smyth v. Tankersley*, 20 Ala. 212. These charges were therefore properly refused. This disposes of the questions raised by the record. We are unable to relieve against the injustice which the verdict manifestly accomplished in this case. Evidently the jury attached too great weight and importance to the general testimony of Mr. and Mrs. Russell that she was the owner of the horse. While, under our rulings, testimony of that character is admissible to serve a *prima facie* showing of ownership, yet it is so admitted in view of the principle that the witnesses so testifying may be

compelled on cross-examination to state the facts in detail upon which the claim of ownership is based; and when, as in the present case, the general statement of ownership is overwhelmed by the facts given in detail by the same witnesses, we are at a loss to conceive how the triers of fact can disregard those facts, and adopt rather the general statements of the witnesses; or how the court, if the exercise of its power over verdicts be invoked, can suffer such a finding to stand. This record presents no proceedings for a new trial, and, of course, our revisory jurisdiction in the matter of new trials cannot be exercised. The judgment of the circuit court is affirmed.

(98 Ala. 461)

**HUMES et al. v. DECATUR LAND IMPROVEMENT & FURNACE CO.**

(Supreme Court of Alabama. May 24, 1893.)

**ATTORNEY AND CLIENT—ACTION FOR SERVICES—CONTRACT—EVIDENCE—INSTRUCTIONS.**

1. In an action against a corporation to recover for services as associate counsel in an action in which defendant was interested, but not a party, it is not error to permit defendant to ask plaintiff, on cross-examination, what would be a reasonable fee for such services, "employed at the time your firm was employed, to obtain specific performance of that contract, independent of the value of the land, looking only to the pleadings representing plaintiff's interest in said cause," especially where there appears to be no contention as to the value of the services.

2. Where it appears, in such case, that one B. was defendant's general counsel, and it contends that plaintiffs were not employed by it, evidence as to whether or not defendant paid B. and its president a salary is properly excluded.

3. It is error to admit in evidence a section of defendant's by-laws to show how B.'s and the president's "compensation was fixed," or for any other purpose, when there is no pretense that plaintiffs had any knowledge of the existence of such by-law.

4. Where defendant's president was plaintiff in the case in which such services were rendered, and he employed them, it is not error to refuse to charge that if, at the time, nothing was said by either party as to the capacity in which he was acting, plaintiffs "had the right to presume, from all the circumstances of the case, that he was acting for and on behalf of defendant," when the court cannot say that there is no evidence, other than the conversation had at that time, tending to rebut the circumstances which tend to show that defendant employed plaintiffs.

5. Where the president of a corporation, who is authorized to make contracts for it, employs attorneys to render services in an action to which he is a party, and in which the corporation is also interested, and the interests of both are fully disclosed to such attorneys, and nothing is said as to who is to be liable for such services, both the president and the corporation are liable.

6. Though plaintiffs were originally employed to represent such president personally, a subsequent contract with defendant for their services, which imposed on them no additional duty, is not void for want of consideration, where its interest was many times greater than its president's.

7. Instructions that defendant is not liable unless plaintiffs were employed by it, though it was benefited by the services rendered, irre-

spective of what plaintiffs understood as to its liability, are not erroneous.

8. There was evidence that the particular services plaintiffs were to render were originally agreed on, but that they were afterwards required to render greater services than those agreed on; that some of the latter services were rendered at the instance of the president of defendant, who succeeded the one who originally employed them; and that all the services rendered were accepted by it. *Held*, that instructions which ignored such testimony were erroneous.

9. An instruction that proof that the services were performed is not sufficient to render defendant liable, unless there is also proof of knowledge and recognition thereof as having been rendered at the instance and request of defendant, is not erroneous.

10. An instruction to the effect that defendant is not bound by statements or admissions made by its officers after such services were rendered is not reversible error.

11. It is error to charge, in such case, that if a contract was made between defendant's president and plaintiffs for services in the cause in which he was plaintiff, and a specified compensation was agreed on therefor, the verdict must be for defendant.

12. It is also error to charge that the jury may consider the fact that defendant had no enforceable right under its contract with its president, in connection with all the other legal evidence in the case, to determine whether it employed plaintiffs to assist in enforcing a contract between him and a third person, in which it had no enforceable interest.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by Humes, Walker & Sheffey against the Decatur Land Improvement & Furnace Company to recover for professional services as attorneys. From a judgment for defendant, plaintiffs appeal. Reversed.

The facts attending the employment of the plaintiffs, as shown by the witnesses introduced in their behalf, were as follows: In the early part of the year 1888, Judge Brickell, who was the general counsel of the defendant, telegraphed to Mr. Humes, of the plaintiff firm, to come to Decatur; that, in response to said telegram, Mr. Humes went to Decatur, and there, in conversation with Major Gordon, who was then the president of the company, Mr. Harris, who was one of the directors, and Judge Brickell, the conversation which led up to the employment of the plaintiffs was had. The evidence for the plaintiffs further tended to show that, in this conversation, Mr. Humes was told that the gentlemen with whom he was talking desired to secure the services of his firm in the litigation of *Gordon v. Bean and Williams*. The substance of the litigation is sufficiently stated in the opinion. Mr. Humes testified that during this conversation he was told that it was a matter of great importance to the company that a speedy and successful termination of the suit be obtained, and that any other result would be disastrous, and that this was the principal reason stated to him for the employment of his firm in the suit. He was thereupon given a history of the transactions involved in the suit, and immediately thereafter commenced to "render services for which he was employed." Upon

further testifying, this witness stated that he had no recollection of any specific agreement or understanding as to what amount the compensation would be, but he understood, and it was so stated, that his firm was to be employed in the case for the benefit of, and to render services for, the Decatur Land Improvement & Furnace Company, and that he understood that he was to be paid by said company. There was also evidence to the effect that while the suit was being prosecuted, nominally, in the name of Gordon, it was for the benefit of the defendant in this cause; and that, while Gordon took part in the conversation in which the plaintiffs' firm was employed, Mr. Humes was not employed by him in his individual capacity, but in his capacity as president of the defendant. Judge Brickell, as a witness, testified that he was not willing to take all of the responsibility, and after talking over the matter with Mr. Harris he saw Major Gordon, and told him to employ Capt. Humes, and that he insisted upon it, whereupon Capt. Humes was telegraphed for, and his services engaged. Mr. Gordon, as a witness, testified that, about the middle of July, Judge Brickell said to him that the case of Gordon v. Bean was pending, and that he and Mr. Harris had gotten pretty well through with the cause, but that there were two or three other witnesses in the case whose depositions had to be taken, and they needed the services of some other attorney to take their testimony; that Judge Brickell suggested the employment of Capt. Humes, as he "had special tact for business of that sort." This witness further testified that after the arrival of Mr. Humes in Decatur, in response to a telegram, and in conversation with him when alone, he (Gordon) employed Mr. Humes, and agreed upon a fee of \$250; that at the time he had this conversation, and employed Mr. Humes, he did not suppose there was a great deal of work to be done, and regarded this a reasonable fee,—and further testified: "I made the contract with him individually, to protect my individual interests." There was testimony, introduced without conflict, showing that the plaintiffs performed a great deal more work than that for which they were originally employed, and that they were of counsel in the case up to the time of its final settlement. There was also evidence introduced by several attorneys that the services performed by the plaintiffs in the case involved were reasonably worth \$5,000. Upon the examination of Mr. Sheffey as a witness, he testified that he was one of the partners of the plaintiff firm. He was asked on cross-examination the following question: "In the case of Gordon v. Bean, what, in your judgment, would be a reasonable fee for the services, as associate counsel, employed at the time your firm was employed, to obtain specific performance of that contract, independent of the value of the land, looking only to the pleadings representing

plaintiff's interest in said cause?" The plaintiffs objected to this question on the ground that it was irrelevant and immaterial testimony. The court overruled the objection to this question, and the plaintiffs excepted. The witness answered: "The whole fee should have been ten per cent."

The plaintiffs requested the following written charge, and duly excepted to the court's refusal to give said charge: (3) "If the jury believe from the evidence that the plaintiffs were employed in the said chancery case of Gordon v. Bean and Williams by the said Gordon, and at the time of such employment he was the president of the defendant, and if the jury further find that at the time of such employment nothing was said by either of the parties to said conversation as to the capacity in which the said Gordon was acting, in contracting for such employment, the said Humes and the other plaintiffs in the case would have the right to presume that the said Gordon, from all the circumstances in the case, was acting for and on behalf of the defendant in the making of the said contract of employment; and if the jury further believe from the evidence in the case that the plaintiffs acted upon the correctness of this presumption, in the performance of the service sued for in this action, the jury would be authorized to find for the plaintiffs."

At the request of the defendant the court gave the following written charges, to the giving of each of which the plaintiffs separately excepted: (1) "If you believe from the evidence that the land company was in like interest with said Gordon in the result of the litigation of the case of Gordon v. Bean, and that said land company was benefited by the services rendered by plaintiffs in said cause, yet there is no rule of law which fastens the liability on said land company for any part of plaintiffs' fee in said case, unless plaintiffs were employed therein by said land company." (2) "If you believe from the evidence that both Gordon and the land company were interested in the property involved in the litigation of Gordon v. Bean, and that Gordon individually employed plaintiffs to press an interpretation of the contract involved in said suit favorable to the interest of said Gordon and said land company, and that plaintiffs were not at the same time employed by said land company in said cause, then this was Gordon's individual act,—Gordon's individual contract,—and the land company would not be liable to plaintiffs therefor." (3) "However valuable the services of plaintiffs, for which this suit is instituted, may have been to the land company, yet plaintiffs cannot recover of said land company unless they were employed by it in the suit in which such services were rendered. The law is that when Humes was employed as attorney, and entered upon his employment, in the case of Gordon v. Bean, his duty was a vigilant prosecution of the rights of Gordon in the litigation." (5) "Notwith-

standing the land company may have been benefited by the services rendered by plaintiffs in the case of *Gordon v. Bean*, if you believe such to be a fact, yet the jury is not authorized to go beyond the parties making the contract by which such services in said cause were procured, in search of an implied promise to pay for such incidental benefit." (6) "So far as the liability of this defendant is concerned, it makes no difference what plaintiffs understood as to the land company being liable to them for their fee in said case of *Gordon v. Bean*. If you believe from the evidence that plaintiffs' services in said cause of *Gordon v. Bean* were not procured by the defendant land company, then this defendant is not liable to plaintiffs for their services in said case, and your verdict should be for the defendant." (7) "When Humes first entered upon his employment as an attorney in the case of *Gordon v. Bean*, he did so under a contract, either expressed or implied; and any promise afterwards made by the land company, either express or implied, to pay him or his firm for services rendered in said cause in his capacity as associate attorney in said cause of *Gordon v. Bean*, is without consideration, so far as the land company (defendant) is concerned, and the defendant in this cause would not be liable therefor." (8) "If you believe from the evidence that plaintiffs entered upon the prosecution of the case of *Gordon v. Bean* under promise, either expressed or implied, from Gordon, that they were to be paid a reasonable compensation for their services, then the defendant land company is not liable to plaintiffs for the services rendered by them in said cause, and your verdict should be for the defendant." (9) "Before the plaintiffs can recover in this action, it devolves upon them to show to your reasonable satisfaction that their services in said case of *Gordon v. Bean* were retained by the defendant land company; and if you believe from the evidence that the plaintiffs entered upon the performance of services in said cause of *Gordon v. Bean* at the instance of said Gordon, and under an implied promise from him to pay them what their services in said cause were reasonably worth, then no subsequent implied contract on the part of the defendant land company could be made with plaintiffs to pay plaintiffs for their services in the prosecution of said suit of *Gordon v. Bean*, in this case." (10) "Before the plaintiffs in this case can recover of the defendant land company, they must show to the satisfaction of the jury that they were employed by the land company as attorneys in the cause of *Gordon v. Bean*; and, unless you believe from the evidence that plaintiffs entered upon service in said cause of *Gordon v. Bean* under employment of the land company, your verdict should be for the defendant in this cause." (11) "The law is that when plaintiffs were employed, and entered upon their employment, in the case of *Gor-*

*don v. Bean*, their duty was a vigilant prosecution of the rights of Gordon in that litigation. If you believe from the evidence they were employed, it is immaterial what benefit the land company derived from the services rendered by them in said cause, in the prosecution of the rights of said Gordon. If said services were not procured by said land company, it is not liable to plaintiffs in this case." (12) "If you believe the evidence, you will find that whatever interest the land company had in the litigation involved in the case of *Gordon v. Bean* was derived by contract from said Gordon; and if you find from the evidence that plaintiffs made a contract with said Gordon, either express or implied, to represent his interest in said litigation, said contract necessarily embraced the interest of the land company in said litigation, and no subsequent promise of said land company, either express or implied,—if you believe such promise was made,—to pay the plaintiffs for their services rendered in said cause for the protection of said land company's interest, would be binding upon said land company, and said land company would not be liable therefor." (13) "If you believe the evidence, you will find that whatever interest the land company had in the litigation involved in the case of *Gordon v. Bean* was derived by contract by said Gordon, and if you find from the evidence that plaintiffs made a contract with said Gordon, either express or implied, to represent his interest in said litigation, said contract necessarily embraces the interest of the land company in said litigation, and no subsequent promise of said land company, either express or implied,—if you find such promise,—to pay the plaintiffs for their services rendered in said cause for the protection of said Gordon's interest, would be binding upon said land company, and said land company would not be liable therefor." (14) "If you believe from the evidence that the services of the plaintiffs in the prosecution of the case of *Gordon v. Bean* were procured by the complainant, Gordon, in said suit, and you further find that at this time there was no express contract made for the amount of plaintiffs' fee in said suit, then the law is that there was an implied contract on the part of said Gordon to pay plaintiffs what said services were reasonably worth; and no subsequent contract, either express or implied, could be made between plaintiffs and the defendant land company, by which this defendant land company would be liable to plaintiffs for their fee for their said services in said cause of *Gordon v. Bean*." (15) "Plaintiffs cannot recover in this case for professional services rendered by them, without proving to the reasonable satisfaction of the jury that they were retained by the land company; and even proof of the actual performance of such services is not sufficient, unless plaintiffs go further, and prove a knowledge and recognition of such services as having been rendered

at the instance and request of the land company." (16) "If you believe from the evidence that plaintiffs were employed in the cause of Gordon v. Bean by Gordon, the complainant in said suit, and if you further believe from the evidence that at this time the plaintiffs were not also employed by the land company, then plaintiffs cannot recover in this suit, and your verdict should be for the defendant." (17) "The parties making the contract by which plaintiffs' services in the case of Gordon v. Bean were procured, if you find such contract was made, are alone liable to plaintiffs for their fee in said cause." (18) "If you believe from the evidence that Judge Brickell was the general counsel of the defendant land company, and that while he was such general counsel, and during the progress of the suit of Gordon v. Bean, whilst the plaintiffs were performing services in said suit, he stated to plaintiffs, or either of them, in the presence of Harris and Jones, or either of them, that under the arrangement between Gordon and the land company the land company was liable and responsible to the plaintiffs for whatever services plaintiffs might render in said cause of Gordon v. Bean, and if you further believe from the evidence that Harris and Jones, or either of them, knew that plaintiffs were employed in said cause by the complainant Gordon, and that said Harris and Jones did not deny the statement of said Brickell, but assented to and affirmed the same, then I charge you, gentlemen of the jury, that the law is that the failure of said Harris and Jones to deny said statement would not raise any presumption of an implied promise on the part of the land company to pay for said services, and that their assent to and affirmance of said statement of said Brickell was not such a promise that would make said land company liable to plaintiffs for said services." (19) "If you believe from the evidence that a contract was made between Major Gordon and Capt. Humes for the services rendered in the cause of Gordon v. Bean, and that the compensation agreed upon was two hundred and fifty dollars, then your verdict should be for the defendant in this suit." (20) "Under the evidence in this case the Decatur Land Improvement & Furnace Company had no right capable of enforcement under the contract with Gordon, in evidence before you; and you may look to that fact, in connection with all the other legal evidence in the case, to determine whether said land company employed plaintiffs to assist in enforcing a contract in which that company had no legal or enforceable interest."

Wert & Speake, for appellants. John C. Eyster, for appellee.

COLEMAN, J. The appellants, who are plaintiffs, sued in assumpsit, upon the common counts, to recover for services as at-

torneys, claimed to have been rendered at the instance and request of the defendant. The plaintiffs' right of action grew out of a bill filed in the chancery court, in which E. C. Gordon was complainant, vs. Bean and Williams,—filed to enforce specific performance of an agreement between Bean and Williams in regard to the sale of 20 acres of land. Williams assigned and transferred to Gordon whatever rights and interest he acquired in the land by his agreement with Bean. Gordon and others formed an association for the purpose of organizing and being incorporated as the Decatur Land Improvement & Furnace Company, and in furtherance of this intention an agreement was entered into between Gordon and certain parties as trustees, which provided for the sale and conveyance of the land to the Decatur Land Improvement & Furnace Company. After the incorporation was effected the corporate company took possession of the land, laid it off into lots, and sold many of them to purchasers; the terms of the sale to the purchasers of the lots being one-third cash, and balance on credit; titles to be made upon full payment of purchase money. The sales by the land company aggregated about \$100,000. The consideration that Williams contracted to pay Bean was \$1,000. It was under these circumstances that Gordon called upon Bean, tendered him the \$1,000, and demanded the performance of his agreement with Williams, by a conveyance of the legal title. Bean refused to carry out the agreement, and Gordon filed the bill to enforce specific performance. After the bill had been filed, and while it was pending, plaintiffs were employed to assist in the prosecution of the suit. At the time of their employment, Gordon was president of the Decatur Land Improvement & Furnace Company; Harris, a director; and Brickell, general counsel. Before final decree in the chancery court, Harris was elected president of the company, and he was president, also, pending its appeal to the supreme court of the state. The question of contention is whether plaintiffs were employed by Gordon to represent him alone, individually, or by the company, to protect and represent its interest, as involved in the suit between Gordon and Bean. The evidence is in conflict, there being evidence tending to sustain both contentions. The credibility of witnesses, and what conclusions of fact are sustained by the evidence, are questions wholly within the province of the jury, guided by proper instructions from the court as to the law of the case. In ascertaining the value of professional services rendered by an attorney, it is the practice, in this state, to consider the amount, or value involved, in connection with the labor and skill used by the attorney, the reasonable expense incurred, and the benefits received. These may be considered together in forming a



conclusion. On cross-examination it is not improper to inquire as to the value of each, or any other proper ingredient which may have been considered in arriving at a conclusion of the value of the whole. The objection to the question of the witness Sheffey was properly overruled. Moreover, there seems to be no contention as to the value of the services rendered. The contention is as to who is liable, and whether there was a specific contract for a definite amount.

There was no error in sustaining the objection to the question to the witness Harris, "Was the land company paying you and Judge Brickell a salary?" We do not see how the contract or terms of employment of Brickell and Harris could throw any light upon plaintiffs' contract or terms of employment. They had no connection with each other, so far as disclosed by the record.

Against the objection of the plaintiffs, the court admitted in evidence section 4 of the by-laws of the defendant. If it be true, as contended for in brief by appellee, that this by-law was admitted merely "to show how Brickell's and Harris' compensation was fixed," then it was irrelevant, and the objection to it should have been sustained upon the same grounds that the objection to the question to the witness Harris was sustained. We think, however, that the effect of the introduction of the by-law was calculated to impress the jury with the conviction that it was incumbent on plaintiffs to show they were employed, and their compensation fixed, as therein provided. By-laws of this character may be binding upon members of the association, but cannot bind strangers dealing with it, unless they have knowledge of the existence of such by-laws. 1 Mor. Priv. Corp. §§ 500-510, and note; *Id.* § 538. There is no pretense that plaintiffs had any such notice.

There was no error in refusing charge No. 3, requested by plaintiffs. Pretermitted other defects, the charge clearly invades the province of the jury. The proposition asserted is that if at the time of plaintiffs' employment by Gordon in the case of *Gordon v. Bean*, he then being president of the company, nothing was said by either party as to the capacity in which Gordon was acting, plaintiffs had "the right to presume, from all the circumstances in the case, that Gordon was acting for and on behalf of the company." There are circumstances in the case which, if believed by the jury, tend to show an employment by the company. We cannot say there is no evidence in the case, other than the conversation with Gordon, which tends to rebut or contradict these circumstances. If the court should declare, as a conclusion, that plaintiffs had the right to presume, under the circumstances, that Gordon acted for and on behalf of the company, it would determine the credibility and weight of evidence.

The exceptions to the charges given for the defendant, and the assignments of error, are very numerous, and we will first declare general principles of law which appear applicable to the case. No person has the right to compel another, involuntarily, to become his debtor, except in certain excepted cases. If one perform useful services and work for another, of a character that is usually charged for, with the knowledge of that other, and he express no dissent, or if he avail himself of the services, then the law implies a promise to pay for such services what they are reasonably worth, and assent is sometimes implied from silence. *Seals v. Edmondson*, 73 Ala. 298. This rule of law applies to corporations as well as natural persons. 2 Pars. Cont. (7th Ed.) pp. 55, 57, 58; *Story*, Ag. § 53. In *Grimball v. Cruse*, 70 Ala. 544, the rule is thus declared: "Few decisions are rendered, affecting property rights, that do not in some respects benefit others, who are not parties to the suit or the retainer. To travel beyond the parties making the contract, in search of an implied promise to pay for such an incidental benefit, would introduce a new and dangerous principle in implied contracts, the extent of which it is difficult to conjecture." "However valuable the services of an attorney may have been to a party in a suit, in which he represented others, having a similar interest, he cannot recover a fee from a party who has not employed him." Quoting *Rosellius v. Delachaise*, 5 La. Ann. 481. It is also stated that where there are two defendants, and one of them employs an attorney to represent both himself and the other defendant, of which the latter is apprised, he cannot recover of the latter. 70 Ala. 545. Of course, the principle last declared has no application if the one defendant who secured the services of the attorney had been duly authorized by the other defendant to employ counsel for him, and under such authority, acting for himself and the other defendant, the contract of employment had been entered into for the benefit of both. *Wood v. Brewer*, 66 Ala. 570; *Railroad Co. v. Hill*, 76 Ala. 303. Contracts may be expressed or implied, or partly expressed and in part implied. One who employs another to perform certain services for his benefit, without an agreement as to terms, impliedly agrees to pay reasonable compensation for the services. If the person contracting for the services of another is known to be an agent duly authorized to contract for his principal, and the services to be performed are wholly for the benefit of his principal, and this is fully explained to the person employed, and there is nothing said about the price to be paid, or who was to be liable, and the principal knew that the services were being rendered, and assented thereto, the law implies an obligation on the part of the principal, the consideration mov-



ing to him, to pay what is right. To hold an agent personally liable, in cases in which he discloses his principal, and that the services to be rendered are for the sole benefit of his principal, and the contract is within the scope of his authority, it must be shown that credit was given exclusively to the agent, and that the agent was informed of that fact. *Taintor v. Prendergast*, 1 Amer. Lead. Cas. pp. 628, 638; *Story*, Cont. §§ 145, 146, 160; *Id.* § 279; 1 *Wait*, Act. & Def. pp. 237, 256.

According to one phase of the testimony, the question is raised as to what are the presumptions of law in cases where an agent duly authorized to make a contract for the principal is himself, also, with the principal, personally interested, and his interest and that of his principal are fully disclosed to the person at the time of the contract of employment, and nothing is said as to the amount to be paid, or as to who is to be liable for the services. It would seem to follow from the foregoing principles of law—and it is right in principle—that both would be liable, and either or both could be sued in separate actions, and a recovery had upon quantum meruit. *Story*, Ag. §§ 279, 288, 289. Of course, these legal presumptions may be rebutted by other facts and circumstances in the case, if there are any, which may show that it was intended by the parties that credit should be given the one or the other, or to both parties.

There is some evidence tending to show that at the time plaintiffs were retained they were informed of the extent and character of the services to be rendered, but in the subsequent prosecution of the case it became necessary for plaintiffs to render other and valuable services, in addition to those of which plaintiffs were informed at the time of their employment. If the additional services were rendered at the instance and request of the defendant, acting through its lawfully-authorized agents, we know of no principle of law which would relieve the defendant from liability for such services, either upon an express or implied contract.

The proposition is asserted in some of the charges that, if plaintiffs were employed by Gordon to represent him individually, any contract made with defendants in regard to the suit of *Gordon v. Bean*, which imposed no additional duty upon plaintiffs, was without consideration, and null and void. In the case of *Johnson v. Sellers*, 33 Ala. 265, it is said: "A promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons, is without consideration." We are not disposed to depart from the rule as here stated, but we are not willing to extend it so that if the party making the second contract is directly interested in the result, and is to be benefited, he cannot employ the same party for the

protection of his own interest. If two persons are jointly indicted and put upon trial, or if only one is upon trial, and either employs counsel to defend him, the fact that an acquittal of the one employing counsel must result in acquittal of the other will not render a contract of employment by the latter null and void. He would not be liable in the absence of a contract, although directly benefited by the contract of the other. Under the evidence in this case the individual interest of Gordon in the case of *Gordon v. Bean* was less than a thousand dollars, while that of the defendant was many thousands. Such a difference would exert a very material influence in the compensation to be paid, and which all the evidence shows, in this case, was reasonable at \$5,000. The responsibility is proportionately increased, and also the extent of liability for neglect of duty. We are of opinion that, although Gordon may have employed plaintiffs to represent him individually, that fact would not render invalid a contract of employment by the defendant to represent its interest, acting through its lawful agent.

The first six charges given at the request of the defendant do not conflict with these principles. Their particular phraseology may, in some instances, have justified an explanatory charge, but we cannot see that either of them asserts incorrect principles of law. Charges 7, 8, 9, and 10 do not accord with the law, and should have been refused. These charges ignore that part of the testimony which tends to show that plaintiffs were called upon to render a great deal more and material services than at first stated to them, and there is evidence tending to show some of these services were rendered at the instance of Gordon, and some of them at the instance of Harris, after he was elected president of the defendant company. Furthermore, we will not extend the rule declared in *Johnson v. Sellers*, 33 Ala. 265, supra, as far as asserted in some of these charges. The same objections apply to charges 12, 13, 14, and 16. It would not follow from all the evidence, as the only legal conclusion, that, if Gordon agreed that plaintiffs should be paid reasonable compensation for services to be rendered in the case of *Gordon v. Bean*, defendant would not be liable. In construing these charges it must be remembered that Gordon was president of the defendant company; that not only his individual interest in the result of the suit was explained to plaintiffs, but also that of the defendant, and the services rendered were for the protection of both, and accepted by both parties. Under these circumstances it requires more proof than the mere fact of employment by Gordon to make him solely liable. We find no error in charges 11, 15, and 17. As we understand charge 18, it simply asserts the proposition that statements or ad-

missions by an agent as to past transactions are not competent evidence against his principal. The wording of the charge may have had a tendency to mislead, and justified an explanatory charge, but the giving of such a charge, as thus understood, is not reversible error. Charge 19 is in conflict with the law, as we have declared it. Although Gordon may have agreed to pay \$250 individually, that would not necessarily entitle defendant to a verdict. Non constat but defendants were also bound by the contract of employment, or on an implied contract, under some phases of the evidence. Charge 20 might have been refused, as argumentative, but it is erroneous in law. Conceding, merely for the argument, that the defendant had no enforceable rights under the contract with Gordon, if the question was of that doubtful and grave character as that defendant deemed it necessary to employ counsel to protect it, and guard against supposed disastrous consequences, as was certainly the opinion of its learned general counsel and its president, the fact that, as a matter of law, its interest was not in jeopardy, ought not to exert any influence in determining whether there was a contract of employment for its protection. It is unnecessary to construe the contract referred to in this charge, and we express no opinion upon it.

Reversed and remanded.

(98 Ala. 521)

**LOUCHEIM et al. v. FIRST NAT. BANK OF TALLADEGA et al.**

(Supreme Court of Alabama. June 8, 1893.)

**FRAUDULENT CONVEYANCES—WHEAT CONSTITUTE—PAYMENT OF ATTORNEYS' FEES—PLEADING.**

1. On demurrer to a bill to set aside a conveyance as in fraud of creditors, general averments that the conveyance was executed for the purpose of hindering and delaying creditors are of no consequence, and only the facts alleged therein will be considered.

2. A mortgage is not rendered fraudulent as to creditors by usury in the debt where the usurious charge is a stipulation incident to and part of the contract creating the debt, and is not added to the debt at the time of the execution of the mortgage for the purpose of swelling the amount secured.

3. Where, at the time of the execution of a mortgage by a failing debtor, he was indebted to attorneys for services rendered in connection with the execution of the mortgage, the fact that the attorneys were paid by the creditors secured, and the amount included in the mortgage, did not vitiate the latter for fraud.

4. Where a deed of trust authorizes the trustee to sell merely sufficient property to pay the costs of executing the trust and the debt secured, it cannot be insisted that a sale of the whole property might be made, and the surplus, after payment of the debt secured, turned over to the debtor, enabling him to defeat his creditors.

5. A deed of trust is not vitiated by failure to mention collaterals given to secure the debt secured by the deed of trust.

6. A stipulation in a deed of trust given by a failing debtor that the surplus remaining after payment of the debt secured shall be paid to the debtor does not vitiate it.

Appeal from chancery court, Talladega county; S. K. McSpadden, Chancellor.

Bill by Joseph Loucheim and others, as creditors of F. B. Fulmer, against said Fulmer, the First National Bank of Talladega, and J. E. Denny, to set aside a mortgage or deed of trust of a stock of merchandise made by said Fulmer to J. E. Denny as trustee of the First National Bank, on the ground that the same was fraudulent. From a decree sustaining a demurrer to the bill, plaintiffs appeal. Affirmed.

Bishop & Whitson and E. H. Dryer, for appellants. Browne & Brewer, for appellees.

**McCLELLAN, J.** 1. The general averments of the bill that the deed of trust executed by Fulmer to secure certain recited indebtedness to the Bank of Talladega was the consummation of a plan conceived by all the defendants for the purpose of hindering, delaying, and defrauding the complainants and other creditors of Fulmer, are of no consequence in passing upon the demurrers to the bill, aside from the facts alleged therein as constituting the fraud complained of, and relied on as a predicate for the relief prayed. Or, in other words, the inquiry of fraud vel non on the averments of the bill is to be determined by a consideration of what was done by the parties as therein alleged and the circumstances surrounding the transaction. The allegation that the transaction was entered into and consummated to hinder, delay, and defraud creditors is a mere conclusion of the pleader. The facts alleged will be indicated in the following discussion of them.

2. Usury in the debt does not vitiate the mortgage or deed of trust, where, as in this case, the usurious charge was a stipulation incident to and a part of the contract by which the debt was created, and not added to the debt at the time of the transaction intended to secure it for the purpose of swelling its amount, so as that it would equal or approximate the value of the property conveyed. *Harris v. Russell*, 93 Ala. 59, 9 South. Rep. 541.

3. It seems that Fulmer, the failing debtor, became, and was at the time the mortgage was executed, indebted to certain attorneys in the sum of \$50 for services in connection with that transaction. This sum was paid by the bank to the attorneys, and included in the amount secured by the mortgage. There was no fraud in this. Nothing was paid to the debtor. This payment to the attorneys did not place in his hands money which he could withhold from his creditors. It was not pro tanto a cash consideration for the conveyance in trust; but, at most, was the assumption and payment by the bank of a debt due from Fulmer to a third person, as a part of the consideration for the mortgage. That this involves no vitiating consequences has more than once been declared by this

court. *Bank v. McDonnell*, 89 Ala. 434, 8 South Rep. 137, and cases there cited.

4. We do not understand the deed of trust to authorize the trustee, Denny, to sell in any manner, at wholesale or retail, any more of the property covered by the instrument than would suffice to pay the costs incident to the execution of the trust, and the secured debt; hence we do not concur in the insistence of complainants' counsel that the mortgage or deed of trust authorized a sale of the property in bulk by the trustee, and that, of consequence, the trust might have been executed by an immediate sale of the whole property for a sum in excess of the secured debt and charges, and the payment of this sum to the debtor, thereby putting it in his power to defeat other creditors. To the contrary, we construe the deed to have this effect: That any surplus of the property remaining after the trustee had realized a sufficient sum from sales to discharge the trust, and thus exhausted his authority, reverted to Fulmer, and in his hands, discharged of the trust, could be subjected to his other debts with as much facility as if this transaction had never occurred. Moreover, in determining the amount to be realized out of the property, regard was necessarily to be had to the amount of the secured debt at the time of realization from the sale or sales of the goods. If the bank had collected any of the choses in action delivered to it by Fulmer as collateral security, the money derived from this source would go in diminution of the sum to be collected through sales of the property; so that the apprehension suggested in briefs of counsel—"that the bank might have collected a good portion of its debt out of such collateral before it was due, or to the extent of such collaterals, then its agent and trustee, in the exercise of the power to sell at wholesale, could have converted the entire stock at once into cash, thus shifting any surplus beyond the reach of his creditors"—is, to our minds, unwarranted.

5. With respect to the effect to be accorded the fact that Fulmer gave the bank certain choses in action as additional security for its debt, and these collaterals are not mentioned in the deed of trust, the law is settled in this court, against the vitiating consequences for which counsel contend. *Trust Co. v. Foster*, 58 Ala. 502.

6. Nor does the stipulation that upon a sale by the mortgagee, after the law day, of the whole property, any surplus of the proceeds should be paid to the mortgagor, invalidate the instrument. This stipulation is but the expression of the legal effect of the conveyance, and does not avoid it. *Trust Co. v. Foster*, supra, and cases there cited.

7. The proposition that the provisions of the deed of trust for the payment of the reasonable expenses of its execution out of the property covered by it vitiates the instrument is not insisted on in argument, though advanced by the bill as stamping fraud upon

the transaction. The proposition is manifestly sound.

What we have said, it is believed, disposes of all the matters relied on in the bill of complaint to taint the deed of trust and mortgage—for in some aspects the instrument is both—with fraud. The facts alleged do not make out a case of fraud. The case is a stronger one for the appellees than that of *Murray v. McNealy*, 86 Ala. 234, 5 South. Rep. 565, if it differs at all from that case in principle. The decree of the chancellor is supported by that case and authorities there cited; by the case of *Corrugating Co. v. Thacher*, 87 Ala. 458, 6 South. Rep. 368, and many others; and is affirmed.

(99 Ala. 169)

### HICKS v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

WITNESSES—IMPEACHMENT—THEFT—EVIDENCE—POSSESSION OF PROPERTY—INSTRUCTIONS.

1. An accused person, who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements, on a proper predicate therefore.

2. On a trial for the burglary of a house, and the stealing therefrom of 4 \$10 gold pieces, evidence that accused, when arrested, had on his person a \$5 gold piece, and that about that time he handed 10 silver dollars to a person with him, to hold, is admissible, in connection with evidence that he also handed a \$10 gold piece with the silver, and had had opportunities to change the pieces.

3. A requested charge as to the effect of mere possession of stolen goods without other evidence of guilt is improper, where there is other evidence tending to prove defendant's guilt.

4. A requested charge, assuming that none of the money found in defendant's possession was part of the stolen money, was improper, it being for the jury to say whether the \$10 gold piece was one of those stolen.

Appeal from circuit court, Blount county; John B. Tally, Judge.

Lit Hicks was convicted of burglary, and appeals. Affirmed.

The appellant in this case was indicted jointly with one Arthur Hale for the burglary of a dwelling house, and stealing therefrom "four gold coins of the United States, of the denomination of ten dollars each, and of the aggregate value of forty dollars, the personal property of one Mose Carter." On the trial of the case there was a severance, and the appellant was tried and convicted for burglary, and sentenced to the penitentiary for four years. On the trial of the case, Mose Carter, as a witness for the state, testified that one Sunday in the month of September, in the year 1892, he and the defendant went to his house together, in the afternoon, and that while there he took from his trunk a box in which there was a sack, and in the sack there was some money, consisting of four \$10 gold pieces, which he showed to the defendant, and then put them back in the sack and in the box, and placed the box in his trunk; that he spent the night away

from home, and on returning, the next morning, found his door open, his trunk broken open, and his money gone; and that on the following Monday morning the defendant, in company with two or three others, left the place "for Guntersville, Alabama." The state's testimony further tended to show that the defendant, on being overtaken, was ordered by those making the arrest to hold up his hands; that just as this order was made he put his hand in his pocket, and took out a small bag, and handed it to Albert Slaughter, who was accompanying him, and said to him, "Here, hold this for me." The state's witness further testified that this bag had in it at the time 1 \$10 gold piece and 10 silver dollars, and that there was found 1 \$5 gold piece and some small change on the defendant, on his being searched. There was other testimony introduced on the part of the state, tending to prove that the defendant was seen with Arthur Hale on the Sunday night of the burglary, between 11 and 1 o'clock, going in the direction of Mose Carter's house, and that on the next day he stopped at several stores on the way, trying to buy different articles. It was further shown by the state that the defendant gave different explanations as to how he came in possession of the money. On the cross-examination of the defendant as a witness in his own behalf, the solicitor "proceeded to lay a predicate for the purpose of impeaching him, by repeating to the witness the statements he had made to Bob Herron [in a confession which said Herron alleged the defendant made to him while under arrest, to which confession the court had refused to allow the said Herron to testify,] and then asked the witness if he made such statements." In answer to such question the defendant denied that he had made some of the statements, and admitted others, "but stated that he was induced to make them." When the defendant closed his evidence, the state recalled Bob Herron, and "asked him to state what the defendant said in his confession made to him while under arrest." The defendant objected to this witness testifying to any conversation with the defendant, in which the defendant made a confession, on the ground "that it was a confession by defendant, and that the court, on the preliminary examination of Bob Herron, had held that the confession, or evidence of the confession, was inadmissible, because it was not voluntary, and because the same was illegal, immaterial, and irrelevant." The court overruled this objection, and to this ruling of the court the defendant duly excepted. Thereupon the witness Herron, against the objection and exception of the defendant, stated what the defendant had told him at the time and place designated. After the introduction of all the evidence the defendant moved the court to exclude from the jury, as evidence, the statements of the witnesses in regard to the \$5 gold piece

found in the defendant's pocket at the time of the arrest, and the \$10 gold piece and the 10 silver dollars handed by the defendant to Slaughter at that time, on the ground that it was not the money alleged or shown to have been stolen by the defendant, and that it was not identified as the money stolen. The court overruled these objections, and the defendant duly excepted. The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) The mere possession of stolen goods, without other evidence of guilt, is not *prima facie* evidence of burglary." (2) "The money found on the person of the defendant not being the money alleged to have been stolen, the defendant is not required to account, to the satisfaction of the jury, for his possession of the money found upon his person at the time of his arrest."

Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The question whether the accused, who makes himself a witness in his own behalf, under the statute authorizing him so to do, is subject to impeachment, as other witnesses, by the introduction by the state, upon the proper predicate therefor, of evidence of contradictory statements previously made by him, is not an open one. The following authorities settle that he is subject to such impeachment: *Clarke v. State*, 78 Ala. 474, 87 Ala. 71, 6 South. Rep. 368; *Norris v. State*, 87 Ala. 85, 6 South. Rep. 371; *Cotton v. State*, 87 Ala. 103, 6 South. Rep. 372; *Rains v. State*, 88 Ala. 91, 7 South. Rep. 315; *Mitchell v. State*, 94 Ala. 68, 10 South. Rep. 518.

There was no error in the refusal of the court to exclude the evidence that a \$5 gold piece was found in defendant's pocket at the time of the arrest, and that defendant handed to Albert Slaughter 10 silver dollars at or about that time. While these pieces of money were not the stolen coins, yet, in connection with the other evidence, his possession of them, and his conduct with reference to the silver dollars, were circumstances proper to be considered by the jury, who might, under all the facts and circumstances shown in evidence, have legitimately inferred that he had exchanged the stolen coins, or some of them, for those found in his possession. For the greater reason was there no error in the motion to exclude the evidence that he handed to Slaughter a \$10 gold piece at or about the time of the arrest. The stolen coins consisted of four \$10 gold pieces.

The first charge requested by defendant was abstract. This is not a case dependent for conviction upon mere evidence of possession by the accused of the stolen property. There was other evidence tending to prove the defendant's guilt of the burglary and larceny. The charge requested was therefore improper.

The second charge requested was also improper. It assumes that none of the money found in defendant's possession was part of the stolen money. It was for the jury to say whether the \$10 gold coin he had was one of those stolen. Moreover, there was other evidence in the case, besides the bare possession of the money, which had to be considered in determining whether defendant should satisfactorily account for that possession, and these were considerations for the jury. The charge clearly invaded the province of the jury. There is no error in the record, and the judgment is affirmed.

### JOHNSON v. STATE.

(Supreme Court of Alabama. June 7, 1893.)

INDICTMENT FOR LARCENY—OWNERSHIP OF PROPERTY—HUSBAND AND WIFE.

Since Act Feb. 28, 1887, (Code, § 2341,) gives a wife separate ownership of property, an indictment for larceny of a wife's property must allege ownership in her, instead of in her husband. *Rollins v. State*, (Ala.) 13 South. Rep. 280, followed.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Eugene Johnson was convicted of larceny, and appeals. Reversed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Eugene Johnson feloniously took and carried away two bushels of corn, part of an outstanding crop of corn, the property of W. T. Merriwether, against the peace and dignity of the state of Alabama." The evidence introduced on the part of the state tended to show that in Montgomery county, within 12 months before the finding of the indictment, the defendant feloniously took and carried away five ears of corn from an outstanding crop of corn; that the land on which the corn was grown was the property of Mrs. Merriwether, who was the wife of the man in whom the property was laid in the indictment. Mr. W. T. Merriwether testified that the land belonged to his wife; that he furnished the labor, and made the crop, and did the farming; but that there was no agreement whatever between him and his wife, who lived together on said farm, about the farming business, and that the proceeds of the farming operations were used for the support and maintenance of himself and wife and children. This was all the evidence, and the court, *ex mero motu*, charged the jury "that the property in the corn was properly laid in the husband, although it really belonged to the wife;" and to this charge of the court the defendant duly excepted. The defendant then asked the court to give the following written charge, and duly excepted to the court's refusal to give the same: "If the jury believe the testimony, they must find the defendant not guilty."

Sayre & Pearson, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. Reversed and remanded, on the authority of *Rollins v. State*, 13 South. Rep. 280, (at present term.)

(98 Ala. 326)

### BIRMINGHAM MINERAL R. CO. v. HARRIS.

(Supreme Court of Alabama. June 7, 1893.)

AMENDMENT OF STATUTE—EFFECT—ACTION AGAINST RAILROAD COMPANY—INJURY TO STOCK ON TRACK—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—ARGUMENT OF COUNSEL.

1. Code 1876, § 1700, which provides that where persons or stock are injured or killed on a railroad track the burden of proof is on the company to show a compliance with the statutory requirements, was amended in Code 1886, § 1147, by the insertion of the words, "at any one of the places specified in the three preceding sections." Acts 1886-87, p. 47, adopting the Code of 1886, provides (section 2) that no act passed at that session should be repealed or affected by the adoption of the Code of 1886, but all acts amending sections of the Code of 1876, and which were incorporated in the Code of 1886, should be printed in place of the original sections. On the same day an act was approved to amend section 1700 of the Code, (Acts 1886-87, p. 146,) and the amended section is an exact transcript of that section, as it is in the Code of 1876. *Held*, that by the latter act the section was restored to its original form, without amendment as to the burden of proof.

2. Under Acts 1886-87, p. 146, the burden is on a railroad company, on injury to stock on its track, to show a compliance with all statutory requirements as to signals, care, etc.

3. In an action against a railroad company for injury to stock on its tracks, plaintiff testified that on a certain afternoon he turned several mules into his pasture, through which defendant's road passed; that on the following afternoon he found four killed,—two on each side of the track,—and two crippled; that the track was straight where the mules were killed; that there was a curve some 600 feet from such place, but so slight that it did not prevent one from seeing along the track. *Held*, that plaintiff made out such a prima facie case as to require defendant to rebut the presumption of negligence.

4. Defendant showed that three trains passed over the road on the night in question. The engineer of one train testified that the night was clear; that his headlight would reveal an object for about 125 feet; that on that night he knocked two mules off the track; that he first saw them when they were about 100 feet in front of the engine; that the curve was about 175 feet from where he struck them; that he was keeping a good lookout; that he applied the air brakes and sounded the cattle alarm, but did not have time to reverse the engine; that he was running down grade, with steam shut off, at from 20 to 25 miles an hour, and could not have stopped the train in less than 200 yards. The other engineer testified to striking a mule under nearly the same circumstances, and that he could not have stopped his train in less than half a mile. *Held*, that the evidence was insufficient to rebut the presumption of negligence.

5. Plaintiff was not negligent in allowing his mules to run in his own pasture, though defendant's road ran through the same.

6. Where the evidence showed that the mules were appraised in plaintiff's presence, but not at his demand, and that the appraise-

ment was not in writing, as required by Acts 1888-89, p. 808, and did not show what was said or done by any one at the time, it was proper to refuse to allow defendant to ask plaintiff, on cross-examination, "What were the mules appraised at?"

7. It was improper for defendant to ask the engineer if he saw the mules as soon as the light of the engine permitted him to see them, since such question ignored the maintenance of a proper lookout by the engineer at the time.

8. It was proper for plaintiff to ask the engineer when his train left O., when it arrived at B., the distance and number of stops between the two places, and the average duration of such stops, since the rate of speed of the train was a matter of which plaintiff could complain.

9. On the examination of the engineer as to his written report of the accident to the company, an objection to his examination as to its contents, without first showing the time and place where the report was made, was properly overruled.

10. It was proper to refuse to permit the engineer, on cross-examination, to examine another report of the accident, made at another time and place.

11. It was error to refuse to allow defendant to ask the engineer if sounding the cattle alarm and applying the air brakes was a more effective means of saving the mules than reversing the engine, since the engineer was an expert.

12. It was error to permit plaintiff, in rebuttal of his own witness, and over defendant's objection, to ask "whether there was curve enough to prevent seeing along the track through there," since that was an inquiry as to a visible and certain physical fact.

13. It was proper for plaintiff's counsel to say, in his argument to the jury, "that the burden of proof was on defendant to acquit itself of negligence; that the law was reasonable, because, if it were otherwise, plaintiff would be compelled to put defendant's employees on the stand, and prove by them their own negligence."

14. It was also proper for such counsel to say: "Don't you know, gentlemen of the jury, that fast running was the cause of the killing of plaintiff's mules?"

15. It was not error to charge the jury "that, after it was shown that plaintiff's mules were killed on defendant's railroad by a moving train, the burden of proof was on defendant to show that it was not negligent in respect to a lookout."

16. An instruction that if the jury believed the evidence they could not allow damages for the mules killed by either train was properly refused, since both engineers testified that it was impossible, at the rate of speed at which they were running at the time of the accident, to stop their trains in time to save the mules.

17. It was proper to refuse an instruction that if the jury believed that none of the mules were seen in time to stop the trains by the use of all possible means, or if, at their rate of speed, they could not have stopped within the distance within which the headlights would reveal objects on the track, and that the headlights were such as were used on well-regulated roads, they must find for defendant, since such instruction ignored the duty of the engineers to keep a lookout, and not to run their trains at a negligent rate of speed.

18. An instruction that if the jury believed that defendant's engineers, who testified, exercised reasonable diligence in keeping a lookout, they must find for defendant, was properly refused, since it ignored the passage of the third train over the road on that night, and, besides, it was on the effect of the evidence.

19. An instruction that, "if you believe the evidence, you must find for defendant," was

properly refused, as being on the effect of the evidence.

20. It was proper to refuse instructions which required plaintiff to show by what train the mules were killed, and that defendant was negligent.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by George C. Harris against the Birmingham Mineral Railroad Company to recover for the negligent killing of plaintiff's mules. Judgment for plaintiff. Defendant appeals. Affirmed.

All the facts of the case, and the rulings of the court upon the evidence, are sufficiently shown in the opinion. Upon the introduction of all the evidence the defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them, as asked: (1) "There can be no recovery by plaintiff for any mules which the jury, from the evidence, are unable to determine were killed, either by the engine of the witness Jesse, or that of the witness Orr, if the jury believe that any were so killed." (2) "If the jury believe the evidence, they cannot award plaintiff any damages for the mules killed by the train of which the witness Jesse was engineer, if they believe any mules were so killed." (3) "If the jury believe the evidence, they cannot award plaintiff any damages for the mules killed by the train of which the witness Orr was engineer, if they believe any mules were so killed." (4) "If the jury believe that the engine which the witness Orr was running killed two of the mules for which recovery is sought, and that the engine which the witness Jesse was running killed the other two of the mules for which recovery is sought, then they must find for the defendant, under the first count." (5) "If you should believe from the evidence that the train on which the witness Jesse was engineer did not kill either of the mules for which this suit was brought, then, for two of the mules for the killing of which this suit was brought, you must find for the defendant." (6) "If two of the mules, for the killing of which this suit was brought, were killed by a train not disclosed or discovered by the evidence in this case, you must find for the defendant as to the killing of said two mules." (7) "If the jury believe that any of the mules, for the value of which recovery is sought by plaintiff in this action, were killed by any other engine than those operated by the witness Orr or the witness Jesse, the burden is on the plaintiff to show that such mule or mules were killed by defendant's negligence." (8) "If the jury believe that none of the four mules were seen by defendant's servants in time, by the use of all the means at hand, to have stopped their trains, then defendant's servants were not required to attempt to stop them, and the jury must find for defendant." (9) "The burden of proof is on the plaintiff to show that defendant's engineers were negligent in

falling to keep a proper lookout for the plaintiff's mules." (10) "The burden of proof is on the plaintiff to show that the plaintiff's mules were perceived on the track in time, by the use of all the means in the power of defendant's engineers, to have stopped the trains." (11) "If the jury believe that any one of the mules, for the value of which recovery is sought in the complaint, was not killed by either the train of which the witness Orr was engineer, or the train of which the witness Jesse was engineer, they cannot award the plaintiff any damages for such mule or mules." (12) "Unless the jury believe that all of the four mules, for the value of which recovery is sought in this action, were killed by either the train on which the witness Jesse was engineer, or the train on which Orr was engineer, they cannot award plaintiff damages for all of said four mules." (13) "If the jury believe that, at the rate of speed at which defendant's trains were running, they could not have stopped within the distance within which the headlights would reveal stock, and that such headlights were used on many well-regulated railroads at the time, your verdict must be for defendant." (14) "If the jury believe that the defendant's engineers on the trains which killed plaintiff's mules, for the value of which recovery is sought in this action, exercised reasonable diligence in the matter of keeping a lookout ahead for obstructions, and if they believe all the evidence, they must find for defendant." (15) "If you believe the evidence, you must find for the defendant." (16) "If you believe the evidence, you must find for the defendant under the first count of the complaint." (17) "If you believe the evidence, you must find for the defendant under the second count of the complaint." (18) "If you believe the evidence, you must find for the defendant under the third count of the complaint." (19) "If you believe the evidence, you must find for the defendant under the fourth count of the complaint." (20) "The burden of proof is on the plaintiff to show that the defendant was negligent in failing to sound the cattle alarm." The court charged the jury, at the request of the defendant, that there was no evidence that defendant was guilty of any negligence in running its trains at the speed at which the evidence showed its trains were running at the time and place of the injury.

Hewitt, Walker & Porter, for appellant.  
Cabaniss & Weakley, for appellee.

**HARALSON, J.** 1. We held in *Railroad Co. v. Bees*, 82 Ala. 340, 2 South. Rep. 752, that when a plaintiff proves his stock has been killed or injured by a railroad train, and their value, even if the evidence fails to show, distinctly, that the engineer either saw the animals, or could have seen them, by ordinary diligence, in time to stop the train or prevent the injury, the onus devolves on the railroad company to rebut the pre-

sumption of negligence, and, no explanatory or exculpatory evidence being offered, the plaintiff is entitled to a verdict. To the same effect are many other adjudications of this court. *Railroad Co. v. Blanton*, 84 Ala. 157, 4 South. Rep. 621; *Railroad Co. v. McAlpine*, 75 Ala. 114; *Railroad Co. v. Posey*, (Ala.) 11 South. Rep. 423. These decisions, except the last, were under sections 1699 and 1700 of the Code of 1876, (sections 1144 and 1147 of the Code of 1886.)

2. The codifiers of the Code of 1886, or the legislative committee to which the work of the codifiers was referred, inserted into section 1700 of the Code of 1876 the words, "at any one of the places specified in the three preceding sections," thereby bringing about, without more, a change in the rule as to the burden of proof for injuries occurring at places not specified in section 1699 of that Code, constituting section 1144 of the Code of 1886. The act adopting the Code of 1886 was approved February 28, 1887, (Acts 1886-87, p. 47,) the second section of which provides: "No act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this Code, but all acts amending sections of the Code of 1876, which sections have been incorporated in this Code, shall be printed in place of, and as, such sections." On the same day, February 28, 1887, an act was approved "To amend section 1700 of the Code," which amended section is an exact transcript of that section, as it is in the Code of 1876, without any change. Acts 1886-87, p. 146. It was evidently intended as an amendment of that section, as it had been modified by the codifiers or legislative committee, and carried into the Code of 1886, so as to restore it to its original form, without amendment as to the burden of proof. That act, as printed in the Code of 1886, as a note on page 300, is now the law, taking the place of section 1147, which it was designed to substitute. This act of the 28th February, 1887, as we have said, is an exact copy of section 1700 of the Code of 1876. That section was enacted on the 31st January, 1861, and appears in the Code of 1867 as section 1401, which section was afterwards, and before it appeared in the Code of 1876, amended by making it applicable to persons, as well as to stock or other property, and with this exception this statute is now as it was when first enacted, in 1861. That original statute was construed by this court in the case of *Railroad Co. v. Williams*, 53 Ala. 595, in which the court said: "The effect of the statute is that a railroad company is liable for injuries to stock, when they result from the negligence of its servants or agents, whenever or wherever it may occur. If the injury occurs at or near any public road crossing, or any regular depot or stopping place, or within the corporate limits of any town or city, or because of

an obstruction which could or ought to have been perceived, no degree of diligence will excuse the company from liability, unless all the requirements of the statute have been observed. In either case, the injury being shown, the burden of proof is on the railroad company to acquit itself of negligence, or to show a compliance with the statute. If any other construction of the statute should be adopted, it would almost license the destruction of cattle or other stock by railroads." That ruling was subsequently followed in the cases of *Railroad Co. v. Bayliss*, 74 Ala. 159; *Clements v. Railroad Co.*, 77 Ala. 537; *Railroad Co. v. McAlpine*, 75 Ala. 118; *Id.*, 80 Ala. 73. In this last case the court explained and limited some of the expressions in the *Williams* and *Clements* Cases, *supra*; but the rule as to the burden of proof—viz. that injury raises the presumption of negligence, and casts on the railroad company the burden of disproving it—has not been disturbed. When, therefore, the general assembly passed said act of the 28th February, 1887, it re-adopted section 1700 of the Code of 1876, as previously construed by this court, which was an adoption of the judicial construction previously placed upon it; and, being the last legislative expression on the subject, we feel bound by it. *Ex parte Matthews*, 52 Ala. 51; *Railroad Co. v. Jones*, 68 Ala. 54; *Railroad Co. v. Bayliss*, *supra*; *Ex parte State*, 87 Ala. 54, 6 South. Rep. 328. A construction different from the one we now feel constrained to place on this statute was given to it in the cases of *Railway Co. v. Hughes*, 87 Ala. 610, 6 South. Rep. 413, and *Railroad Co. v. Perryman*, 91 Ala. 413, 8 South. Rep. 699, and they are each overruled. In the case we try, the plaintiff testified he had four mules killed, and two crippled, on the 20th August, 1891; that he turned them in a pasture near Green's station, on the line of the defendant's railroad, about 5 o'clock in the afternoon of that day; that the next day, in the afternoon, he found four of them killed, and two crippled; that there were two of those killed on each side of the track, in the ditch that ran on either side, and about 10 feet apart; that the two crippled ones were about 20 yards below the dead ones; that the place of the accident was in his pasture, about 400 yards from Green's station, on the road; that the track where the mules were killed was straight; that two trains—a passenger and a freight—passed over the road that night; that those killed were worth \$200 each, and the crippled ones were paid for by the company. On this evidence the plaintiff rested, and, under our rulings, we hold he made such a *prima facie* case as to require the defendant to rebut the presumption of negligence arising from the fact that the animals were killed by its trains. Authorities *supra*. It is proper to add, in this connection, as to this case, that the plaintiff in-

troduced evidence in rebuttal tending to show that it was about 600 feet from where the mules were killed to the curve; that the curve was a slight one, and not "enough to prevent one seeing along the track through there."

3. The proof for the defense tended to show—and it was uncontradicted, except as to the sharpness of the curve—that three trains passed over the defendant's road on the night of the 20th of August, 1891: No. 1, under Engineer Orr, at about 8 o'clock P. M.; No. 2, under Engineer Jesse, about 1 o'clock A. M.; and No. 3, some time in the night, but which way going, under what conductor, and at what time in the night, is not made known. Orr testified that the night was a clear one; that his headlight was a good one, in good repair, and such as was in use on well-regulated railroads; that it would reveal an object in front of the engine from 125 to 150 feet, and better on a dark than a clear night; that when he first saw the mules there were two of them, from 100 to 125 feet in front of the engine, and they were knocked off on the right-hand side of the track, going south; that the curve, which was "a right smart curve," was about 175 feet north of where he struck the two mules; that he was keeping a lookout as he was approaching the curve; that he first saw the mules when he had run 25 or 50 feet on the straight track; that he immediately applied the air brakes and sounded the cattle alarm, but did not reverse the engine before the animals were struck, because, after applying the brakes and sounding the alarm, he did not have time to do so; that it was down grade at that point,—steam was shut off, and they were rolling down the grade; that he could not have stopped the train, going at the speed they were,—about 20 or 25 miles an hour,—using all the means in his power, including his reverse lever, in a less distance than 200 or 250 yards. His was an excursion passenger train. Jesse testified he was engineer, that night, pulling No. 2, a freight train consisting of 22 cars loaded with lime rock, besides a caboose, and passed the place where the mules were injured about 1 o'clock A. M.; that as he was approaching Green's station, a fourth of a mile north therefrom, he struck a mule, standing on the track, when he first saw it, about 30 feet ahead of him,—knocked it off on the right-hand side,—and his best judgment was that he killed it; that there was a down grade at that point, and he was rolling down, with steam cut off, at about 25 miles an hour; that his headlight was good, in good condition, and such as were in use on the best-regulated railroads; that it would enable one to see objects distinctly, but not so plainly as to tell what they were, 100 yards off; that there was a curve 50 yards from where he first saw the mule, and he could not see it till he got round the curve on the straight track, where the headlight could reveal it;



that immediately on seeing the animal he sounded the cattle alarm, and applied his steam jam, after first calling for brakes; that he did not reverse his engine, because there was not time in which to do it, after what he had done, before striking the mule; that he had no other means in his power, other than those he did employ, to avert the injury; that he could not have stopped his train, at the speed he was going, and the grade descending, with all the appliances he had, in less than half a mile; and that he was keeping a good lookout at the time, and before he discovered the mule.

4. The plaintiff in this case was guilty of no negligence in allowing his animals to run upon his own pasture grounds, or even upon the commons. The owner of domestic animals is not required to fence against a railroad. That duty, as we have held, devolves upon the company, if it would use its privileges and franchises with due regard to the rights and interests of others. Accordingly, we have recently decided that if a railroad company knowingly runs its trains under such conditions as would make it impossible for those in charge to prevent injuring stock straying on its track, and injury results, it is accountable for the loss. As we then said: "Such is undoubtedly the case when the train is run, in the nighttime, at such a fast rate of speed that, by reason of the darkness of the night, stock cannot be seen, by the aid of a headlight, in time to prevent the injury by the use of the ordinary means and appliances with which trains are usually supplied." *Banking Co. v. Ingram*, 12 South. Rep. 801; *Railroad Co. v. Jones*, 71 Ala. 487; *Railroad Co. v. Lyon*, 62 Ala. 71. In the case at bar, without dispute, the trains that are known to have killed any of the animals were running in the nighttime at a speed, each, of from 20 to 25 miles an hour,—one a passenger, and the other a heavily-loaded freight. Each approached and rounded a curve at this rate of speed. Some of the evidence tends to show the curve was slight, not preventing seeing along the track ahead, and some of it,—that of defendant,—that it was too sharp to see ahead, until it was rounded. But whether it was slight or sharp can make no difference as to the duty to exercise the reasonable care the company owed to plaintiff as to his mules, which were running upon his own grounds. It must be added, however, that the sharper the curve the greater the care with which the trains, as to their speed, should have been operated, to prevent the liability to encounter obstacles hidden by reason of the curve. Where anything suggests care to avoid peril and damage to others, the higher the duty increases to observe it. In what has been said, we do not desire to be understood as holding that railroad companies are bound by any principle of law, in the absence of statute or contract requiring them to fence their lines against the incursion of live stock on them, and,

without fencing, that they are liable in such case only for the want of reasonable and proper care to avoid the injury. 7 Amer. & Eng. Enc. Law, pp. 906, 912; 1 Ror. R. R. 614; 1 Thomp. Neg. p. 514, § 20. Having thus settled the principles which must govern the decision of this cause, we may dispose of the questions reserved. We first consider the rulings of the lower court on the evidence offered.

5. The evidence showed the mules were appraised in the presence of the plaintiff, but it does not appear it was done on his demand, nor that the appraisement was in writing,—both as required by statute. Acts 1888-89, p. 808. Nor was it shown what was said or done by any one at the time. The question propounded to the plaintiff on his cross-examination by the defendant, "What were the mules appraised at?" was therefore, on the objection of the plaintiff, properly disallowed, as calling for *ex parte* and illegal evidence.

6. Defendant's counsel's question to the witness Orr, examined in behalf of defendant, "Did you see the mules, as soon as the light of the engine permitted you to see them?" was improper, if for no other reason, because it ignores the maintenance of a proper lookout by him at the time. But the witness' own evidence shows he was running at such a rate of speed as to have made it impossible for him to stop his train, after he might have seen the animals, before running upon them.

7. The court allowed the plaintiff to ask the defendant's witness Orr when his train left Oneonta, when it arrived at Birmingham, the distance between the two points, the distance between Oneonta and Boyles, and the number of stops between them, the average duration of these stops, and the time it took to go from Boyles to Birmingham. The ground of objection was that the testimony was immaterial unless it was introduced for the purpose of showing that the train was running at a negligent rate of speed, and that it was illegal for this purpose, because no rate of speed was negligent of which plaintiff could complain. If the evidence was improperly admitted, on any grounds that might have been urged, it was not for the reason assigned, since the rate of speed was a matter of which the plaintiff could complain.

8. When the defendant's witness Orr was being examined touching his report to the company about the occurrence, the plaintiff showed the witness his written report, and questioned him about its contents. The defendant objected to the plaintiff asking the witness as to the contents of the report, unless he first laid a predicate as to the time and place where the report was made. The objection was properly overruled. There was no merit in it. Being in writing, if the object of the cross-examination was to contradict the witness as to the statements of the

report, (and such does appear to have been the object,) it was immaterial, for such purpose, to lay a predicate of time and place when and where the paper was written.

9. While the plaintiff was cross-examining this witness about said report, defendant handed the witness another report of the same accident, made at another time and place, and asked if he made that report also. Plaintiff objected, and the court refused to allow the witness to examine this last report. The request of defendant's counsel for the witness to examine the report was out of time. The witness was being cross-examined by the plaintiff's counsel, and it was within the discretion of the court to disallow the intrusion. The ruling was correct for the further reason that, from aught appearing, it was on an ex parte document, and not binding on the plaintiff.

10. Defendant's counsel asked witness Orr whether or not sounding the cattle alarm and applying the air brakes were more effective means of saving the cattle, (mules,) under the circumstances, and at the time of the injury, than reversing the engine would have been. The court sustained an objection to this question. The witness was an expert, having been a railroad engineer for seven years; and, besides, he had testified he sounded the cattle alarm, and applied the air brakes, but did not have time to reverse the engine. It was competent, therefore, to show by him that he did not fail to do that which was best, or equally effective to be done, under the circumstances, to prevent the injury, if it could be done. But this was error without injury, since this witness shows that all the appliances in his power at the time could not have averted the injury, running at the negligent rate of speed he was going.

11. The plaintiff, in the rebuttal of one of his own witnesses, was allowed to ask him, against the objection of defendant, "whether there was curve enough to prevent seeing along the track through there." This was an inquiry as to a visible and certain physical fact, of which, if the witness knew, he could testify; and, besides, it was a collective fact.

12. The defendant excepted to the ruling of the court, in allowing plaintiff's counsel, in his argument to the jury, to say "that the burden of proof was on the defendant to acquit itself of negligence; that the law was reasonable, because, if it were otherwise, the plaintiff would be compelled to put the defendant's employes on the stand, and prove by them their own negligence." We fail to see the impropriety of the remark. If the expression of a legal opinion of counsel, though incorrect, it did not furnish ground for the objection made to it. Besides, a prima facie case of negligence having been shown by plaintiff, the remark was a declaration of a correct legal principle, as held in *Railroad Co. v. Williams*, 65 Ala. 74.

13. Counsel for plaintiff, against defend-

ant's objection, was allowed also to say, in argument to the jury, "Don't you know, gentlemen of the jury, that fast running was the cause of the killing of plaintiff's mules?" The statement was argumentative, and, if unsound, it would not do to allow an exception to it, on that account, without opening up, to no profit, a new and vast field of exceptions in the lower courts, for adjudication here, which would be limitless and profitless. But, from the view we have taken of the case, it would seem that fast running had much, if not all, to do with bringing about the destruction of plaintiff's animals.

14. Passing to the consideration of the charges of the court, and applying the principles heretofore announced to them, we hold there was no error in that part of the general charge of the court to the jury: "That, after it was shown the plaintiff's mules were killed on defendant's railroad by a moving train, the burden of proof was on the defendant to show that it was not negligent in respect to a lookout."

15. Charges 2 and 3 were properly refused. Each engineer testified that it was impossible, moving at the speed he did, to have stopped the train short of killing the mules, after they could have been discovered on the track. If so, it was negligence, for which the company was liable. Charge No. 4 was Nos. 2 and 3 combined, and was properly refused, for the same reasons they were.

16. Charges Nos. 8 and 13 each ignore the duty of the engineer to keep a lookout, and not to run his train at a negligent rate of speed.

17. No. 14 ignores the passage of train No. 3 over the road that night, by which one or more of the mules may have been killed, the burden being on defendant to show by what train they were killed. It does not define what reasonable diligence in the matter of keeping a lookout is, ignores the rate of speed at which the trains were moving, and is the general charge on the effect of the evidence, improper in this case.

18. Nos. 15 to 19 inclusive were charges on the effect of the evidence, and properly refused. The remaining charges (1, 5, 6, 7, 9, 10, 11, 12, and 20) refused misplaced the burden of proof, in that they required the plaintiff to show by what train the animals were killed, and that the defendant was negligent. We find no error in the record, and the judgment of the court below is affirmed.

(99 Ala. 218)

GARNER et al. v. ULLMAN et al.

(Supreme Court of Alabama. June 7, 1903.)

PRESUMPTIONS ON APPEAL—RECORD.

Where the bill of exceptions does not purport to set out all the evidence, it will be presumed that there was other evidence sufficient to support the judgment appealed from.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action in attachment by A. Ullman & Co. against R. E. Garner & Co. to recover rent. Plaintiffs had judgment, and defendants appeal. Affirmed.

The respective contentions of the plaintiff and defendants are shown by the following summary of the evidence in behalf of each, as contained in the bill of exceptions: J. A. Hughes, who was the owner of the premises at the time of the renting, testified that during the month of December, 1891, he rented the storehouse to defendants for the term of one year, from the 1st of January, 1892, at and for the rental of \$400 per year, payable in monthly installments of \$33.33 $\frac{1}{3}$  per month; that defendants went into possession of the store, under said renting, on the 1st day of January, 1892, and paid witness the rent as agreed up to the 15th of March, 1892, when witness sold the store to plaintiffs. A. Ullman, one of the vendees of the premises, testified that on 15th March, 1892, plaintiffs purchased the storehouse from J. A. Hughes; that, on the same day, witness went to the storehouse, and called for defendant R. E. Garner, who was not in; that witness told E. A. Doolittle, a member of the firm of R. E. Garner & Co., that plaintiffs had bought the store occupied by defendants, and told said Doolittle the terms of the contract, as set out above in Hughes' testimony, as he had been informed of it by Hughes, which Doolittle admitted to be correct, and suggested that henceforth he would prefer to pay the rent on the 15th, instead of the 1st, of each month; that he would pay the rent to the 15th of March to Hughes, and thereafter to witness, to which witness assented; that on the night of July 1, 1892, defendants vacated said storehouse, and had their goods placed in cases for shipment, when he attached them for rent; that Doolittle refused to pay rent to the 15th of July, but offered to pay to the 1st, when they vacated, which witness refused to accept; that witness received the keys to the house by registered letter two days after the house was vacated; that Hughes transferred his rental lease, as made with defendants, to the plaintiffs, on the 15th March, 1892, the day of their purchase from Hughes. R. E. Garner, one of defendants, testified that on the 19th of December, 1891, he and E. A. Doolittle made a contract with J. A. Hughes for the rent of the store, the rent to begin and possession given on the 1st of January, 1892; that the contract was verbal, and the renting by the month, payable at the end of each month, \$33.33 $\frac{1}{3}$ ; that on the 30th June, 1892, they vacated the store, and moved out in the daytime; that he never at any time made any contract with Ullman. E. A. Doolittle testified that he and his partner,

Garner, on the 19th of December, 1891, made a contract with Hughes for the rent of the store by the month. That the renting was to begin January 1, 1892, rent payable at the end of each month. That on the 15th March, 1892, plaintiff Ullman came to the store, and said, "I'm your landlord." Witness replied, "Is that so?" Ullman said, "Yes; I have bought this store from Mr. Hughes, and you may continue on the same as you have been doing;" to which witness replied, "Very well." That witness paid Hughes the rent to the 15th March, and then to Ullman to 15th of June, and witness never made any contract with Ullman in regard to the renting. That, according to this understanding, the contract of renting was for no specified length of time, and that defendants had the right to move out at any time. That defendants vacated the store on the 30th June, 1892, in the daytime. That he saw Ullman before the attachment was sued out, and tendered to him the rent due up to the time they vacated the store, and he refused to receive it. That witness also tendered to him the keys, which he refused to accept, and he afterwards, July 2, 1892, sent them to him by registered letter, and offered in evidence the receipt of the postmaster of that date for keys.

Jas. D. Garner, for appellants. J. A. Bilibro, for appellees.

HARALSON, J. Under the evidence set out in the bill of exceptions, alone, whether the account given of the rent contract by the plaintiffs or that given by the defendants be true, we might hold that the plaintiffs were not entitled to recover; for, according to the plaintiffs' evidence, the contract was void, under the statute of frauds, in that it was not shown to be in writing, and to be performed within a year from the making thereof; and according to defendants', it was a verbal renting, by the month, which might be terminated at the end of any month; and they had paid or tendered all they owed up to the date of their leaving, and tendered the possession of the premises to the plaintiffs. *Crommelin v. Thies*, 31 Ala. 412; *White v. Levy*, 93 Ala. 484, 9 South. Rep. 164. But the bill of exceptions does not purport to set out all the evidence; and, under the uniform rulings of this court, we must presume there was other evidence introduced, not set out, which was sufficient to sustain the judgment of the city court. *Hood v. Manufacturing Co.*, (Ala.) 11 South. Rep. 10; *Hunt v. Johnson*, Id. 387; *Packet Co. v. Slater*, at present term; 3 Brick. Dig. p. 406, § 43.

Affirmed.

<sup>1</sup> Held pending rehearing.

(38 Ala. 475)

MARION v. REGENSTEIN et al.

(Supreme Court of Alabama. June 8, 1893.)

DEFAULT JUDGMENT—VACATING—DEFENSE OF COVERTURE.

Under Code, § 2835, providing that "no judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contains a substantial cause of action," a default judgment on a note will not be set aside merely because defendant was under coverture when she made the note.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Action by J. Regenstein & Co. against Georgie Marion. Plaintiffs had judgment by default, and defendant filed her motion to set the same aside. Plaintiffs demurred to the motion, on the ground "that the motion shows that the judgment was obtained by default, and that the matters and things relied on to set it aside could and should have been specially pleaded by defendant to be available to her as a defense to the action." The demurrer was sustained, and defendant appeals. Affirmed.

King & Carthell, for appellant. Matthews & Whiteside, for appellees.

MCCLELLAN, J. This action is prosecuted by Regenstein & Co. against Georgie Marion. The complaint contains two counts, —the first on a note executed by Georgie Marion, with waiver of exemptions, and the second, on an account for goods, chattels, and merchandise sold defendant by plaintiffs. Judgment in due course was taken by default. This judgment was manifestly under the first count, since it contains a declaration of waiver of exemptions. Afterwards motions were severally made by Georgie Marion to set aside the judgment by default, and by J. H. Marion, her husband, for a new trial. The gist of each of these motions lies in the fact that at the time of executing said note, continuously since then, and at the times of judgment and motions made, Georgie Marion was a married woman, the wife of J. H. Marion, and the latter had not in writing assented to the execution of the note by her. Demurrers were sustained to each of these motions, and they were severally denied and dismissed. Georgie Marion took this appeal, and errors are assigned here separately by her and J. H. Marion.

It is not readily, or at all, conceivable what standing J. H. Marion had on the record below to make any motion in the cause. He was not a party to the suit, nor in any legal sense to be affected by the judgment. His motion was for a new trial, which, even if he had been a party, he could not have made, since there had been no trial, within the purview of our statute obtaining in the premises, and no motion for a new trial could be entertained, (*Truss v. Railroad Co.*,

[Ala.] 11 South. Rep. 454;) and, moreover, he not only had no right to prosecute an appeal, but has not attempted to do so. For each of these several reasons, further reference to him will be pretermitted.

On this appeal the only question presented is as to the right of Mrs. Marion to have the judgment by default set aside. Her motion was made solely to that end, and that is the only relief she seeks. The mode of executing that judgment—the process by which and the property out of which it is to be satisfied—is not a matter involved in the case as it is presented to us; and hence this case is not within the principles declared in *Callen v. Rottenberry*, 76 Ala. 169, even if that case be conceded to be the law upon the point decided by it under existing statutes in relation to the status and property of married women. The contract executed by Mrs. Marion to the plaintiffs—the note sued on—was not a void contract, but voidable merely, and this at her election. *Scott v. Cotten*, 91 Ala. 623, 8 South. Rep. 783. The time for this election to be made was when this suit was pending. If her purpose was to repudiate liability on it, it was then upon her to appear and plead her coverture, and facts showing that its disabilities with respect to this contract had not been removed by the assent, in writing, of her husband to her entering into it. It was not for the plaintiff to aver the coverture, and avoid its disabling attributes by further averring the husband's assent. This was defensive matter, appropriate only to a plea. The law always presumes the contractual capacity of the parties to a contract until the contrary is made to appear by averment and proof. It was therefore not upon the plaintiffs to allege and avoid defendant's coverture. The complaint without this contained a perfectly good cause of action,—the averment of a promise to pay by one whom the law presumed *prima facie* to have the capacity to make the promise, and a failure to comply with it; and if, in fact, the defendant had not the requisite capacity, she could and should, if her purpose was to avoid liability, have pleaded it. 1 *Freem. Judgm.* 150; 1 *Chit. Pl.* §§ 743, 747; *Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. Rep. 333. The contract not being void, but open merely to a defense by the seasonable interposition of which it could have been voidable, the complaint containing a good cause of action, and the defense of coverture not having been interposed, the case is brought within section 2835 of the Code, which provides: "No judgment can be arrested, annulled, or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action." And we therefore hold that the lower court committed no error in sustaining demurrers to the defendant's motion, and denying and dismissing the same.

Affirmed.

(38 Ala. 10)

**HODGE v. STATE.**

(Supreme Court of Alabama. June 6, 1893.)

**HOMICIDE—EVIDENCE.**

In a murder trial, evidence that a dog trained to follow the tracks of a human being was shortly after the homicide put on what appeared to be the tracks of the guilty person, and followed them to defendant's house, where defendant was shown to have been the night after the killing, is admissible.

Appeal from circuit court, Escambia county; John R. Tyson, Judge.

Amos Hodge was indicted, tried, and convicted for the murder of one Rose Stanback, and was sentenced to be hanged. He appeals. Affirmed.

The only question presented by the appeal arose in the following way: The testimony for the state tended to show that on the night of the killing, just after it was done, several witnesses went to the place of the killing, and discovered, in close proximity to the house, man tracks. These tracks were sufficiently marked to be easily followed, and were followed by several of the witnesses up to or very near to the house of the defendant. One of the witnesses, while on the stand, was asked the following question: "If he had, at the time he was searching for tracks, a trained dog for tracking a man?" The defendant objected to this question, and duly excepted to the court's overruling his objection. The witness stated that he did own such a dog at that time, and that when the tracks were discovered, near the house of the deceased, he got his dog, and put him on the tracks, and, after putting him on the tracks, he followed the dog, in company with other witnesses, and that the dog, after "taking the trail," followed the tracks, and went to the defendant's house. The defendant moved the court to exclude this testimony, and duly excepted to the court's overruling his motion.

Wm. L. Martin, Atty. Gen., for the State.

**McCLELLAN, J.** It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy. The evidence in this case showed that a dog thus trained was, within a very short time after the homicide, put upon the tracks of the person towards whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks, or "trailing," went to the house of the defendant. It was also in evidence by several witnesses that the tracks found at the scene of the homicide were followed by them thence to the house of the defendant, being measured at various points along the route, and otherwise at each of such points identified as being made by the same shoes as were the tracks at the place of the murder, and that the route thus traced by them was pre-

cisely that taken by the dog throughout. On this state of case we are of the opinion that the fact that the dog, trained to track men as shown in the testimony, was put on the tracks at the scene of the homicide, and, "taking the trail," so to speak, went thence to defendant's house, where he, the defendant, is shown to have been that night after the killing, was competent to go to the jury for consideration by them in connection with all the other evidence as a circumstance tending to connect the defendant with the crime; and, of consequence, that the court committed no error in refusing to exclude it. The ruling of the court on this point is the subject-matter of the only exception reserved. This being without merit, the judgment must be affirmed, and, as affirmed, the sheriff of Escambia county will execute the sentence of death imposed thereunder, as prescribed by law, on Friday, July 7, 1893. Affirmed.

(101 Ala. 333)

**NORTH ALABAMA DEVELOPMENT CO., Limited, v. SHORT.**

(Supreme Court of Alabama. June 6, 1893.)

**NOVATION—ASSUMPTION OF PURCHASE-MONEY NOTE.**

Where a purchaser of land covenants with the vendor to assume and pay a note given by his vendor to his grantor, the latter can sue the purchaser at law on the covenant, though not a party to the conveyance.

Appeal from circuit court, Franklin county; H. C. Speake, Judge.

Action by Albert Short against the North Alabama Development Company on a promissory note made by one A. Parish to the plaintiff, and assumed and agreed to be paid by the North Alabama Development Company, in part payment of the purchase money for certain land bought of A. Parish. There was judgment for the plaintiff, and defendant appeals. Affirmed.

Rouehac & Nathan, for appellant. Almon & Bullock, for appellee.

**COLEMAN, J.** Albert Short, the owner of certain real estate, sold and conveyed the same to one A. Parish, who executed to his vendor, Short, his promissory note for \$600. Parish sold the same land to the North Alabama Development Company, which company "assumed and agreed to pay at maturity the note executed by Parish to Short." Short was not a party to the conveyance and agreement between Parish and the North Alabama Development Company. The only question in the case is whether Short can maintain an action in a court of law against the North Alabama Development Company on its covenant and agreement with Parish, its vendor, to pay the Short debt. Whatever may be the rule in other states, it is not an open question in this state. In *Dimmick v. Register*, 92 Ala. 458, 9 South. Rep. 79, the court uses this language: "It was a

promise the creditors could claim the benefit of, and on which they could maintain an action in their own names. The debt became prima facie a debt to them, and Wilkins and associates [the person making the sale] could maintain no action upon it, unless the creditors repudiated the substitution, or, the promise not being kept, coerced or took steps to coerce payment from the original debtor. We discussed these questions so fully both on reason and authority in *Young v. Hawkins*, 74 Ala. 870, and *Coleman v. Hatcher*, 77 Ala. 217, that we deem it unnecessary to further reproduce the argument. The promise inured to the benefit of the creditors, and prima facie they alone can claim payment or sue for the breach of the agreement. See, also, *Huckabee v. May*, 14 Ala. 263; *Lockwood v. Nelson*, 16 Ala. 294; *Mason v. Hall*, 30 Ala. 599." The precise question, and upon a contract containing the exact covenant and assumptions as in the case at bar, was recently decided in the circuit court of the United States for the northern district of Alabama in the case of *Development Co. v. Orman*, 53 Fed. Rep. 469, 55 Fed. Rep. 18, and the court held that Orman could maintain the action, citing the Alabama cases, *supra*. There was no error in the judgment rendered. **Affirmed.**

(101 Ala. 111)

#### BROOKS v. RODGERS.

(Supreme Court of Alabama. May 16, 1893.)

RIGHTS OF LANDLORD—TROVER AGAINST TENANT—MEASURE OF DAMAGES—ADVERSE POSSESSION BY TENANT—WHAT CONSTITUTES—EVIDENCE—BURDEN OF PROOF—DEPOSITIONS—APPEAL.

1. A landlord may bring trover against his tenant, during the tenancy, for the value of wood into which trees wrongfully severed from the premises by the tenant have been converted.

2. The fact that the landlord claims the forfeiture of the lease because of such a severance, and that the tenant denies such forfeiture, and forces the landlord to an action of ejectment to recover the premises, before the lease has expired, which action is pending when trover is instituted, does not show that the possession of the tenant is adverse to that of the landlord, but simply that the tenant claims a right to continue his possession under the lease.

3. In such action the landlord may introduce in evidence the lease under which the tenant holds, to show that the tenant's possession is not adverse.

4. Judgments on demurrers cannot be presented to the appellate court for consideration by a bill of exceptions.

5. An objection, at the second trial of an action, to the admission of a deposition introduced at the first trial, will be overruled, where the objection goes to the entire deposition, and is not made before the commencement of the second trial, or does not show that the grounds of the objection became known only after the commencement of such trial.

6. The overruling of an objection to an answer to cross interrogatories on the ground that such answers are not responsive is harmless, where the answers are competent evidence in the cause, and but repetitions of answers to the interrogatories in chief.

7. In such an action of trover the measure of damages is the value of the wood at the time of the conversion, with interest to the time of trial.

8. Where the tenant claims that the landlord has released the cause of action, the burden of proving the same is on the tenant.

9. The acceptance of rent by the landlord after the severance and conversion and the execution of a new lease for a subsequent period, though they may work a waiver of the forfeiture of the lease existing at the time of the severance and conversion, do not release the tenant from liability for the value of the wood converted.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Trover by Charlotte Thompson Rodgers against John D. Brooks for the conversion of certain wood. Judgment for plaintiff. Defendant appeals. **Affirmed.**

There was a demurrer interposed to the complaint, but the record discloses no ruling thereon. The bill of exceptions states that the defendant pleaded the general issue, and, by special pleas, set up as a defense that at the time of the alleged conversion he was in the actual possession of the property from which the trees were cut and the wood sold, as the tenant of the plaintiff, and that as such tenant he was "claiming use, occupation, and possession of the said property adversely against the plaintiff and all the world, for the term of said lease," at the time of the alleged conversion of said wood, and that whatever portion of said wood was converted was in fact cut down and severed from the property during the continuance of said adverse holding and possession. There were demurrers interposed to these pleas, but the rulings of the court thereon are only shown in the bill of exceptions, which makes it unnecessary to notice them in this statement. The judgment entry recited that issue was joined on the pleas; and, in accordance with the verdict of the jury, there was judgment for the plaintiff, assessing her damages at \$2,603.

On the first trial of this cause in the court below, the jury failing to agree upon a verdict, there was a mistrial. Upon the cause coming up for the second trial, the bill of exceptions recites: "The defendant informed the court that since the last term of this court the plaintiff had rescinded the lease under which the defendant held, and claimed right of possession to said plantation, described therein, from which the said trees were alleged to have been severed and converted into wood, for the value of which the suit is prosecuted, and that the plaintiff had commenced an action of ejectment in this court against the said defendant herein, for the possession of said plantation, and that said defendant had refused to surrender the possession of said plantation to the plaintiff, and was then resisting said action of ejectment, and had filed in this cause the plea which was then read to the court." This plea sets up as a defense that at the time of the hearing of this cause the defendant was

in the actual use, occupation, and possession of the property described in said suit, and claimed the same adversely against the plaintiff and all the world, for the term of said lease, at the time of the alleged conversion of said wood, and that the defendant had not committed any breach of the contract of lease, and refused to surrender the possession of said plantation. The defendant then moved the court to allow this plea to be filed as a plea to this suit, and upon the plaintiff's objection, and motion to strike said plea from the file, the court refused the motion of the defendant, struck the plea from the file, and to this action of the court the defendant duly excepted. Thereupon, as is stated in the bill of exceptions, the defendant pleaded the general issue, "in short, by consent, with leave to give in evidence any matter that might be introduced under a special plea."

The testimony for the plaintiff tended to show that her plantation was leased to the defendant in 1883, through her attorneys and agents, Sayre & Graves, for five years; that this contract of letting was in writing, and had been misplaced; that one of the provisions of this contract was that the tenant was not to cut or destroy any of the wood or timber on said plantation, except for farm purposes, and such timber as would be necessary to reclaim and clear up such of the land as had grown up in small pines; that at the expiration of the five-years lease the defendant, by a verbal lease, rented from Sayre & Graves the said plantation for a term of one year from January 1, 1888, to January 1, 1889; that when the plaintiff and her husband went upon the plantation, in the early part of the year 1888, they discovered that a great deal of the timber had been cut from the plantation, and that the defendant had converted the same to his own use, selling it in open market; and that upon ascertaining this fact the plaintiff objected. It was further shown that on March 15, 1888, the plaintiff made with the defendant a written five-years lease from January 1, 1889, having therein the express covenant on the part of the defendant that he would not "cut down nor destroy any of the wood or timber on said premises, except such as are absolutely necessary for the plantation purposes,—for fuel, repairs, and improvements to be used or placed thereon;" and it was expressly stipulated that in the event of the breach of this covenant, or any of the covenants contained in said contract of letting, the lease could be rescinded by the plaintiff. It was also in evidence, on the part of the plaintiff, that the original lease, made in 1883, contained similar covenants and stipulations. The evidence for the plaintiff tended to show that during the pendency of the 1st, 2d, and 3d leases the defendant had cut down, and converted to his use, a large quantity of timber and wood, from the plantation of the

plaintiff. Upon the plaintiff's introducing in evidence the lease executed on March 15, 1888, the defendant objected because the evidence showed that said lease was not in force at the time of the alleged wrongful cutting of wood, for which the suit was prosecuted. The court overruled this objection, and the defendant duly excepted. Upon the examination of Lorraine Rodgers as a witness for the plaintiff, the defendant handed him the written notice of the rescission of said lease, dated March 15, 1888, and asked the witness if the said notice had not been served on the defendant. The plaintiff objected to this question, whereupon "the defendant read said notice to the court, and stated to the court that he expected to show by said witness that since the mistrial of the case, at the last term of said court, the plaintiff had served defendant with a written notice of alleged forfeiture of said lease on March 15, 1888, on the part of the defendant, and had notified defendant that she had rescinded said lease on account of said forfeiture, and demanded possession of said plantation of the defendant, as shown by said notice," and that the defendant had denied said forfeiture, and refused to surrender the possession of said plantation except on the terms and conditions stated by the defendant. The court sustained the objection of the plaintiff, and the defendant duly excepted. The defendant then offered to introduce in evidence, for the purpose of having the same identified by the witness Lorraine Rodgers, another communication, dated November 19, 1891, from the plaintiff and her husband, addressed to the defendant, in which, after stating the cause of the forfeiture of the lease, and notifying said Brooks of her rescission therefor, she demanded the immediate possession of her plantation. The plaintiff objected to the admission of this instrument. The court sustained the objection, and the defendant duly excepted. The defendant sought to introduce in evidence the summons and complaint in the ejectment suit, but upon the objection of the plaintiff the court refused to allow the same to be introduced, and the defendant duly excepted. Upon the witness Lorraine Rodgers being asked as to the value of the wood cut from the plaintiff's plantation, the defendant objected to such testimony, and duly excepted to the court's overruling his objection. The defendant moved to exclude from the jury that portion of the lease of March 15, 1888, which prohibited the cutting of wood or timber on the plantation, on the ground that the provisions in said lease were not shown to be the same as those in the lease pending at the time of the alleged conversion of the trees, for the value of which this suit was prosecuted. Upon the introduction of the deposition of the plaintiff the defendant objected thereto "because said deposition was taken prior to the trial of the cause in this court at the last

term of this court, and for the purpose of being used on that previous trial, on the ground that the plaintiff was not a resident of Alabama, residing in New York, but was now a resident of the city of Montgomery, and could be had on the stand as a witness." The court overruled this motion, and the defendant duly excepted. To the sixth cross interrogatory propounded by the defendant to the plaintiff, as found in her deposition, the plaintiff answered "that she has never given verbal permission to cut wood on her plantation; that the only permission she has given is in the lease signed in March, 1888." The defendant moved the court to exclude from the jury the plaintiff's answer to this cross interrogatory on the ground that it was not responsive to the court's interrogatory, and was irrelevant and incompetent. The court overruled this motion, and the defendant excepted. The defendant then moved the court to strike from the jury that portion of the answer of the plaintiff to the second cross interrogatory in which she answered that "she is certain it [the lease] gave him no right to cut timber for other than plantation purposes," because the same was not responsive to said interrogatory. The court overruled this motion, and the defendant duly excepted. The testimony for the defendant tended to show that under his lease he had the right to clear up the property, cut down such trees as were necessary, and that, on a visit to her plantation by the plaintiff and her husband, defendant said to them that it was necessary for him to cut the wood, and sell the same, in order that he could pay the rent, but if Mr. Rodgers objected he (the defendant) would stop, and that thereupon the husband of the plaintiff said: "Oh, no; go ahead." The testimony for the defendant further tended to show that he had paid the rent regularly every year, as the same fell due.

The defendant separately and severally excepted to the following portions of the general charge given by the court: "The fact that another suit is pending here for the recovery of the land from which the wood was cut can have no influence on the right of recovery by plaintiff, whatsoever, in this suit." "That the plaintiff was entitled to recover interest on whatever wood that they might find defendant was chargeable with cutting, from the time of the cutting of the wood." At the request of the plaintiff the court gave the following written charges to the jury: (1) "If the jury find for the plaintiff, they should give her the value of the wood, from the time it was cut by defendant, with interest thereon from the time it was cut by him." (2) "That the burden is on the defendant to establish, to the satisfaction of the jury, that the plaintiff, Charlotte Thompson Rodgers, agreed, as part of the lease made between her and defendant in March, 1888, that he should be released from all damage from

cutting wood on her land." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1) "The court charges the jury that if they believe the evidence they must find a verdict for the defendant." (2) "The court charges the jury that if they believe from the evidence that the wood alleged to have been converted by the defendant was cut from trees which were severed by defendant from the land known as the 'Charlotte Thompson Place,' and which lands were in the actual occupation and possession of said defendant, under a lease from the plaintiff to him for the payment of rent, holding and claiming said lands, and in the actual occupation and possession thereof, under said lease, against the plaintiff, and against her right of entry on said lands, at the time of the commencement of this suit, and up to the trial of this cause, continuously, then the jury must find a verdict for the defendant." (3) "The court charges the jury that if they believe from the evidence that the wood alleged to have been converted by the defendant was cut from trees severed by the defendant from lands on the Charlotte Thompson place, and that said lands were in the actual occupation and possession of said defendant, under a lease to him by the plaintiff for the payment of rent therefor, under which the defendant claimed and held possession of said lands against the plaintiff, and against her right of entry thereon, for the term of said lease, at the time said trees were severed from said lands, and also at the time of the commencement of this suit, continuously up to the present time, then the jury should find a verdict for the defendant." (4) "The court charges the jury that if they believe from the evidence that said wood alleged to have been converted by the defendant was cut from trees that were severed from lands on the Charlotte Thompson place, which were in the actual occupation and possession of said defendant, under a lease made to him by the plaintiff, at a stipulated rent, for said lands, claiming and holding the lands thereunder against the plaintiff, and her right of entry thereon, at the time said trees were severed by the defendant from said lands, and at the time of the commencement of this suit, continuously up to the present time, and that the plaintiff has since that time rescinded said lease, and notified defendant thereof, and demanded of him the surrender of the possession of said lands, and that defendant refused to surrender said possession thereof, and that she then commenced an action of ejectment against said defendant for the possession of said lands, and that said action is pending, and is resisted by the defendant, then you should find a verdict for the defendant." (5) "The court charges the



jury that if they believe from the evidence that defendant was in the actual occupation and possession of lands known as the 'Charlotte Thompson Place,' claiming and holding the same under a lease for rent from the plaintiff to the defendant, against the plaintiff, and against her right of entry on said lands, for the period of said lease, at the time the said trees were converted into wood, the value of which is the subject-matter of this suit, and that defendant was also in the actual possession and occupation of said lands as aforesaid at the commencement of this suit, and since that time to the present, claiming the same as aforesaid, then such possession would be adverse to the plaintiff, and in that event this suit cannot be maintained, and you should therefore find a verdict for the defendant." (6) "The court charges the jury that if they believe from the evidence that the plaintiff was not in the actual possession of the lands from which said trees were severed by the defendant at the time they were severed, and thereafter converted by him into wood, and if she can show title to said trees severed as aforesaid from said lands only by showing title to the lands, and if the defendant has been in the actual occupation and possession of said lands since the severance of said trees, as tenant of plaintiff, under a lease for the payment of annual rent for said lands, up to the present time, then this action will not lie, and in that event you should find a verdict for the defendant." (8) "The court charges the jury that if they believe from the evidence that the plaintiff renewed the lease for said plantation in the year 1888, to the defendant, for five years, beginning on the 1st day of January, 1889, at an annual rent of eleven hundred dollars, with full knowledge of the fact that said defendant had severed said trees from said plantation, and converted the same into wood, for the value of which this suit is prosecuted, and that the plaintiff thereafter permitted defendant to remain in the use and possession of said plantation to January, 1891, and accepted the payment of said annual rent from defendant for said years of 1889 and 1890, that plaintiff would be presumed to have waived the breach of said lease in the cutting of said trees, and in that event you should render a verdict for the defendant." (9) "The court charges the jury that the acceptance of rent by the plaintiff, and the renewal of the lease for five years, with full knowledge by the plaintiff that said trees had been severed by defendant from said plantation without her consent, and in violation of said lease, is presumptive evidence that the plaintiff has waived and condoned the breach of said lease; and, if you believe from the evidence that she has waived or condoned said breach of said lease, then you should find a verdict for the defendant." (10) "The court charges the jury that

if they believe from the evidence that the plaintiff can only show her right to the possession of the wood alleged to have been cut by the defendant during his actual possession of said lands, only by showing her right of entry into the possession of said lands, against the right of said defendant, in consequence of his breach of said lease by the severance of said trees by him from said lands without authority, then and in that event, under the evidence in this case, the plaintiff cannot maintain this suit, and you should therefore find a verdict for defendant." (12) "The court charges the jury that if they believe from the evidence that the defendant, in good faith, cut down the trees, and converted them into wood, under the belief that he had a right to do so under the lease obtained by him from Sayre & Graves, the authorized agents of the plaintiff, then, and in that event, if you should find a verdict for the plaintiff, you should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the expenses of hauling the same to market."

Upon the jury's return of a verdict in favor of the plaintiff, the defendant moved the court for a new trial, assigning as grounds therefor that the verdict was contrary to the evidence; that it was excessive, and that it was contrary to law; that the court erred in his instructions to the jury and in his rulings upon the evidence. This motion was overruled, and the defendant duly excepted.

Richardson & Reese, for appellant. Arrington & Graham, for appellee.

MCLELLAN, J. This case was defended below, and the rulings of the trial court are assigned as erroneous here, mainly upon the theory that a landlord cannot maintain trover for timber wrongfully cut off the demised premises, sawn into firewood, and sold, by the tenant, until after the lease has been forfeited, or the tenancy has otherwise been terminated, and the landlord, in consequence, has a right to the immediate possession of the land. This contention is sought to be rested on the doctrines, perfectly well established in themselves, that trespass for injuries done to land by a tenant cannot be maintained by the landlord while the tenancy continues, and that trover cannot be maintained by the owner of land for timber, fixtures, gravel, and the like, severed from the freehold, and converted, against one who is in the adverse possession of the land; but neither of these principles has any bearing upon, or application to, the question raised in this case. Trespass will not lie against a tenant pending the term, because the wrong which is the gist of the action is an offense against the actual possession and right of possession, and these are in the tenant; and trover

will not lie, at the suit of the owner of land, against one in adverse possession, for the conversion of things severed from the freehold, because in such case a trial of the title to the land from which the severance has been made would be necessary, and title to realty is beyond the issue triable in this form of action. But there is no question in this case either as to the possession and right of possession of the land, or as to the title to the land. The recovery sought does not depend upon inquiry into these matters. The tenancy of the defendant entitled him to the possession, of course; and it is not the object of this suit, and cannot be its effect, to disturb that right, or its enjoyment. The tenancy of the defendant is also an unequivocal admission of the plaintiff's title to the land. The defendant, so long as he continues in possession under the lease,—and his sole right to the possession is referable to the lease,—cannot dispute the plaintiff's title; cannot set up any claim to title in himself against the plaintiff; cannot hold adversely to the plaintiff. His possession is that of his landlord. He has contracted for the landlord's right of possession for the term of his lease. His possession of the land entitles him to the possession, of course, of all that is attached to it so as to constitute a part of the freehold,—as trees, so long as they remain so attached, and continue to be a part of the freehold,—but he has no title to trees, and can assert no adverse claim to them against his landlord. The title to them, as to the land, remains in the landlord. When they are severed from the freehold they cease to be a part of the thing leased by the tenant. They are no longer a part of the realty, but they at once become personal chattels, the right to the immediate possession of which is in the landlord, because the title is in him, and the right of possession of personalty is referred to the title. This, with conversion by the defendant, is all that is necessary to the maintenance of trover,—the title and right to immediate possession in plaintiff to the personalty converted. To show title to the personalty, in such case, involves no inquiry as to the title of the land from which the severance has been made, and no inquiry as to the right of possession of the land. The plaintiff is not required to say he had title to the land, and the defendant is not allowed to say that plaintiff had not title. That issue cannot be made. The relation of landlord and tenant entirely eliminates it. Similarly, defendant's right of possession of the land is not involved, but that right of possession is confined to the land itself. It does not pertain to things which have ceased to be land, or appurtenant to land, through unauthorized and wrongful severance. The plaintiff, having title to the thing severed, and the right to the immediate possession of it, may, of course, maintain trover, where

there has been a conversion of the thing by the defendant. These views, which lead to and result in the concrete proposition that the action of trover will lie at the suit of a landlord against his tenant, pending the tenancy, for wood into which trees wrongfully severed from the demised premises by the tenant has been converted by him, are abundantly supported by the authorities. 2 Brick. Dig. p. 484, § 1 et seq.; 3 Brick. Dig. p. 779, § 1 et seq.; *Street v. Nelson*, 80 Ala. 230; *Mather v. Trinity Church*, 3 Serg. & R. 509; *Harlan v. Harlan*, 15 Pa. St. 507, 513; *Anderson v. Hapler*, 34 Ill. 436; *Truss v. Old*, 6 Rand. (Va.) 556; *Mooers v. Walt*, 8 Wend. 104; *Farrant v. Thompson*, 5 Barn. & Ald. 826; 2 Tayl. Land. & Ten. § 74; *Society v. Fleming*, 11 Iowa, 533. And it is upon these considerations that the landlord, the owner of the land, may maintain an action on the case for waste injurious to the inheritance, or detinue or replevin for fixtures, trees, ores, and the like, or debt for the statutory penalty for felling trees, against his tenant, during the term, and without recovery of possession of the land. They are all actions which do not rest upon possession, or right to immediate possession, of the land; and, being between landlord and tenant, they involve no inquiry as to title, the fact of the relation being itself determinative of that question. *Rogers v. Brooks*, (Ala.) 11 South. Rep. 753. The cases of *Cooper v. Watson*, 73 Ala. 252, and *Beatty v. Brown*, 76 Ala. 267, are clearly distinguishable from this one, in that the defendants in those cases held adversely to the plaintiffs,—a fact which is, as we have seen, of controlling importance,—and the recoveries sought involved trials of the conflicting claims of title, which could not be adjudicated in these transitory actions. The case of *Allison v. Little*, 93 Ala. 150, 9 South. Rep. 388, did not involve the relation of landlord and tenant; and perhaps what is there said should be limited by a consideration of the fact—which does not appear as prominently in the report of the case and in the opinion as it should—that the wrongdoer was a mere naked trespasser, who set up no claim to the title or possession of the land against the trustees. Though not a tenant of the plaintiffs, he still was not in the adverse possession of the premises.

The facts that plaintiff claimed a forfeiture of the lease existing at the time of the wrongful severance of the timber by the defendant, or of a lease subsequently made, of the premises, covering succeeding years, because of such severance, or upon any other ground; that defendant denied the forfeiture, and put plaintiff to her action of ejectment to recover the land before the last lease had expired, which action was pending, and being defended by the tenant, when this cause was tried, or when it was instituted,—were attempted to be availed of by the defendant on the trial

below of this case, as showing that defendant held the land adversely to plaintiff. These facts had no such tendency. They showed, indeed, that the defendant claimed the right to continue in possession, but they also showed that he based this right on his lease from the plaintiff; that he asserted no possession, or right of possession, except as plaintiff's tenant, and in full recognition of plaintiff's title. If either party was injured by the exclusion of this evidence, or by the refusal of the court to allow the defendant to file in this cause a plea which he had interposed in the ejectment suit, and in which he asserted his right to possession for the term of the last lease entered into between the parties, under that lease, and as plaintiff's tenant, it was the plaintiff. Certainly, the defendant can have no ground of complaint, based on the exclusion of evidence and judicial admissions of his, going to show that he did not claim, and had never claimed, adversely to the plaintiff.

Of course, it was competent for plaintiff to introduce the lease which was current at the time this suit was brought, as showing that defendant's possession was under, and not adverse to, her title; and we can conceive of no ground for the exclusion of any part of that instrument, on any idea that some of its provisions might possibly be looked to by the jury to determine what were the stipulations of a previous lease, in a certain particular. Moreover, the provision which was singled out by a special motion to exclude tended to contradict the oral testimony of the defendant as to what was said in certain conversations between him and the plaintiff and her husband, acting, it is insisted by defendant, as her agent; and for this reason alone the appellant can take nothing on account of the ruling in question. What we have said covers and disposes, adversely to appellant, of all the rulings of the court in respect of the pleadings, on the admission of testimony, and upon charges requested and given or refused, except rulings relating to the testimony, by deposition, of the plaintiff herself, and two or three charges to be presently considered.

It is to be observed, with reference to the pleadings, that, so far as this opinion bears upon questions intended to be raised in that connection, it is merely incidental to the disposition of the same questions arising on the evidence and instructions to the jury, for the record of the trial court does not show that any pleas were filed, or that any demurrers to pleas were interposed, or that any ruling was made as to the sufficiency of pleas, or, indeed, anything out the complaint, certain demurrers to the complaint, which do not appear from the record to have been ruled upon, and a final judgment on verdict for the plaintiff. The bill of exceptions, which is no part of the record below, recites certain pleas, demurrers, and judgments thereon; but, as has been many times decided here,

such judgments cannot be presented for the consideration and revision of this court in and by a bill of exceptions.

The refusal of the court to exclude the deposition of Mrs. Rodgers may be rested on the ground, among others, perhaps, that the motion to that end went to the whole deposition, and was not made before the trial was entered upon; the ground of the objection not appearing to have transpired, or become known to defendant, only after commencement of the trial. *Moody v. Railroad Co.*, (Ala.) 13 South. Rep. 233; Code, § 2810.

If that part of the testimony of Mrs. Rodgers which was objected to because not responsive to the cross interrogatories under which it was given, was in fact not responsive, the defendant was not injured by its admission, since it was competent evidence in the cause, and but the repetition of facts to which the witness had deposed in response to interrogatories in chief.

The measure of damages in this case was the value of the wood at the time of the conversion of the trees into cord wood, with interest to the time of trial, as declared by the court in its instructions to the jury. 2 Brick. Dig. p. 488, § 67 et seq.; 3 Brick. Dig. p. 780, § 29 et seq.

The court correctly charged that the burden of showing that plaintiff had released this cause of action to defendant was upon the latter. 3 Brick. Dig. p. 433, § 388.

Plaintiff's acceptance of rent from the defendant for a period subsequent to the severance and conversion of the trees, and the execution by her of a lease for a subsequent time, may have amounted to a waiver of the forfeiture of the lease current at the time thereof, but these facts do not operate a release of defendant's liability for the value of cord wood made from the trees wrongfully severed by the defendant. The cause of action laid in this case is not dependent upon the waiver vel non of any forfeiture of the lease. Charges 8 and 9, requested for defendant, were therefore properly refused.

Charge 12 of defendant's series was, to say the least, invasive of the province of the jury. If they had a right to measure the damages by reference to the facts hypothesized in that charge, it was a matter within their discretion to do so or not, and the court properly refused to require them to do so.

We will not extend this opinion by discussing the application for a new trial. It was obviously without merit, and the court committed no error in overruling it. The judgment of the circuit court is affirmed.

(38 Ala. 59)

#### GILYARD v. STATE:

(Supreme Court of Alabama. May 25, 1893.)

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—IMPEACHMENT OF WITNESS—INSTRUCTIONS.

1. There being the positive testimony of one witness that he saw defendant commit the offense with which he was charged, an instruc-

tion to find for defendant was properly refused.

2. On a prosecution for shooting into a railroad train, an instruction that defendant should not be convicted upon the uncorroborated testimony of an impeached witness was properly refused, where there was some corroborating testimony, two other witnesses having testified that they saw defendant at the place where the shooting occurred on the night on which it was done.

3. A witness having testified that he saw defendant commit an offense, no sufficient predicate was laid for testimony that such witness had said that he did not see the act done, where the witness was not asked if he had made the statement, did not deny making it, and had no opportunity to admit, deny, or explain it.

4. An instruction that the testimony of a single witness under a cloud, and who is contradicted in material matters, is not such preponderance of testimony as will warrant a conviction, and that, "if the jury find from the evidence this to be the condition of this case, it is their duty to discharge the defendant," was properly refused, as invading the province of the jury.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Harry Gilyard was convicted of shooting into a car of a railroad train, and he appeals. Affirmed.

The third charge requested by defendant, reference to which is made in the opinion, was in the following language: "The testimony of a single witness under a cloud, and who is contradicted in material matters, is not such preponderance of testimony as will warrant the jury in convicting the defendant; and, if the jury find from the evidence this to be the condition of this case, it is their duty to discharge the defendant."

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was indicted, tried, and convicted, under section 4098 of the Criminal Code, for shooting at or into a locomotive or car of a railroad train, in or on which there was a human being. The only questions reserved arise upon the refusal of the court to give three several charges as requested by the defendant. The first was the general affirmative charge to find for the defendant. There was positive evidence by one witness that he saw defendant commit the offense. The charge was properly refused. The second charge refused was to the effect that the jury must not convict upon the uncorroborated testimony of an impeached witness. This charge was properly refused, first, because there was some corroborating testimony. Two other witnesses testified to seeing the defendant at Thorin, where the offense was committed, on the night of the Sunday on which the shooting occurred. Second, the record fails to show that the witness was impeached. Two witnesses for the defendant testify that the witness for the state told them in a conversation that he did not see the defendant do the shooting. No predicate was laid for the introduction of this conversation. The witness for the state was

not asked in reference to it. He never denied making the statement, and had no opportunity either to admit or deny or explain it. Moreover, the principle of law intended to be asserted was incorrect. The rule in this state is that such a charge invades the province of the jury. They are the judges of the weight to be given to the testimony of any witness. *Nabors v. State*, 82 Ala. 8, 2 South. Rep. 357; *Moore v. State*, 68 Ala. 360. For the same reasons, the third charge requested was properly refused. In addition to all that has been said, the record does not pretend to set out all the evidence; and in such cases, if it was necessary to sustain the action of the trial court, we would be bound to presume there was other evidence introduced by the state on the trial.

Affirmed.

(45 La. Ann. 969)

# STATE v. THOMPSON. (No. 1,272.)

(Supreme Court of Louisiana. July 2, 1893.)

## CRIMINAL LAW—INSTRUCTIONS—JUSTIFIABLE HOMICIDE—PROVINCE OF JURY.

1. It is the duty of the court to instruct the jury upon every phase of the case made by the evidence. Where evidence is offered to prove a certain state of facts, and the claim is made that they are proved, the court should, if requested so to do, charge the jury what the law is as applicable to the facts claimed to be proved. *State v. Tucker*, 38 La. Ann. 536, 789.

2. When two parties have had a difficulty, if one of them quits the combat, and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and kill his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not. *State v. Tucker*, 38 La. Ann. 536, 789; 1 Archb. Crim. Pl. & Pr. p. 690; 9 Amer. & Eng. Enc. Law, p. 602.

3. A person free from fault, when attacked by another, who manifestly attempts by violence to take his life, or to do him great bodily harm, and under such circumstances that no retreat is practicable, is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense. 1 East, P. O. 271, 272; *Luby v. Com.*, 12 Bush, 1; *Pond v. People*, 8 Mich. 177; 2 Starkie, Ev. 963; *Fost. Cr. Law*, 273.

4. In criminal trials it is the exclusive province of the jury to weigh and give effect to the evidence.

5. When a charge asked was applicable to the facts as set forth in the bill of exceptions, and when the trial judge does not specifically deny such facts, but virtually admits the material ones, by quoting them in hypothetical cases in his general charge, it should be given; and his opinion of the merits of the case is no excuse for not giving it.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans.

Abe Thompson was convicted of manslaughter, and from the judgment and sentence thereon he appeals. Reversed.

O. C. Luzenberg, for appellant. John J. Finney, Asst. Dist. Atty., for the State.

FENNER, J. The defendant was prosecuted for murder, convicted of manslaughter, and sentenced to pay a fine of \$2,000, and to suffer imprisonment in the state penitentiary at hard labor for the term of 20 years. He appeals from the verdict and sentence, and relies for their reversal on two bills of exception taken to the refusal of the judge to give two special charges to the jury, as requested by him.

The first special charge is in the following words: "I charge you that, when two parties have had a difficulty, if one of them quits the combat, and retreats in good faith, and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not." It is not disputed that the charge embodies a sound statement of the law. *State v. Tucker*, 38 La. Ann. 536, 789; 1 Archb. Crim. Pl. & Pr. p. 690; 9 Amer. & Eng. Enc. Law, p. 602. But the judge declined to give it, for the following reasons, stated on the bill. "Per Curiam. The facts did not justify such a charge. Thompson was a strong, robust man, armed with a loaded revolver, concealed on his person. Mitchell was a boy 17 or 18 years of age, unarmed, and open handed. Thompson was not in danger of his life or of great bodily harm. He could have retired from the contest, just as his companion Moore did. There was but one difficulty. Mitchell was shot in the back of his head, evidently turning away from his assailant." The charge may not have been justified by the facts as the learned judge appreciated them, but it was certainly applicable to the testimony given by the witnesses in the case, as carefully recited in the bill, and not denied by the judge. The bill shows that there was testimony to the effect that there had been a collision and angry words between Thompson and deceased at the corner of Camp and Garennie streets, from which Thompson retired, and retreated up Camp street; that deceased, with four or five companions, pursued Thompson, surrounding and beating him and assaulting him with bricks and stones up to the moment of his turning and shooting the deceased. This testimony may have been true or false, or may have been in utter conflict with other superior evidence, but it was the exclusive province of the jury to estimate and determine its weight, and, if believed by the jury, it furnished proper and serious ground for the contention by counsel that it was necessary for defendant to turn and slay his pursuer in order to protect his own life, and he was entitled to the special charge asked. We had occasion to discuss this subject very carefully in *Tucker's Case*, where we held as follows: "When a bill of exceptions

recites the facts which the counsel had contended before the jury had been established by the evidence, and refers to the evidence in support thereof, and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case is error, unless the judge states there was no evidence in the case supporting or tending to support the contentions of counsel." *State v. Tucker*, 38 La. Ann. 536.

The second special charge refused by the judge was the following: "If you find from all the evidence heard upon this trial that the accused was attacked by the deceased and others, who manifestly attempted by violence to take his life, or do him great bodily harm, and under such circumstances that no retreat was practicable, then I charge you, if you should so find, that under such conditions the party who is attacked is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is justifiable self-defense." The law as here laid down is not disputed by the judge, and is supported by ample authority. 2 Starkie, Ev. 963; *Fost. Cr. Law*, 273; 9 Amer. & Eng. Enc. Law, p. 600; *Pond v. People*, 8 Mich. 177; *Luby v. Com.*, 12 Bush, 1. The judge gave the following reasons for refusing the charge: "Per Curiam. I made three hypothetical cases in charging the jury, based upon the evidence, and covering the law of murder, manslaughter, and self-defense, as applicable to the facts of the case. There was no attempt to take defendant's life, or to do him bodily harm. Retreat was eminently practicable, as defendant's companion Moore retreated safely. There was absolutely no necessity for the taking of human life." Looking at the charges which the judge referred to as having been given, the only one having any applicability to the state of facts referred to in the charge asked, is the following: "If, however, you find from the facts of the case that the deceased and his companions were the aggressors; that they seriously assailed the prisoner at the bar, and pursued him to Camp street, up to the point where the killing occurred; that they were armed with rocks or bricks or other dangerous missiles or weapons; that they surrounded the prisoner, and began an attack so violent and fierce as to endanger his life or to inflict great physical injury on him, or to make the defendant honestly believe by reason of the suddenness, violence, and determination of the attack that his life was in danger, or that he was in danger of great bodily hurt; that the suddenness of the attack, and the number of his assailants was such that he could not escape, and that it was necessary for him, under the circumstances, and to preserve his life or his person from great bodily harm,

to slay the deceased,—then he is not guilty, and you should so find your verdict." This is an excellent statement of the law as far as it goes, but a comparison of it with the charge asked shows that it entirely omits the vital point in the latter touching the right of the defendant, under the circumstances stated, "to pursue his adversary" in order to secure himself from danger. The recitals of the bill, not contradicted by the judge, show evidence to the effect that at the moment of the shooting the deceased had turned, and was trying to get away from the accused, and was actually running away; and that thereupon the counsel for the state contended that these facts were fatal to the defense. It thus became important to accused to have the law correctly charged as to his rights to turn upon a retreating adversary, and even to pursue him, if necessary to secure his own safety. We are bound to hold that the judge erred in refusing the charge asked. His statements that retreat was practicable; that there was no attempt to take the life of accused, or to do him bodily harm, and no necessity for taking life,—are obviously the judge's inferences from the testimony, which belonged to the exclusive province of the jury, there being evidence tending to show the contrary, and justifying defendant's counsel in so contending. It is therefore adjudged and decreed that the verdict and sentence appealed from be annulled and set aside, and that the case be remanded to the lower court for a new trial and further proceedings according to law.

(45 La. Ann. 973)

**STATE v. ALEXIS. (No. 1,285.)**

(Supreme Court of Louisiana. June 14, 1893.)

**CRIMINAL LAW—ACCUSED AS WITNESS—EXAMINATION OF.**

In case an accused person avails himself of the grace of the special statute authorizing him to testify in his own behalf, he occupies the dual position of witness and accused; and his credibility as a witness may be attacked by interrogating him in reference to his having been previously prosecuted or criminally punished, and his character indirectly involved.

(Syllabus by the Court.)

Appeal from district court, parish of East Baton Rouge.

John Alexis was convicted of petit larceny, and appeals. Affirmed.

Cross & Cross, for appellant. George K. Favrot, Dist. Atty., for the State.

**WATKINS, J.** From a conviction of the crime of petit larceny, and sentence to six months' imprisonment in the penitentiary, the defendant prosecutes this appeal, relying upon a single bill of exceptions which he reserved to the ruling of the trial judge, with regard to the admissibility of certain testimony. It appears from the bill of ex-

ceptions that the accused availed himself of the grace of the special statute on the subject, and testified as a witness in his own behalf, and during his cross-examination he was asked the question whether he had not previously served a term in the penitentiary. To this question the objection was interposed that it involved a question of character, and it could not be drawn in question by the prosecution, for the reason that the defendant had not put it in issue. This identical question was raised and decided, contrary to present contention, in the recent case of *State v. Murphy*, 13 South. Rep. 229; the theory of our opinion being that the question was rather one touching the credibility of the accused as a witness than his character for honesty. The court was of opinion that the position occupied by the defendant was dual, he being at one and the same time witness and accused, and that, occupying such position, the prosecution was thus entitled to test his credibility. *Whart. Crim. Ev. § 489; State v. Willingham*, 33 La. Ann. 537. Judgment affirmed.

(45 La. Ann. 1013)

**WILLIAMS et al. v. GILKERSON-SLOSS COMMISSION CO. (No. 1,286.)**

(Supreme Court of Louisiana. June 14, 1893.)

**ATTACHMENT—WAIVER OF CITATION—ADMISSIONS IN ANOTHER SUIT—ESTOPPEL.**

1. The condition on which the property attached is released, and delivered to the defendant, is that he should appear by attorney or in person, and that he should furnish security judicatum solvi.

2. The absent defendant, by appearing and bonding the property attached, waives citation.

3. The defendants in another suit judicially admitted their indebtedness to the plaintiff, and obtained judgment for the amount against plaintiff's former debtor. They are not to be heard who allege things contrary to each other.

(Syllabus by the Court.)

Appeal from district court, parish of Morehouse.

Action by Mrs. M. K. Williams and husband against the Gilkerson-Sloss Commission Company to recover the amount of a draft. Judgment for plaintiffs. Defendants appeal. Affirmed.

Newton & Cason and Ellis & Hall, for appellants. Potts & Hudson and S. T. Baird, for respondents.

**BREAUX, J.** Plaintiff is the wife of John A. Williams, a member of the firm of Bond & Williams. In 1891 this firm became indebted to her in the sum of \$5,912. The defendants were the commission merchants of the commercial firm of Bond & Williams, to whom they advanced supplies and furnished money during that year in large amount. In November, 1891, they executed a draft on the defendants to pay their indebtedness to plaintiff. The plaintiff, the payee, indorsed the draft, and forwarded it to the defendants, with direction to place the amount to

her credit. In December of that year, the firm of Bond & Williams being financially embarrassed, and not having complied with its obligation to the defendants, the latter sued them, and obtained a writ of attachment. They alleged in their petition in that suit that, after allowing all proper credits, there was a balance due them of \$16,292, as per itemized account. Their account was filed in evidence on the trial. It shows that on December 1, 1891, the plaintiff was credited for the amount of her draft, and that the firm of Bond & Williams was charged with the amount so credited. Judgment was pronounced for the said balance, upon due proof of the amount of the indebtedness. It includes the sum of \$5,912, amount of plaintiff's draft. Property attached, movable and unmovable, was seized and sold. It was bought by the defendants. The amount of the sale did not satisfy the judgment. There is a large balance due to the defendants, who are absentees. The plaintiff sues to recover the amount of the draft forwarded to the defendants, as stated, and prays for writ of attachment and for garnishment process, which were issued, and certain claims of the defendants were taken possession of under the writ. In reference to this draft, the plaintiff testified in the case at bar in support of defendants' account (which account had been previously proved up in case 6,852) filed in their suit against Bond & Williams, and denied that any agreement was entered into, differing from the allegations and the judgment obtained against her late debtor, the firm just named. One of the defendants states, as a witness, that there was an agreement that his company would not have accepted the draft, and placed it to the credit of plaintiff, in the absence of an agreement that the money was not to be paid until all the indebtedness of Bond & Williams had been paid, and sufficient cotton on hand in excess to pay the amount; that the amount of the draft sued on in this case is charged to Bond & Williams. The testimony of a witness (defendants' agent) who testified in the suit of defendants against Bond & Williams (No. 6,852) that he knew nothing further than is stated on the face of the draft, and of another witness, was admitted, over defendants' objections. On the trial of the case at bar, the testimony of these two witnesses, and the letter marked "A," were offered to prove the agreement alleged in defendants' answer, and were excluded for the reason set forth in the plea of estoppel. There was no copy of the citation and of the petition and writ of attachment posted at the courthouse door. Personal service was made of these on the curator ad hoc appointed to represent the absent defendants. The curator ad hoc appointed by the court was also the attorney of the defendants. He, as curator ad hoc, applied to the court for an order authorizing the defendants to take possession of the property attached, on their

furnishing bond. He, as attorney for the defendants, not as curator ad hoc, had previously agreed with the attorney for plaintiff to the delivery of the property attached, to the defendants, on their furnishing solvent bond. The bond was furnished by the defendants, represented by their authorized attorneys. The property was delivered to them. Judgment was pronounced in favor of the plaintiff for the amount claimed, and the property attached was ordered to be sold in satisfaction of the claim. The defendants appeal. The plaintiff answers, and prays for damages for a frivolous appeal. The bill of exceptions reserved by the defendants to the court's ruling excluding the testimony of two witnesses, and the letter marked "A," will be considered and passed on with the merits of the case.

The defendants defend on two grounds: (1) That the service is illegal; the required posting of the petition, citation, and writ of attachment at the courthouse door not having been complied with. (2) That the defendants became the owners of plaintiff's claim, and were subrogated to her rights, under a verbal stipulation that no payment would be exacted of them before the collection of the amount of plaintiff's draft from the drawers, the firm of Bond & Williams. In reference to the first proposition, the plaintiff's counsel argue that the defendants waived the informality of service of citation and writ of attachment by their appearance in the suit, and furnishing bond, and obtaining the possession of the property attached. In reference to the second proposition, they plead an estoppel, for the reason that the defendants, in their suit against Bond & Williams, (A. Baldwin & Co. and others, interveners,) recovered judgment for the amount, and placed themselves in such attitude as to preclude the possibility of sustaining the defense that the plaintiff is not a creditor, as alleged.

This brings us to the first point,—that embraced in the motion to dissolve the writ of attachment. The defendants, in their agreement to bond the property attached, and in their petition for the order authorizing them to furnish bond and take possession of the property, did not reserve any right to plead informality of service. They appeared in the suit, and unqualifiedly delivered to the sheriff their obligation to satisfy such "judgment, to the value of the property attached, as may be rendered against him in the suit pending." It is the appearance authorized by article 259, Code Pr. It is characterized as an appearance in the suit. The only question for our decision is, does that appearance cure the informality of service alleged? It is determined in a number of decisions that the appearance of a defendant in a suit cures want of citation. Our attention is directed by defendants' counsel to the case of *Love v. Dickson*, 7 Mart. (N. S.) 161,—that defendant's giving bond, and taking the

property out of the possession of the sheriff, does not cure a defect similar to that pleaded in the case at bar, and that it is a well-settled rule "that nothing cures defects in citation but appearance and pleading to the merits." Subsequent to that decision the point arose in other cases, and appearance to release property attached was held as an appearance having the effect of curing informality in citation. In *Rathbone v. London*, 6 La. Ann. 440, the bonding of property attached was given an effect at least equal to an appearance curing a defective citation, or the absolute want of citation. The court says: "The condition on which the property attached is released and delivered to the defendant is that he should appear in person or by attorney, thus rendering himself liable to a judgment" in his default to answer, and that he should give security *judicatum solvi*. "We do not understand that the constitutionality of this article is drawn in question, or the power of the legislature to enact it. It seems to us, beyond all question, that the purpose of the law was to give, in the case provided, to the creditor, a personal judgment against the debtor, which he was required to give security to abide by and perform. The words of the article are free from any qualification or ambiguity, and leave room for no other interpretation." In *Love v. Voorhies*, 13 La. Ann. 550, this court decided that the act of bonding the property attached does not debar the party giving it from subsequently moving to quash the order of attachment. The question of citation did not arise in that case. The decision gives no support to the proposition that appearance to bond property attached does not cure the want of citation. The court, in the case, approvingly refers to the cases of *Rathbone v. London*, *Bush v. Dewing*, 24 La. Ann. 272. The bond was not executed in the name of the curator ad hoc. The property was delivered to the defendants, and the waiver, therefore, was the act of the defendants.

The alleged conditional acceptance of the draft presents the remaining issue. It is not denied that the plaintiff was the creditor of *Bond & Williams*. Her right to receive the draft does not admit of question. The disposition made of it is not an infrequent act in business, i. e. to send a draft to the drawee, the merchant, with direction to place the amount for which it is drawn to the payee's credit. It is possible, ordinarily, to receive a special and conditional acceptance of a draft in lieu of an absolute acceptance. A verbal acceptance may be shown. These undeniable propositions are without force or application in the case at bar, for the reason that the defendants have declared, in another suit, that the draft was paid, and the amount placed to plaintiff's credit. He is not to be heard who alleges things contrary to each other. *Edson v. Freret*, 11 La. Ann. 710. The drawer was

the common debtor of the plaintiff and the defendants. They chose to receive the draft, and place the amount to her credit, without any entry whatever of any condition as to deferring payment in any contingency. They are the owners of the claim, with a title recognized by the courts, and decreed legal in every respect. The defendants, as plaintiffs in that case, alleged their ownership, and proved that the amount was credited to Mrs. M. K. Williams, plaintiff in this case. They cannot now be heard to prove that the entry was not correct; that the cash carried to plaintiff's credit, as proven in the case referred to, was not cash. They cannot discredit their own title, and prove the incorrectness of their own judgment. *Bond & Williams* were condemned to pay the amount in question to the defendants, as their creditors. The terms of the judgment cannot be changed. It cannot be held that the amount was not due to the defendants, but to another. The regularity required in judicial proceedings, and the absolute correctness which should characterize every judgment, will not sanction the shifting of positions, at will, by those on whose allegations and proof they were obtained. There are acts in judicial proceedings which bind the parties to them, even in so far as third persons may be concerned. The judgment of the defendants, in so far as they are concerned, must remain unchanged, as to the amount in question. If the conditions alleged were to prevail at this time, a final judgment would be without *raison d'être*, as to nearly one-third of its amount. The defendants cannot ignore their own judgment, their judicial declarations, and their evidence. The court will not allow the substitution of one debtor for another by creditors at whose instance the judgment fixing their rights was pronounced.

Our conclusion in reference to the effect of allegations and proof in a former suit (No. 6,852) sustains the correctness of the court's ruling in excluding testimony offered to establish that others, and not the defendants, are the debtors. The testimony of witnesses who testified in the former case was not *inter alia* as to defendants, and appertains to the issue involved. The ruling admitting this testimony was not erroneous.

The appellee has not sustained her demand for damages. The issues presented do not impress us as being frivolous.

Judgment affirmed, at appellants' costs.

(45 La. Ann. 968)  
ANSBACHER et al. v. DE NEVUE. (No. 1,269.)

(Supreme Court of Louisiana. June 14, 1893.)  
VENUE—CHANGE OF RESIDENCE BY PARTY—UNCERTAIN RESIDENCE—PRESUMPTIONS.

1. Where a party has removed from one parish to another, but has not made a formal declaration of his intention to change his domicile, if a year has not elapsed since his removal, it is optional with a party desiring to sue him to bring the suit in either parish.



2. In cases of ambiguous domicile, a presumption attaches in favor of the continuance of the former domicile, and, if a party so acts as to leave it doubtful in which of two places he resides, parties interested may sue him at either.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita.

Action by A. B. Ansbacher and others against Edward De Nevue. From a judgment dismissing the action as of nonsuit, plaintiffs appeal. Reversed.

Potts & Hudson, for appellants. C. T. Madison, for appellee.

FENNER, J. This is an attachment suit, brought against the defendant under paragraphs 1, 4, and 5 of the Code of Practice. A curator ad hoc was appointed to represent the absent defendant, who appeared and filed an exception to the jurisdiction of the court on the grounds that the defendant was domiciled in the parish of Orleans, and had been for two years prior to the institution of the suit, and that he had not left the state permanently, and had no intention of doing so. Judgment was rendered sustaining the exception and dismissing the case as of nonsuit, from which judgment the plaintiffs appeal.

The evidence certainly fails to establish that defendant has left, or intends to leave, the state permanently, but, notwithstanding this, the suit may stand on the grounds of fraud alleged, if the defendant was legally stable in the parish of Ouachita. The proof fully establishes that defendant had been for many years domiciled and doing business in the parish of Ouachita. This suit was brought on May 31, 1892, and it is clearly shown that defendant was then domiciled in the parish of Orleans; but that fact does not suffice to defeat the jurisdiction of the Ouachita court. Article 167, Code Pr., declares: "If the defendant change his domicile, he must be cited in the parish where he has resided within the last year, or within that where he has declared in the manner prescribed by law that he intended to have his domicile." It is admitted that defendant has never made or filed any declaration in the manner prescribed by law of his intention to change his domicile from the parish of Ouachita to the parish of Orleans. Unless, therefore, the defendant has actually resided in New Orleans for a full year prior to the institution of this suit, plaintiffs had the undoubted right to sue him in the parish of his former domicile. The jurisprudence of this court to that effect is emphatic and unequivocal. In *Berry v. Gandy*, 15 La. Ann. 533, the supreme court said: "Where a party has removed from one parish to another, and has acted in the latter parish in such a manner as to manifest sufficiently his intention to change his domicile, but has not made a formal declaration to that effect, if a year

has not elapsed since his removal, it is optional with a party desiring to sue him to bring the suit in either parish. If a person wishes to protect himself from being sued in the parish from which he has removed, he should make an express declaration of his intention to change his domicile." In *King v. Watts*, 23 La. Ann. 583, the same doctrine was held as correctly expressed in the following language of the syllabus: "If a party has acquired a domicile in one parish, and removed therefrom to another parish, he may be sued and cited in the parish of his former domicile within one year after his removal therefrom, unless he has, by public declaration in the manner provided by law, declared the place of his domicile." To same effect, see *State v. Steele*, 33 La. Ann. 910; also, *Villere v. Butman*, 23 La. Ann. 516; *Alter v. Waddill*, 20 La. Ann. 246; *Hennen v. Hennen*, 12 La. 190; *Waller v. Lee*, 8 La. 213; *Hyde v. Henry*, 8 Mart. (N. S.) 51. Such is the unambiguous precept of the law, and no gloss could either make it clearer or impair its binding force.

The case, then, pivots upon a single and simple question of fact, viz. had defendant changed his domicile from Monroe to New Orleans more than one year prior to the institution of this suit, on May 31, 1892? We have critically examined the evidence on this point. The curator introduced much evidence very clearly establishing defendant's domicile in New Orleans, but the only testimony which fixes a date prior to May, 1891, is that of the two ladies keeping the house in which he boarded in New Orleans; and their evidence on that point is contradicted not only by several witnesses for plaintiffs, but by two of defendant's own witnesses. The evidence, as a whole, satisfies us that, while defendant no doubt conceived the idea of removing to New Orleans, and began to take steps to that end, in or before May, 1891, he did not actually make his permanent removal before October of that year. If he kept a boarding place in New Orleans, he also retained one in Monroe up to October. The evidence leaves no doubt in our minds on this point; but, even if it were doubtful, defendant's conduct would at least subject him to the application of the principle announced in article 38, Rev. Civil Code: "If he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereafter prescribed, any one of said places may be considered as his principal establishment, at the option of the persons whose interests are thereby affected." This principle is further strengthened by the presumption which, in cases of ambiguous domicile, attaches in favor of the continuance of the former domicile. Under the evidence presented in this case, we think it quite clear that plaintiffs had the right to conclude that defendant's domicile in Ouachita parish had certainly continued up to less than one year

prior to their suit, and therefore that they had the right to bring their action in that parish. It is therefore adjudged and decreed that the judgment appealed from be avoided and reversed, that defendant's exception be now overruled, and that the case be remanded to the lower court for further proceedings according to law, defendant to pay costs of exception and of this appeal.

#### On Rehearing.

The question of the validity of citation and service is not involved in this appeal, which is taken solely from a judgment on an exception to the jurisdiction of the court. The remarks on the citation in this application are entirely foreign to the issue before us.

Rehearing refused.

(45 La. Ann. 391)

THOMPSON et al. v. HERRING. (No. 1,267.)

(Supreme Court of Louisiana. June 16, 1893.)

RESTRAINING ADMINISTRATOR'S SALE OF REALTY—PRIOR SALE TO PLAINTIFF—EVIDENCE.

1. A party holding an authentic deed of sale, perfect on its face, executed by the decedent, is not required to stand by, and see the property sold at judicial sale as the property of the vendor's succession, under an order of sale provoked by his administratrix, which could only be sustained by proof that the sale was a pure simulation. He may rightfully enjoin such a sale.

2. The allegations of the administratrix that the price of the sale was not paid, and the thing sold had not been delivered, do not necessarily import the nullity of the sale. Rev. Civil Code, art. 2456.

3. If the act of sale evidenced a real transaction, whatever its character, the administratrix could not ignore it, or attack it collaterally, but could only claim its judicial revocation by direct action.

4. As between the parties, the verity of authentic sales can only be assailed by a counter letter, or by answers to interrogatories on facts and articles.

5. The letters of plaintiffs, produced as the equivalent of a counter letter, do not evidence an acknowledgment that the sale was a simulation, but, on the contrary, assert that it was real, and based on valuable consideration.

6. Considering the willingness expressed by plaintiffs to permit the sale to proceed, provided their claims for reimbursement are secured on the proceeds, the judgment is amended accordingly, and, as thus amended, is affirmed.

(Syllabus by the Court.)

Appeal from district court, parish of West Carroll.

Action by W. B. Thompson and others against M. D. Herring, administratrix of the succession of John S. Herring, deceased, for an injunction. From a judgment dissolving the preliminary writ, and denying the relief prayed, with damages, plaintiffs appeal. Modified.

Wells & Wells, for appellants. C. T. Dunn, for appellee.

FENNER, J. On the 8d day of March, 1890, John S. Herring executed an authentic

act, by the terms of which he sold to plaintiffs several tracts of land for the price of \$2,500 cash, receipt of which is acknowledged in the deed. The act contained a stipulation that the vendor should have the right to take back the property within one year, and binding the vendees to reconvey on repayment to the latter of the sum of \$2,500, with interest, together with all sums which shall be expended by the purchasers for taxes, insurance, and incidental expenses connected with said property. This act was duly recorded. Herring died shortly after the sale. His succession was opened, and his widow was qualified as administratrix. She caused the property to be inventoried as property of the succession, and provoked an order of sale thereof, under which it was advertised to be sold on April 15, 1893. Thereupon the plaintiffs brought the present suit, in which they set forth the authentic sale to them, and their ownership in virtue thereof; charge that the acts of the administratrix in causing the property to be inventoried, and her proceedings for the sale thereof, are wrongful and illegal, and injurious to them; and pray for a writ of injunction, prohibiting and restraining her from proceeding further with said sale until the further orders of the court, and for judgment perpetuating said injunction. The answer of the administratrix denies the ownership of plaintiffs; sets forth that the sale to them was "never legally completed, for the reason that they never paid the price; that the acknowledgment of the receipt of \$2,500, as expressed in the deed, is not true; that Thompson & Co. never had actual delivery of the property, but the same has been, and now is, in the possession of defendant, as legal representative of Herring's succession; that plaintiffs have repeatedly acknowledged, since said deed was executed, that the ownership of the property is in the succession; that plaintiffs have shown no legal cause for injunction, and have wantonly abused that equitable remedy;" and she prays for dissolution of the injunction, with damages. Judgment was rendered, dissolving the injunction, with \$100 damages, and authorizing the administratrix to proceed with the sale, from which judgment this appeal is taken.

It seems to us very clear that, upon the face of the title conferred on them by the authentic act of sale, plaintiffs were not bound to stand by, and see that title ignored, and the property conveyed thereby sold at a judicial sale as the property of another, and that they were fully authorized to enjoin such proceedings, which could only be sustained on clear proof that the sale was a pure simulation. If the sale were a real transaction, whatever its character, the administratrix would be bound to secure its judicial revocation on compliance with whatever obligations it might impose, before she could lawfully disregard it, and sell the

property as that of the succession. *Lawler v. Cosgrove*, 39 La. Ann. 490, 2 South. Rep. 34. The allegations in the answer, that the price had not been paid, and that there had been no delivery of the thing sold, do not necessarily import the nullity of plaintiffs' title. The Revised Civil Code (article 2456) expressly declares: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object, and for the price thereof, although the object has not yet been delivered, nor the price paid." The articles of the Code (2487 and 2549) referred to by defendant's counsel do not conflict with this principle, but only import that the buyer, who has not paid the price due under the terms of the sale, cannot enforce delivery of the thing. The plaintiffs here do not demand delivery of the property, but simply that their title under the authentic act be respected until revoked by proper judicial proceedings.

Has the defendant proved that the sale is a simulation? We think not. We said in a recent case: "It is hornbook law, in our jurisprudence, that the verity and reality of authentic sales can be assailed by the parties thereto only in two ways, viz.: First, by means of a counter letter; second, by the answers of the other party to interrogatories on facts and articles,"—and we cited numerous authorities to that effect. *Godwin v. Neustadt*, '42 La. Ann. 738, 7 South. Rep. 744. Defendant did not undertake to probe the conscience of plaintiffs, nor does she produce any formal counter letter; but she invokes the rule that letters and written acknowledgments of a party are in the nature of a counter letter, and are entitled to like effect; and she produces certain letters written by the plaintiffs to her attorney in this case, which we have carefully considered. The first acknowledges a letter received from defendant's attorney, and incloses an account against J. S. Herring for moneys advanced before the date of sale, and for taxes and insurance paid on the property since the sale, amounting to \$1,307.43, and then proceeds: "This is the amount due us. It is true that at one time we did agree to take \$600 for our claim, and the taxes to be returned to us. We made his proposition with the understanding that the \$600 was to be paid at once, but Mrs. Herring did not accept the proposition, and we shall now expect the entire amount due us paid before we relinquish our claim on the property." The second letter is dated December 21, 1892, and says: "We have received your favor of the 19th inst., and trust that a speedy adjustment of the Herring succession can be had. We are certainly not going to stand in the way, and the only thing that we desire is a recognition of our claims in account. We have no objection to Mrs. Herring selling the

property, provided our account is paid; and we, some time ago, made a still better proposition to Mrs. Herring, in effect, that we would take less for our account than its face value. \* \* \* We trust that you will be able to have Mrs. Herring sell the property, and pay us our claim. We have no desire to press Mrs. Herring in the matter, but we accepted title to the property in perfect good faith, for money advanced, and we think that our claim should have had more attention than has been accorded it heretofore." We can discover in these letters no acknowledgment that the sale was in any sense a simulation. On the contrary, they assert that the sale was made in good faith, for money advanced; and while acknowledging, impliedly, that the whole price had not been advanced, as recited in the deed, they substantially claim that the amount due on the account was accepted as a partial payment, and must be repaid before they would relinquish their title to the property. They simply evince the willingness of the plaintiffs to forego their rights under the sale, and to permit the administratrix to take back and sell the property for account of the succession, provided they were made whole by payment, out of the proceeds, of their account and expenses. The reality of the transaction is further shown by the admission that after the sale the property was assessed to plaintiffs, and that they paid the taxes for the years 1890, 1891, and 1892. The plaintiffs were not bound to establish more particularly, in this case, the precise character and circumstances of the transaction. They stood on their authentic title, which, by itself, was a sufficient ground for the relief sought, unless defendant could destroy it by proving, in the manner provided by law, that it was a mere simulation, which she certainly has not established.

The administratrix was permitted to testify, over the objection of plaintiffs' counsel, to interviews with one of the plaintiffs, and she herself admits that he said he did not consider that the property belonged to the succession. She adds: "I claimed that it did, for the reason that W. B. Thompson & Co. had never paid the purchase price for said property. I told him that I would recognize his claim as a mortgage up to the amount I understood to be due him, which amount I understood to be \$650 and the taxes paid on said property." The plaintiffs admitted and announced in this court their willingness to permit the sale to proceed, provided their claim be ordered paid out of the proceeds. There thus seems to be no substantial dispute between the parties, except as to the amount due. Plaintiffs' account has not been proved in this case, but we think a judgment authorizing the sale to proceed, and recognizing the right of plaintiffs to be paid, by preference, out of the proceeds of sale, the amount of

their claim, to be established contradictorily between the parties, would promote a speedy settlement, and advance the interests of justice. It is therefore adjudged and decreed that the judgment appealed from be amended so as to reverse and set aside the allowance of damages against the plaintiffs, and so as to recognize the right of plaintiffs to be paid, by preference, out of the proceeds of sale of the property, the amount due them on their account for moneys advanced, and for taxes, insurance, and expenses,—the amount and verity of said account to be established contradictorily between the parties by judgment of the court, and a sufficient amount of said proceeds to be retained to satisfy the said judgment, when rendered,—and that in other respects the judgment appealed from be affirmed; defendant and appellee to pay costs of this appeal.

(45 La. Ann. 1024)

**REYNOLDS & HENRY CONST. CO. v. MAYOR, ETC., OF CITY OF MONROE.**  
(No. 1,277.)

(Supreme Court of Louisiana. June 16, 1893.)

**RAILROAD COMPANIES—MUNICIPAL AID—VALIDITY OF PROCEEDINGS AUTHORIZING TAX—ESTOPPEL.**

1. In its application to the municipal corporation, particularly, the estoppel pleaded must be unequivocal and certain.

2. The terms of the contract between plaintiffs and defendants' assignors, and the statutes, made the official promulgation of the returns of the special election a condition precedent to an ordinance by the council levying the special tax.

3. Prior to the promulgation giving sanction to the election as held, the taxpayers cannot be compelled to pay the special tax.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Action by the Reynolds & Henry Construction Company against the mayor and city council of Monroe. Plaintiff had judgment, and defendants appeal. Reversed.

O. T. Madison and T. O. Benton, for appellants. Boatner & Lamkin, for appellee.

**BREAUX, J.** The plaintiff, assignee of the Houston, Central Arkansas & Northern Railroad Company, sues the defendants to compel them to assess, and cause to be collected and paid over to them, a tax of five mills on all taxable property in the city of Monroe for one year. On the 1st day of March, 1888, the city council adopted an ordinance, upon the petition of the required number of taxpayers, calling an election under the laws of the state, and submitting the proposition to the property tax paying electors of the city of voting a five-mill tax for ten years in aid of the Houston, Central Arkansas & Northern Railroad. The ordinance directed the returning officer to provide ballot boxes, and appoint commissioners of elec-

tion to write down the names of the voters, and make returns of election. The returning officer for the parish of Ouachita, in 1888, testifies that commissioners were appointed, and the election held on the 10th day of April, 1888; that all the prerequisites to the election were complied with; that he certified the result, in writing, to the mayor and city council. The mayor corroborates the statement as to the returns, in testifying that the returning officer appeared at the meeting of the city council, and handed in the returns of the election. The plaintiff obtained an order of the court, directed to the mayor and to the secretary and treasurer, to produce and deliver in court the returns to the council by the commissioners of election, and the returns of the returning officer, whereby he expected to prove that the result of the election was largely in favor of the tax. These officers state, in answer to the order, that they have made diligent search for the documents referred to in the order, and have not found them. The secretary and treasurer avers that he entered upon the discharge of the functions of his office on or about the 14th May, 1888; that there were held four meetings of the city council from and between April 10, 1888, and the 14th day of May of that year, when he became an officer of the council; that there is no record or mention in the minutes of the receipt or filing of any of the documents referred to in the order. It is admitted that the ordinance book does not contain any ordinance promulgating the result of the election, or mentioning the returns of the election. The plaintiff incorporates the ordinance under which the election was held in its petition, and it avers that "the result of the said election, being in favor of voting said tax, was duly promulgated by the mayor and city council of Monroe, La., as prescribed by law;" further, that the assignors to plaintiff began and prosecuted in good faith the building of the railroad in the parish of Ouachita, and in the city of Monroe, within 90 days after the promulgation of the vote. We eliminate the other issues of the case, and, in reaching a conclusion, direct our attention to questions relating to, and growing out of, facts,—that there has not been, as yet, any promulgation of the return of election.

#### Estoppel.

Before the trial the plaintiff interposed a plea of estoppel. The city council adopted an ordinance in which they declared that the ordinance 641, approved March, 1888, ordering an election for, and authorizing the assessment of, a five-mill tax for ten years on the property in the city of Monroe, for plaintiff's assignor, is repealed, and all rights thereunder forfeited, for the reason that they had failed to comply with the conditions upon which the tax was authorized. The plaintiff contends that the defendants

are estopped from denying that an election was held, and a tax voted; that in undertaking to repeal the ordinance they have admitted its legality and binding effect; that by declaring the forfeiture of the tax, and seeking to repeal the ordinance under which it was voted, they are estopped. The district court overruled the plea of estoppel. The judgment on the merits was pronounced in favor of plaintiff for one year's tax. From the judgment the defendants appeal.

Our views coincide with the action of the district court in overruling the plea of estoppel. The truth of the proposition that the attempt at repeal did not affect any of the rights the plaintiff may have had is self-evident. The council based their release from the burden of this tax upon other grounds than the alleged informality of the election. They declared that the railroad company had not complied with its contract, and that, as a result, they were released. This declaration did not have the effect plaintiff's counsel intended it to have. A municipal corporation seeking a release from taxation on the ground that the tax is not due; that the consideration of the contract has failed,—is not estopped from defending upon other grounds than want of consideration. Error in repealing, or attempting to repeal, an ordinance, cannot be made the basis of taxation. Conceding, *argumente gratia*, that the plea of estoppel was well taken, and that it should be sustained as to the municipality, it would not bind the taxpayer. It is beyond the power of a municipality to thus bind them. Touching the authority of municipal corporations, Mr. Dillon says: "The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers. The opposite doctrine would be fraught with much danger, and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown." The power of taxation is a part of sovereign authority. Declarations in the attempt to repeal ordinances cannot have the effect of supplying complete omissions to record proceedings, although they may be supplied by other testimony. 1 Dill. Mun. Corp. p. 370 et seq.

In reference to silence, when it is the duty of the party to speak, and of its being equivalent to concealment, and operating an estoppel, as argued by plaintiff's counsel, we deem it answer to state that the party who contracts with a municipal corporation is without right to invoke the silence of its council, and its failure to give proper notification of a want of formality, as a reason to compel the taxpayer to pay a tax, although not legally declared and announced. He can compel compliance.

Save the first ordinance, ordering the election, no record was kept. It does not appear of record that anything more was done than to order the returning officer to deliver the returns to the secretary. There was no compilation made of the returns. In reference to them, the returning officer says that they, to the best of his knowledge, were delivered to the secretary, and adds: "I announced the result of the election verbally, is what I mean by promulgating the election." He does not state whether the election was carried for or against the tax. The only remaining testimony upon the result of the election is the following, by counsel, during the trial: "It is admitted that there have been three different councils elected since the tax in controversy was voted." The admission was directed to the different councils elected. It cannot be determined that the remainder of the sentence sufficiently announces the result to fix the responsibility of the taxpayer.

#### Official Promulgation.

Our examination of the record has not resulted in our discovering any testimony establishing that the election was carried for the special tax,—a fact of which the official promulgation wanted would be evidence. The statutes command that the municipal authority shall make public and official promulgation of the result. Act No. 84 of 1880; act No. 35 of 1886. Section 9 of the ordinance of special election provides for an official promulgation of the returns. This ordinance must be read in the contract between the parties. It imperatively includes promulgation. The law and the contract have made it a condition precedent to the final action of the council imposing the tax. Mandamus will lie to compel compliance with the statutes and the terms of the contract, but the taxpayer cannot be made to pay the taxes prior to official promulgation of the result of the special election. Relative to removing a parish seat in one of the parishes, it was required of the police jury to proclaim the result of the election. Act No. 33 of 1888. This court determined that the result of the election should be officially announced, and gave its special sanction to the enforcement of that provision of the act. We quote from *Davis v. Police Jury*, 42 La. Ann. 971, 8 South. Rep. 475: "It is evident that no compilation of the votes, as contemplated and required by Act 33 of 1888, was made. \* \* \* No result was declared or proclaimed by any order or vote of the police jury." *State ex rel. Davis v. Police Jury*, 43 La. Ann. 1010, 10 South. Rep. 359. The functions of police juries and city councils in the matter of holding special elections is of importance. In the absence of statutory authorization to the courts in determining contests in matter of election, recourse is left to them in determining whether or not a special tax has been voted. The extent of the authority is interpreted in a number of cases: *State*

v. Judge of Second Judicial Dist. Court, 13 La. Ann. 89; State ex rel. Woodruff v. Police Jury, 41 La. Ann. 846, 6 South. Rep. 777; State ex rel. Davis v. Police Jury, 43 La. Ann. 1009, 10 South. Rep. 359; Reynolds, etc., Const. Co. v. Police Jury, 44 La. Ann. 863, 11 South. Rep. 236. In the case at bar these decisions are referred to as supporting plaintiff's contention that this court is without authority over a contested election, to determine the result. This emphasizes the importance on the part of these bodies of complying strictly with the forms prescribed, and of their not treating as merely directory the compilation of the votes they should make, and the official proclamation of the result.

It may be asked, what is the practical usefulness of the ruling? The answer at once suggests itself. It is a compliance with the law's requirements. Moreover, it places the seal of approval on the different acts preceding the proclamation; keeps a record of that of which a record should be kept; a memorial of a levy of taxes, of the different steps taken in lending aid to improvements, of which a community should have a complete and ready reference. There is safety in adhering to the letter of the statute, in the exercise of a comprehensive grant of power, such as these conferred upon the municipalities, in the imposition of special taxes by submitting the levy to a special election. The conclusion is well supported. Official promulgation should be made, and a record kept of the promulgation. The duty concerns the corporation, the taxpayer, and the party contracting.

This conclusion precludes a review, at any length, of a decision in *pari materia*, pronounced at the last term of the court. Reynolds, etc., Const. Co. v. Police Jury, 44 La. Ann. 863, 11 South. Rep. 236. Though of no practical bearing, we will briefly notice one of the points determined in the case to which we gave attention prior to reaching a conclusion in the case at bar: (1) The exemption of property of other taxpayers was pleaded, and it was urged that in consequence the tax levied was not equal and uniform. The suit was not brought by the taxpayers, or others in interest, seeking to have that exemption recalled and annulled. It was the defense of the police jury, representing the taxpayers claiming to be released thereby from the payment of the tax. We held that upon that ground they had no cause of complaint. If A. be illegally exempted from the payment of his taxes, it does not give B. a right of action not to pay his taxes, however well defined his right may be to have the exemption annulled. The jurisprudence of the supreme court of the United States is pronounced upon the subject. The national banks, for instance, are protected by United States laws similar in effect to article 205 of the constitution of this state, requiring that the authorities

of the states, in taxing them, shall observe uniformity and equality. They have sought to defend themselves from the payment of taxes claimed by the authorities of the states on the ground that the states had exempted certain state banks from taxation, and thereby had broken the uniformity and equality which should prevail. In a number of cases it was determined by that court that the exemption could not be pleaded successfully to escape from the payment of the tax. That principle, by analogy, applies to the case to which we refer. With the light before us, we reaffirm the authority of that decision, after having reconsidered the points it decides.

For reasons assigned, it is ordered and decreed that the judgment appealed from be annulled, avoided, and reversed, and plaintiff's suit is dismissed, without prejudice to any legal right it may have to take such legal proceedings, as the law may allow, to compel the city council to promulgate the election; plaintiff and appellee to pay the costs of both courts.

(45 La. Ann. 1049)

**BENNETT v. HER CREDITORS et al.**  
(No. 1,270.)

(Supreme Court of Louisiana. June 14, 1893.)

COURTS—UNCERTAINTY OF APPELLATE JURISDICTION—PRACTICE—DEBTOR AND CREDITOR—RESPITE.

A party who applies for and obtains two orders of appeal in open court, one to the circuit court of appeals and the other to the supreme court, and prosecutes one, which is dismissed for want of jurisdiction, this order being null and void, he can avail himself of the other order for an appeal, and prosecute it in the court having jurisdiction.

**On the Merits.**

This case involves only questions of fact. Decree in favor of plaintiff, affirming judgment homologating the proceedings of the meeting of creditors which granted a respite.

(Syllabus by the Court.)

Appeal from district court, parish of Caldwell.

Petition by M. L. Bennett against her creditors for a respite. From a judgment granting the petition, a part of defendants appeal. Affirmed.

Gunby & Sholars, for appellants. Boatner & Lamkin, for appellee.

McENERY, J. The appellants obtained two orders of appeal in open court from the judgment, one to the circuit court of appeals and the other to this court. They were applied for and obtained at the same time. The appeal to the circuit court of appeals was prosecuted and dismissed for want of jurisdiction, after which this appeal was prosecuted. The first appeal prosecuted was a nullity, and the second valid and legal. It was in force, and could be prosecuted in accordance with the order granting it.

Because the other order obtained at the same time for an appeal was null and void, it could not affect the order of appeal made returnable to this court. The motion to dismiss the appeal is therefore denied.

#### On the Merits.

The plaintiff applied for a respite, and obtained an order for a meeting of creditors. The meeting was held, and the respite was granted by the creditors. The homologation of the proceedings of the meeting of the creditors was opposed by the several creditors of plaintiff, who appeared at the meeting, and voted against the respite being granted. In number, 12 creditors voted for the respite and 7 against it. In amount, the sum of \$13,028.21 was voted for and the sum of \$627.39 against it. The opponents allege in their opposition—First, that the plaintiff is now, and was at the time of filing her petition for respite, hopelessly insolvent; second, that the application for relief is not made in good faith, but for purposes of delay; third, the schedule of liabilities does not correctly show the condition of plaintiff's affairs, as it omits the legal mortgage in favor of the minor James Bennett, and embraces as creditors those who have no valid claim against plaintiff, particularly L. D. McLain. In case the respite should be granted, opponents pray that plaintiff be required to furnish security as required by law. The proceedings of the meeting of creditors were homologated, and the prayer of opponents denied, except as to the requirement for security. The regularity of the proceedings is not questioned. No error or fraud is alleged.

We think the testimony shows that the plaintiff is solvent, but embarrassed. L. D. McLain swears that the value of the assets is a fair one. M. Mecam, clerk of court, says that in 1887, 1888, 1889, and 1890 he was in the employment of Mrs. Bennett. He is, so he swears, familiar with the parties whose names appear on the schedule, and he estimates that 50 per cent. of the notes and accounts are collectible. C. C. Bridger, in his testimony, says 50 per cent. would be a fair collection of the notes and accounts. C. P. Thornhill, an attorney at law, says that a great many of the debtors whose names appear upon the schedule are negroes, and but few of them own real estate. His opinion is that on an average not over 25 per cent. of the notes and accounts could be collected. Quite a number of the negro debtors, he says, have resided on plaintiff's place at different times, and the majority of them own some personal property. During the past 18 months he had seen and known very little of them. These are the only witnesses as to the value of the notes and accounts. We think the preponderance of testimony is to the effect that 50 per cent. of them can be collected. The value of the real estate is not questioned. De-

ducting 50 per cent. from the notes and accounts, the assets will exceed the liabilities.

We need not review the second ground, as the object of obtaining the respite is for delay in meeting the obligations of the debtor. On the second ground alleged by opponents the testimony shows that L. D. McLain is a creditor of plaintiff for the amount for which he was placed on the schedule. James Bennett is the son of plaintiff, a child 14 years of age. This minor's mortgage, omitted from the schedule, is the recorded abstract of the amount of the inventory of the effects of his father's succession. There is no evidence that the plaintiff owes the minor any sum of money. At all events, her liability on said mortgage is contingent, and it may be that on a settlement of the community she may not owe him anything. Complaint is also made that the schedule is not true and exact, and is not sufficiently definite. It is itemized; the notes and accounts are correctly described, and so is the immovable property. But the opponents claim that "mules, horses, cattle, and farming implements attached to the plantation, \$3,106," is too indefinite a description of the property. It is sufficiently identified with the plantation to which it is attached. The inventory, taken all together, is a fair exhibit of plaintiff's property, and is a substantial compliance with the law.

The complaint that the application for the respite was not made in good faith, we think, is not sustained by the evidence. It appears that the plaintiff referred her affairs to her brother and to her attorneys. To avoid the necessity of a respite, they advised a compromise with the creditors, the brother, L. D. McLain, offering to advance the money in case all the creditors accepted the proposition. Some accepted and some declined the proposition, and the proffered settlement was of necessity abandoned. We find nothing in these several offers to adjust her indebtedness that impugns her good faith in her application for the respite. Judgment affirmed.

#### On Rehearing.

On the application for rehearing in this case our attention is called to the fact that we have not considered as applicable to the case the authority referred to by opponents in case of *Phillips v. Creditors*, 36 La. Ann. 904, and have omitted to notice in the opinion the "main ground" upon which was based the appeal.

1. The case of *Phillips v. Creditors* has no bearing on the facts in this case. The only statement of assets in that case was: "Merchandise, as per ledger and open accounts, houses, etc., \$10,320." In the case referred to we said such a schedule was equivalent to no schedule at all. The schedule in this case presents no such defects. The horses, mules, etc., are identified with the planta-

tion to which they are attached, and are valued.

2. In opponents' brief it is stated in reference to the "main ground" on which the application for an appeal was the basis: "Your honors will understand that, while opponents did not base their opposition on this specific ground, yet testimony quoted below was received without objection, and will, of course, be considered by the court." In the application for a rehearing it is also stated: "It is true that the above testimony is not directly responsive to any allegation in our opposition, but it was received without objection, and, of course, will be considered by the court." Not having been specifically alleged in the opposition, and the evidence not being responsive to any allegation made by opponents, we were of the opinion that this part of the opposition urged only in the brief and in argument was not seriously insisted upon by opponents, from the following extract from their brief: "To take advantage of this act [the failure of the deputy sheriff on the persuasion of plaintiff to seize ten bales of cotton on the plantation, which was afterwards turned over to L. D. McLain, who had a privilege on it] of indulgence of the sheriff, and removing off the cotton to avoid seizure, was an act of extreme bad faith in plaintiff, but opponents have not held her individually responsible for the ungracious act." The omission was not from inadvertence, as we had fully examined the record and the brief of opponents, and inferred from the facts and the brief that this point was not seriously pressed, but that the plaintiff was relieved from responsibility individually, and the blame attached to her brother, and the explanatory paragraph was introduced in order to excuse her and criticize him. Opponents say in their brief: "The plaintiff had for quite a number of years been conducting business as a public merchant, and there had been nothing in her career to indicate that she was familiar with any of the various shifts and devices often resorted to by insolvent debtors to place their property beyond the reach of creditors, or to give an unfair preference to some of them. It was left for the 'financial manager' to make, and to put in operation through the machinery of the courts, an equitable remedy intended for the relief of the embarrassed but honest and solvent debtor," etc. Referring to the facts in the record, it appears that L. D. McLain had furnished the money and supplies that raised this cotton. This is not contradicted. He had a pledge and privilege upon it. The opponents do not assert any privilege upon it. They are ordinary creditors. The proceeds of the sale of this cotton could not be ratably, as contended by opponents, applied to the payment of all the debts. By granting the respite, the creditors do not relinquish the privilege and pledge they may have on particular proper-

ty of Mrs. Bennett at any time after the respite was granted; in fact she was bound, under her agreement, to turn the cotton or its proceeds over to the furnisher of supplies. He had a right to the proceeds of the sale sufficient to pay his privilege debt. The surplus only could be ratably applied to the payment of the other creditors. Opponents were in no way injured by the disposition of the cotton. The evidence does not satisfy us that there was a surplus after paying the privileged debt. No complaint is made of the amount for which the cotton was sold. McLain's debt for supplies furnished on the crop raised and gathered amounted to \$3,000, and for the current year \$2,250, which was placed on the schedule. We do not see in what manner opponents have been injured, and we are satisfied that the plaintiff has made a fair exhibit of her assets and liabilities, and has been guilty of no fraud in applying for relief. Rehearing refused.

(45 La. Ann. 933)

FREIBERG et al. v. LANGFELDER.  
(LANGFELDER, Intervener.

No. 1,278.)

(Supreme Court of Louisiana. June 16, 1893.)  
COURTS — UNCERTAINTY OF APPELLATE JURISDICTION — PRACTICE.

1. While we have recognized the practice, in cases of ambiguous jurisdiction, of taking appeals at the same time from district courts to the circuit courts of appeals and to this court, parties availing themselves of this privilege subject themselves to the risk that, if the first appeal shall not be determined by the court in which it is lodged prior to the return of the second appeal, the latter necessarily lapses.

2. It is a legal impossibility that there can be two appeals, by the same party, from the same judgment, pending at the same time in two different courts.

3. The circuit court to which the first appeal was returned had exclusive authority to determine primarily its jurisdiction over the appeal, and until it has declined jurisdiction, or has been denied jurisdiction under an appeal to the supervisory jurisdiction of this court, the pendency of the appeal is a bar to the prosecution of an appeal, involving the same subject-matter, to this court.

4. Appellees who are held in the circuit court under the appeal still pending there cannot be at the same time impleaded in this court under the second appeal.

5. Appeal dismissed without prejudice to right of new appeal in case the circuit court shall decline or be denied jurisdiction.

(Syllabus by the Court.)

Appeal from district court, parish of Ouachita; R. W. Richardson, Judge.

Action by Isaac Freiberg and others against A. Langfelder, defendant, and Pauline Langfelder, intervener. From the judgment rendered, plaintiffs appeal. Appeal dismissed.

Gunby & Sholars, for appellants. Boatner & Lamkin, for intervener. Stubbs & Russell, for appellee.

FENNER, J. The several plaintiffs in these cases having encountered adverse judg-



ments in the court below, and being, as we suppose, in doubt as to whether the cases were within the appellate jurisdiction of the circuit court of appeals or of this court, applied for and obtained at the same time two orders of appeal, one to the circuit court, returnable on the first Monday of June, 1893, and the other to this court, on the second Monday of June, 1893. A motion to dismiss, filed by appellee, brings to our notice the fact (admitted by appellants) that the first appeal was duly lodged in the circuit court, and was pending in said court undetermined at the time when the appeal was filed in this court, and still remains undetermined. In consideration of the double appellate jurisdiction granted to the supreme and to the circuit courts over district courts, and of the uncertainty which sometimes attends the determination as to which is the proper appellate tribunal, we are disposed to recognize the practice which seems to prevail in ambiguous cases of taking at the same time orders of appeal to both appellate courts. In the case of *Bennett v. Creditors*, 13 South. Rep. 402, (decided at this term,) where appeals had been taken both to the circuit and to the supreme court, and where the appeal to the circuit court had been dismissed for want of jurisdiction before the appeal to this court had been filed here, we declined to dismiss the latter appeal, saying: "The first appeal prosecuted was a nullity, and the second valid and legal. It was in force and could be prosecuted in accordance with the order granting it. Because the other order, obtained at the same time, was null and void, it could not affect the order of appeal made returnable to this court." If this case stood in like position, we should pursue the same course. But the case before us is essentially different. We are confronted with the fact that the appeal taken to the circuit court was duly prosecuted, and had been lodged in that court before the appeal was returned in this court, and is still pending there undetermined. Is it possible that there can be two appeals, by the same party, from the same judgment, pending, at the same time, in two different courts? We can discover no warrant of law for such a proposition. It may be that the appeal to the circuit court may be nugatory, as not within its jurisdiction, and that the circuit court may so decide, and dismiss that appeal, as it did in the *Bennett Case*. But the circuit court is vested with unquestioned and exclusive authority to determine primarily the question of its jurisdiction over the appeal. When it has decided, resort may be had to our supervisory jurisdiction to compel or forbid it to entertain jurisdiction, but we have universally declined to exercise our supervisory powers until the question of jurisdiction has been first submitted to and decided by the circuit court. For us to entertain jurisdiction of the appeal to this court would be, in effect, to order a

dismissal of the appeal to the circuit court in advance of any determination by that court of its own jurisdiction. The two appellate jurisdictions are exclusive of each other. If this court has jurisdiction, the circuit court cannot have it,—at least over the whole judgment; and both appeals are taken from the whole judgment without discrimination. Appellants have themselves invoked the appellate jurisdiction of the circuit court, and they must submit to that jurisdiction until it has been determined in proper proceedings and by proper authority that the circuit court has no jurisdiction. Then, and not till then, can they appeal to this court. We cannot, in this case, decide that the circuit court has no jurisdiction of an appeal regularly taken and pending before it, and it is impossible for us to entertain this appeal without so deciding. It is no doubt unfortunate for appellants that their two appeals thus find themselves in conflict; but it was a risk that they assumed when they took the two appeals that, if the first appeal was not disposed of before the return day of the second, the latter would necessarily lapse. It is a legal impossibility that they should bring their second appeal to this court while their first appeal is still pending undetermined in the circuit court. It does not lie in the mouths of appellants to question the jurisdiction of the circuit court, which they have themselves invoked. Their adversaries may question it, and if they do so successfully appellants may then invoke the jurisdiction of this court; but so long as the appellees are held under the appeal in the circuit court they cannot be impleaded in this court under an appeal by the same parties from the same judgment.

We have reflected on appellants' dilemma from every point of view without being able to discover any alternative except to dismiss the appeal. In doing so we shall reserve their right to take a new appeal to this court in case the circuit court shall be held to be without jurisdiction. It is therefore ordered that the appeal be dismissed without prejudice to appellants' right to take a new appeal to this court in case the pending appeal to the circuit court of appeals shall be dismissed for want of jurisdiction.

#### On Rehearing.

Counsel for appellants insist that in dismissing plaintiffs' appeal our opinion runs counter to the constitution and laws, relying on *Henry v. Tricou*, 36 La. Ann. 520, and supported by an elaborate and extended argument. We will premise these remarks by stating that the dicta announced in *Henry v. Tricou* has been called to our attention for the first time in this application. It certainly is in conflict with our ruling in this case, but we feel bound to overrule that decision. It is couched in dogmatic terms, and supported by thoughtful reasons, and has not been followed by confirmatory prece-

dent. With the utmost desire to preserve uniformity in the rulings of this court, especially upon points of practice, a hasty departure from sound and logical principles ought not to compel us, in the language of Chief Justice Black, "to stumble again every time we come to the place where we stumbled before." We note the statement in the application to the effect that our opinion is slightly in error in saying "that the appeal taken to the circuit court *had been lodged* [our italics] in that court before the appeal was returned into this court," etc.; counsel's insistence being that the record shows that orders of appeal were simultaneously granted, and appeal bonds to this court and the circuit court simultaneously filed, thus vesting jurisdiction in each of said courts simultaneously. On this hypothesis counsel say: "Then it necessarily follows that the appeal was lodged in the supreme court at the same time and in the same manner that it was lodged in the circuit court," etc. While the filing of the appeal bond certainly divests the jurisdiction of the court of first instance, and, presumably at least, vests the appellate court with jurisdiction, yet the appellate court is fully vested with the power of determining when an appeal is properly brought before it. No other court or tribunal is competent to do so; and in order to determine that question in this case we think we must examine and be controlled by the order of appeal. Looking into the order of appeal, we find that the circuit court appeal was made returnable on the first Monday of June, 1893, while the appeal taken to this court was made returnable to this court on the second Monday of June, 1893, just a week later. If the appellants pursued the tenor of this order of appeal, and filed a transcript in each one of the appellate courts on the respective return days, it is evident that, as our opinion states, "the appeal taken to the circuit court had been lodged in that court before the appeal was returned into this court." The clerk's indorsement on the transcript shows same to have been filed on June 13, 1893, which was the second day of the present term, or eight days subsequent to the return day of the appeal in the circuit court. Appellee's motion to dismiss appeal was filed in this court June 14th, and the case was argued and submitted on that day. To this motion is appended the certificate of the clerk to the effect that the appeal had been prosecuted to the circuit court, and that the case had been argued and submitted in said court, and was at the time under advisement by the judges thereof. It is manifest that the statement of our opinion was strictly correct. In our opinion appellee's motion does not involve a question of jurisdiction, but the question of the appellants' right to bring up an appeal to this court, during the pendency of another appeal in the circuit court. If this court should proceed with the case,

and decide it, we might be confronted with a different judgment rendered by the circuit court. True it is that the circuit court might, through courtesy, suspend its judgment so as to conform to our own; but there is no assurance of that course being pursued, nor could this court expect the circuit court so to do. But this is an argument *ab inconvenienti*. The proposition of appellants' counsel involves the philosophical impossibility of two bodies occupying the same place at the same time. There cannot be such a thing as a suit being in two courts at one and the same time. This the appellants have attempted to do; and we simply decline to take cognizance of the appeal they have lodged in this court, since their appeal in the same case was lodged in the circuit court. We have gone very far—possibly too far—in permitting such radically inconsistent pleading as the taking of two self-contradictory orders of appeal from the same judgment, to two different courts at the same time. No express provision of law sanctions such a practice, and we have given it our approval only to relieve parties from the responsibility of deciding in advance doubtful questions of jurisdiction, and to relieve them from the unfortunate consequences resulting, in case the order of appeal first returned and presented for action should be annulled for want of jurisdiction. In that case the second order of appeal would remain in force, and might be prosecuted, without encountering any conflict of jurisdiction. But to claim that a party who has lodged and is actually prosecuting an appeal in the circuit court, can afterwards, and while that appeal is still pending, return into this court another appeal identical in every respect, is to demand what we characterize as a "legal impossibility," and we cannot demonstrate this more completely than was done in our original opinion.

Rehearing refused.

(32 Fla. 253)

#### BURNEY v. STATE.

(Supreme Court of Florida. July 10, 1893.)

#### CRIMINAL LAW—PRESUMPTIONS OF ACCUSED—PRESUMPTIONS.

Where it affirmatively appears that the defendant in a criminal case was personally present in court at the beginning of his trial, that was begun and finished on the same day without interruption by recess or otherwise, the presumption is that he continued to be so present up to and until the rendition of the verdict, even though the record is silent as to whether he was so present at the rendering of the verdict or not.

(Syllabus by the Court.)

Error to circuit court, Leon county; John W. Malone, Judge.

Henry Burney was convicted of receiving property knowing the same to have been stolen, and brings error. Affirmed.

Stephen C. Miller, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

**TAYLOR, J.** The plaintiff in error was indicted, tried, and convicted at the spring term, 1893, of the circuit court for Leon county of the charge of buying and receiving stolen property, knowing the same to have been stolen. He brings the case here by writ of error, and assigns the following as error: (1) The verdict was not found, presented, or filed in accordance with law; (2) the record fails to show that the defendant was present at the time of the rendition of the verdict. The only possible irregularity in the verdict, as the same is copied into the record before us, is that it is not signed by any one as foreman of the jury. This defect, if any, is shown, however, by an agreement of the attorney general and the counsel for the plaintiff in error, filed here, to be a clerical omission in making up the record, in which it is shown and admitted that the verdict rendered was in fact signed by one of the jurors as foreman of the jury. This cures the only objection that can apparently be urged to the verdict, or to the manner of its rendition and presentation in court.

As to the second assignment of error, it appears from the record that the trial of the defendant was begun and finished on the same day without any interruption by recess or otherwise; and the record shows affirmatively that the defendant was personally present in court at the commencement of the trial, was arraigned and pleaded not guilty; and, while the record does not give expression to the fact that he was thus personally present at the rendition by the jury of their verdict, yet the presumption, under the circumstances as disclosed by the record, is that, being personally present at the beginning of the trial, which by the record is shown to have proceeded without interruption up to the rendition of the verdict, he continued to be and was present during the whole of such trial. *Lovett v. State*, 29 Fla. 356, 11 South. Rep. 172.

The judgment of the court below is affirmed.

(32 Fla. 274)

**BENNER et al. v. STREET et al.**

(Supreme Court of Florida. June 19, 1893.)

**PARTITION — DECREE PRO CONFESSO NECESSARY — PUBLICATION FOR ABSENT DEFENDANTS.**

1. In proceedings for the partition of land, no decree of partition should be made until all the defendants to the bill have answered, or until a decree pro confesso has been regularly entered against all those who fail to answer. *Street v. Benner*, 20 Fla. 700, cited and approved.

2. An order for publication requiring absent defendants to appear and answer cannot properly be issued until after the bill or petition is filed that such absent defendants are by such order required to appear to and answer.

3. Under our statute regulating the proceedings for the partition of lands, no order for publication requiring absent defendants to appear and answer can properly be issued or granted until after the petition or bill for partition has been filed; and, by the provisions

of the statute, it is necessary that such order for publication should be based upon the sworn statements contained in such bill or petition as to the nonresidence of such absent defendants.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Bill by Thaddeus Street and others against Mary S. Benner and others for partition. From the decrees entered, Benner and others appeal. Reversed.

J. R. Parrott and Hamlin & Stewart, for appellants. Cooper & Cooper, for appellees.

**TAYLOR, J.** This cause has been passed upon by this court on a former occasion, (*Street v. Benner*, 20 Fla. 700,) where a complete statement of the case will be found. Upon such former appeal it was distinctly held that, under the provisions of our statute regulating the proceedings for partition of lands, no decree of partition should be made until the defendants shall have answered, or until a decree pro confesso is entered as to those who have been summoned by subpoena or by publication; and the decree of partition rendered in the cause prior to such former appeal was reversed by this court, upon the ground, among other reasons, that no decree pro confesso had been entered against various defendants to the bill for whom publication had been made prior to the rendition of such decree of partition.

In the record now before us, upon this second appeal, we find that the following named parties, Mary J. Rand, Sarah G. Rand, L. Pierce, M. Jacques, Thomas Addis Emmet, John B. Thorp, Alexander R. Thorp, Edward P. Abbe, James S. Robinson, Christian S. Delevan, William W. Crapo, and James P. Swain, are parties defendant to the bill, and are therein alleged to have undivided interests in the lands sought to be partitioned, and they are alleged in the bill to be nonresidents of this state. Some evidence is in the record of the publication of a notice to them to appear and answer the bill, but there is nothing in the record now before us to show that any of them have ever appeared or answered, or otherwise pleaded to the bill, and no decree pro confesso appears ever to have been entered or taken against them or any of them. Notwithstanding this and the former decision of this court in the case, the decree of partition now appealed from has been made, commissioners for partition have been appointed, who have reported that the lands cannot be divided in severalty without detriment to the interests of the parties concerned, and another decree has been made ordering a sale of the lands for division. From these decrees this second appeal has been taken.

We are in perfect accord with the former decision of this court in the case as to the necessity for a decree pro confesso against nonanswering defendants, who have been

served either personally or by publication, before the court is authorized to proceed ex parte to a partition, or to the taking of any other material step in the cause. In reference to these absent and nonappearing defendants to the bill, there is another irregularity presented in the record as to the issuance of the notice for publication calling upon them to appear and answer, that is too glaringly at variance with all the established rules of equity practice, and with our statute regulating partition, to permit of our passing over it in silence when called upon to review a decree making disposition of lands in which these parties are alleged to be interested. The notice, as published, calling upon them to appear and answer, was issued and signed by the judge on July 2, 1877, and the bill that such notice required them to answer was not filed until the 14th of July, 1877. This notice, as published, too, does not seem from the record to have been predicated upon either a bill filed or upon any affidavit showing the nonresidence of the defendants, but, as the published notice itself recites, was issued "on motion" of the complainants' solicitors.

Sections 2 and 3 (p. 802, McClell. Dig.) of the statute under which this proceeding was instituted expressly provide that the bill or petition shall be sworn to, and that in case any of the defendants are therein stated to be nonresidents, etc., the judge shall make an order requiring them to appear, etc., which order shall be published, etc. Neither does this statute, or any other rule of practice that we have knowledge of, contemplate that parties who are in future to become defendants to a bill in equity can be required, through the medium of publication, to appear to and answer a bill not yet filed. It follows from what has been said that the decrees appealed from must be, and are hereby, reversed, and the cause remanded for such further proceedings as shall be proper in the premises.

(101 Ala. 149)

**BIRMINGHAM MINERAL R. CO. v.  
JACOBS.**

(Supreme Court of Alabama. May 19, 1893.)

**NEGLIGENCE—COLLISION AT RAILROAD CROSSINGS  
—PRESUMPTIONS—INSTRUCTIONS.**

1. In an action against a railroad company for the wrongful death of plaintiff's intestate, it appeared that deceased was an engineer in the employ of the E. Dummy Ry. Co., whose tracks crossed defendant's tracks at right angles; that a freight train on another track shut out the view of the crossing from the E. Dummy and defendant's road; that as deceased's train approached the crossing a freight train on defendant's road, which had stopped about 800 feet from the crossing, backed to the crossing, where it collided with deceased's train, killing deceased. There was no evidence that deceased saw defendant's train, further than that his engine was found reversed. The conductor and several passengers on the dummy train swore that they saw defendant's train when backing towards the crossing. Code, §

1145, provides that, when the tracks of two railroads cross each other, trains must come to a full stop within 100 feet of such crossing; the train on the older road, having the right of way, being entitled to cross first. *Held* that, without other evidence, it would be presumed that the injury was caused by defendant's negligence in not stopping its train within 100 feet of the crossing, as required by law.

2. Deceased, being an engineer on the older road, had a right to presume that those in charge of defendant's train would perform every act imposed by law, but he could not entertain such a presumption in the face of facts reasonably indicating that they would not perform such acts.

3. The questions of defendant's negligence and deceased's contributory negligence were for the jury.

4. It was not error to refuse an instruction that if the jury found for plaintiff they might look, in assessing the damages, to the fact that at the time of the accident the law was unsettled as to whether the E. Dummy road was a railroad, within the meaning of the statute requiring the stoppage of trains within 100 feet of a crossing, since such an instruction made defendant's ignorance of the law an excuse for its violation.

5. An instruction that "you cannot find from the evidence that the engineer in charge of the engine propelling defendant's freight train was guilty of negligence" was properly refused, since, if the engineer was not negligent, others of defendant's employees, on whom rested duties, might have been, and, besides the question of his negligence was for the jury.

6. An instruction that an engineer in charge of a passenger train should exercise more care than an engineer of a freight train was properly refused, since it was calculated to mislead the jury, and, if ever true, had no application to the case at bar.

7. An instruction that if, at the time defendant failed to stop its train, it did not know, and had no reason to believe, that the dummy train was about to cross defendant's track, then such failure to stop was not negligence, was properly refused, since it ignored the positive requirement of the statute.

8. An instruction that the only negligence for which the plaintiff could recover was the negligence of the conductor, in not stopping defendant's train before reaching the crossing, was properly refused, since it was calculated to mislead the jury, and took from them the consideration of the negligence of defendant's other employees.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action by Hannah Jacobs, as administratrix of Peter Jacobs, against the Birmingham Mineral Railroad Company, for the wrongful death of plaintiff's intestate. Judgment for plaintiff. Defendant appeals. Affirmed.

Among the written charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: (5) "If you believe the evidence, the defendant's train was approaching the dummy track, in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing." (6) "If you believe the evidence, the defendant's train was approaching the dummy track, in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing; and there is no evi-

dence tending to show that defendant's train at such time, and from such place, was hid by the banks of any cut or other obstruction." (7) "If you believe the evidence, there was nothing to prevent the plaintiff's intestate from seeing the defendant's approaching train when the dummy engine was on the railroad crossing first reached by it." (8) "If the jury find for the plaintiff, in assessing the damages as a punishment to defendant, they may look to the fact that at the time of the alleged injury the law was in some doubt as to whether the Ensley Dummy road was a railroad, within the meaning of the statute requiring the stoppage of trains within one hundred feet of the crossing of a railroad." (12) "You cannot find from the evidence that the engineer in charge of the engine propelling the defendant's freight train was guilty of negligence." (16) "I charge you, gentlemen of the jury, that an engineer in charge of an engine propelling a passenger train should exercise more care than an engineer in charge of an engine propelling a freight train." (19) "I charge you, gentlemen of the jury, that if you shall believe from the evidence that the defendant's servants managing and controlling defendant's train failed to stop defendant's train within one hundred feet of the crossing of the dummy track, and if you shall further believe from the evidence that, at the time defendant's said servants failed to stop said train, they did not know, and had no good reason to believe, that the dummy train was about to cross defendant's track, then the failure to make such a stop would not be negligence on the part of defendant's employees." (20) "It was the duty of the plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down defendant's track to see if a train was approaching thereon before he attempted to cross the same with his dummy engine and train; and if the jury believe from the evidence that, by looking up and down defendant's track, he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant." (21) "If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury by looking, and that he omitted to look, or, looking, saw defendant's train approaching the crossing, and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude a recovery in this action." (22) "Although the jury may believe from the evidence that the servants and agents of defendant neglected to use due care and diligence to avoid the collision, this did not relieve the plaintiff's intestate from the necessity of taking due care and precaution for his safety. Before

attempting to cross the railroad track of defendant with his dummy engine and train, plaintiff's intestate was bound to use his senses, to look and to listen for an approaching train on defendant's track, in order to avoid a collision, in this case. If he omitted to use his senses of sight and hearing, and propelled his dummy engine thoughtlessly on the track of defendant's railroad, or if, using them, he saw or heard the approaching train of defendant on the track, and, instead of waiting for it to pass, he undertook to cross the track of defendant's railroad with his dummy engine and train in front of defendant's approaching train, and was injured thereby, he so far contributed to the injury complained of in this complaint as to deprive the plaintiff of any right of recovery." (23) "The only negligence for which the plaintiff can recover, under the evidence in this case, is the negligence of the conductor, in not stopping defendant's freight train before crossing the dummy track, if the jury believe from the evidence that said freight train did not stop for such crossing." (27) "The court charges the jury that an engineer pulling a passenger train, with passengers aboard his train, who sees a freight train approaching the crossing of his railroad and another railroad, and said freight train, when so seen, is near enough to collide with the passenger train, unless such freight train should be brought to a stop, provided the passenger train should proceed to cross in front of the approaching freight, the said passenger train should not attempt to cross before such approaching freight train; and if the engineer of such passenger train should so attempt to cross, and should be injured and killed thereby, then I charge you that in such case there could be no recovery by the administrator of such engineer, unless the injury was inflicted willfully, wantonly, or recklessly." (29) "I charge you, gentlemen of the jury, that if the plaintiff's intestate could have discovered the approach of defendant's train by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, you must find for the defendant." (30) "It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's track; and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the injury, they must find for the defendant." (31) "If the jury believe from the evidence that the plaintiff's intestate could have seen the approach of defendant's train, by looking, in time to have avoided the injury, and that he failed to look, or, looking, saw

the train approaching, and he undertook to pass over in front of defendant's train, they must find for the defendant." (32) "If the jury believe from the evidence in this case that plaintiff's intestate could have discovered the approach of defendant's train, by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (33) "If the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train, by looking, in time to have avoided the injury, and that he failed to look, or, looking, saw the train approaching, and he undertook to pass over in front of the defendant's train, they must find for the defendant." (38) "If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury, by looking, and that he omitted to look, or, looking, saw defendant's train approaching the crossing, and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude a recovery in this action." (39) "It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's track; and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train, by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (40) "It was the duty of plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down defendant's track to see if a train was approaching thereon, before he attempted to cross the same with his dummy engine and train; and if the jury believe from the evidence that, by looking up and down defendant's track, he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant."

Hewitt, Walker & Porter, for appellant.  
Bowman & Harsh, for appellee.

HARALSON, J. In this case, on a former appeal, (92 Ala. 187, 9 South. Rep. 320,) it was held, under the same state of facts, that the testimony did not tend to show that the collision was willfully caused by defendant's servants, but that the trend of the whole testimony repelled such an inference. It was also held that the second count did not charge willful negligence. Since that time, another (the third) count has been filed, which charges no more than mere negligence against the defendant. The pleas were, not guilty, and contributory negligence on the

part of the plaintiff's intestate. The fact that the defendant's train was not stopped, in compliance with the statute, within 100 feet of the railroad crossing, and was run in the manner and at the rate of speed charged in the third count, is negligence for which the railroad company is liable. The proof tends to establish the truth of this count, and the case has been tried, mainly, if not altogether, on the plea of contributory negligence. The statute regulating the duties of railroads when tracks cross each other is: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within a hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the older railroad, having the right of way, being entitled to cross first." Code, § 1145. The defendant's railroad and the Georgia Pacific track ran parallel, and 56 feet apart, at this crossing, intersected by the Ensley Dummy Railway; and the Kansas City, Memphis & Birmingham Railway ran diagonally across both these tracks, 325 feet from the crossing of the defendant and Ensley Railway tracks, forming, with the Georgia Pacific and Kansas City, Memphis & Birmingham Railway and the Ensley Railway, an area in the shape of a triangle, with the defendant's railroad running across the open end of the triangle, 56 feet from, and parallel, as above stated, to, the first-named railroad. This area, as the evidence tended to show, was open, with nothing to obstruct the view, except a few scattering pine trees. It is 320 or 325 feet from the crossing, south, to the Kansas City, Memphis & Birmingham Railway, where it crosses the defendant's track; and, commencing a few feet south of the Kansas City, Memphis & Birmingham road, there runs a cut from 5 to 7½ feet deep. The evidence shows that, at the time the Ensley dummy approached the Georgia Pacific road, there was a freight train on the latter road, completely blocking it up, and obscuring the sight of the crossing below, and the triangular area formed by said railroads, described above. At that time the defendant's freight train, composed of 14 cars, including the caboose, had stopped 865 feet from the Ensley crossing, and beyond the Kansas City, Memphis & Birmingham road, with its rear end, at which there was a caboose car, towards the crossing, where the accident happened. It used the signal bell, as the evidence tends to show, and backed towards the crossing; having attained a speed of from 4 to 12 miles an hour, as variously stated by different witnesses, at the time it reached the crossing. Just at that moment the Ensley dummy engine had reached, and was upon, the crossing; and its engine and the caboose of defendant's train collided, killing the engineer of the Ensley dummy, the plaintiff's intestate. The evidence tends to show that the train of the de-

fendant, from the time it commenced to back towards the crossing, and until the collision occurred, never halted. It was argued that the train on the Georgia Pacific, at the time the dummy engine approached and stopped within 10 or 15 feet of it, and the deep cut above referred to, in which the defendant's train had stopped, shut out the sight of the defendant's train from the dummy engine, and vice versa, so that their respective engineers and servants did not see each other; thereby causing them to be unmindful, each, of the approach of the other. We have no evidence whether the engineer on the dummy saw the defendant's approaching train or not, further than that his engine was afterwards found to be reversed; and other persons on the dummy cars, as witnesses, swear they saw the defendant's approaching train, and the passengers got off in consequence. The conductor on the dummy swears he saw the approach of the other train when it was 75 feet from the crossing.

1. The plaintiff's intestate had a right to rely upon the performance, by those on the defendant's train, in charge of it, of every act imposed by law on them, when approaching the crossing. The presumption was that they should stop within 100 feet of the crossing, as the statute required them to do. It cannot be imputed as negligence to him that he did not anticipate culpable negligence on the part of the employees of defendant. One in the position of this engineer, called upon to exercise care to avoid danger from the acts of others, might, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they would act with reasonable caution, and not with culpable negligence; and it has been held that one approaching a railroad crossing in a city is not bound to be on the alert for danger when he has the assurance—given in the failure of the company to give the statutory signals—that the crossing is safe. *Beisiegel v. Railroad Co.*, 34 N. Y. 622; *Strong v. Railroad Co.*, 8 Amer. & Eng. Ry. Cas. 274; *Loucks v. Railway Co.*, (Minn.) 18 N. W. Rep. 651. Without more than that the defendant's servants failed to bring their train to a stop within the distance required by law, it will be presumed the injury was caused by the negligence of defendant. *Shear. & R. Neg.* § 469; *Huckshold v. Railway Co.*, 90 Mo. 548, 2 S. W. Rep. 794; *Beisiegel v. Railroad Co.*, 34 N. Y. 622.

2. But, on the other hand, all the authorities, so far as we have seen, agree—and it certainly accords with sound principle—that it was the duty of the deceased, before he undertook to cross the track of the defendant, to look out for approaching trains, and the manner and speed with which they might come. This was his duty, notwithstanding his train had the right of way by law, and it was culpable negligence in the defendant's employees not to accord it to him, and he

might presume they would not violate their legal obligation. He had no right to close his eyes to the approaching train, if he was in a position to see. In the absence of all apparent danger, the deceased would not be negligent in crossing defendant's track. He was not authorized, however, to indulge a presumption that the other company would comply with the law, in the face of facts reasonably indicating that they would not. That presumption authorized him to proceed with his train up to the danger line, which no prudent person, in the exercise of that degree of caution for his own safety, and the safety of others intrusted to him, should cross, without being chargeable with negligence. That line lay just where a person occupying his position, observing the prudence he ought to have observed, could reasonably see that the defendant's employees were not going to make the stop. The presumption which the law authorizes him to indulge—that they would comply with the law—gave way, and no longer existed, if and when it became reasonably apparent that they did not intend to stop. The highest degree of care was upon him, just there, without reference to the carelessness of the defendant's agents. In such an emergency it is not enough that the chances are equally balanced. Nice calculations should not be made. The decided weight of probability should be against the chances of a collision. The contention on the part of appellant—that it was his duty to stop his train when it did not appear the other would stop, or without knowing it would do so, in the absence of the dangerous proximity of the other—sets aside the presumption that the law authorized him to indulge,—that the defendant would not be guilty of the culpable negligence of violating the law. It asserts the doctrine that it was his duty to presume the other would not do its duty, while the law is, he had the right to presume it would. *Railroad Co. v. Snyder*, 24 Ohio St. 676; *Meek v. Pennsylvania Co.*, 38 Ohio St. 632; *Belton v. Baxter*, 54 N. Y. 245; *Wendell v. Railroad Co.*, 91 N. Y. 420; *Strong v. Railroad Co.*, 8 Amer. & Eng. Ry. Cas. 274; *Pierce, R. R.* pp. 343, 345, 346.

3. That there was carelessness somewhere is evidenced by the fact that two trains, running, in the daytime, in nearly an open country, on two tracks, at right angles to each other, should have collided. If the deceased was negligent, we are not permitted to compare his with defendant's negligence, or to set off the one against the other, or find against the guiltiest; but the inquiry is, the defendant's guilt being admitted, was the deceased guilty of any negligence which contributed proximately to his injury? We stated in *Railroad Co. v. Schaufier*, 75 Ala. 141, that the proper inquiries were (1) whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant or its servants; or (2) whether the plaintiff, by his own negligence, or want

of ordinary care and prudence, so far contributed to his own misfortune that but for such contributory negligence on his part the misfortune complained of, as the basis of the action, would not have happened. 2 Shear. & R. Neg. § 467. These are matters for the determination of the jury, under the evidence in the case. The court, at the instance of the defendant, gave the following charges to the jury, which stated the law as favorably for defendant as could be: (a) "Though the law requires engineers and others running trains to stop their trains within one hundred feet of railroad crossings, yet an engineer who sees another train approaching said crossing under such circumstances as would indicate to a reasonable man that such approaching train was not going to stop for the crossing should not attempt to cross in front of such moving or approaching train, although he may have complied with the law in stopping for the crossing; and if he attempts to do so, and is injured thereby, he would be guilty of such negligence as would preclude a recovery by him for such injury." (b) "If the jury believe from the evidence that plaintiff's intestate could have avoided the alleged injury by the exercise of extraordinary care and diligence, then plaintiff cannot recover in this action." (c) "I charge you, gentlemen of the jury, that the law required of the plaintiff's intestate the exercise of extraordinary diligence in the management and control of the dummy engine."

Applying the principles stated in this opinion to the charges requested by defendant, and refused, we hold that all of them which we do not specifically notice were contrary to the principles we have announced above, as touching the presumption the law authorized the engineer of the dummy line to indulge,—that the persons in control of the defendant's train would do their duty,—and thus, plainly, or in forms more or less subtle, seek to put the responsibility on him, if it did not appear, or he did not know, that the other train would stop; and they are subject, for the most part, to the objection of being misleading and confusing. Nos. 25, 26, 35, and 37 were passed on, on the other appeal, and are not insisted on now. Nos. 24 and 36 are general charges on the effect of the evidence, and were properly refused. Charges 5, 6, and 7 were properly refused, since they ignore the presumption the law authorized the dummy engineer to indulge,—that defendant's train would obey the law,—and they were, besides, calculated to confuse and mislead. The refusal to give them is justified on these grounds. *Marx v. Bell*, 48 Ala. 497. Charge 8 was bad, in that it makes defendant's employees' alleged ignorance of law an excuse for its violation. No. 12 was properly refused. If it were admitted that the engineer was not guilty of negligence, others of the employees, on whom rested duties, might have been. Besides, we must presume

he knew the road, the distance between the crossings, the length of his train, the speed it was moving, and that it was not going to stop, so far as he was concerned; and whether he was guilty of negligence or not, under these circumstances, was a question for the jury. No. 16 was calculated to mislead and confuse the jury, and the principle it asserts, if ever true, has no application to this case, and cases of this character. No. 19 was an incorrect charge, in that it ignores, and altogether disregards, as a duty to be observed by the defendant train, the positive requirement of the statute,—for it to come to a stop within 100 feet of the crossing of two railroad tracks. No. 23 was calculated to confuse and mislead the jury, and took from them the consideration of the negligence, if it existed, of the other employees of the company. Besides, it does not follow that, because the negligence of the conductor was the only negligence which entitled the plaintiff to recover, she is not entitled to recover at all. Charges 20, 21, 22, 27, 29, 30, 31, 32, 33, 38, 39, and 40 each ignored the presumption the dummy engineer was authorized to indulge as to the other train complying with the law, in giving his train, having the older right of way, the right to cross first, and of itself coming to a full stop before attempting to cross, and in that they are each confusing, and calculated to mislead, being too indefinite as to the proximity of the approaching train, its speed, and in their hypotheses of danger. There were other assignments of error, on account of the admission of evidence against defendant's objection, but they seem to be without merit, are not insisted on in argument, and are therefore waived.

Affirmed.

(36 Ala. 378)

#### DOWNEY v. DOWNEY.

(Supreme Court of Alabama. May 23, 1893.)

##### ALIMONY AFTER ABSOLUTE DIVORCE.

Where an absolute divorce has been decreed at the suit of the husband, allowing each of the parties to remarry, the wife cannot afterwards maintain a suit for alimony. *Jones v. Jones*, (Ala.) 11 South. Rep. 11, followed.

Appeal from chancery court, Perry county; William H. Tayloe, Chancellor.

Bill by Sarah Downey against John Downey for alimony. From a decree overruling a demurrer to the bill, defendant appeals. Reversed.

The complainant alleged in her bill that she was married to John Downey, the defendant, about the year 1845, and that ever since she has resided with him as man and wife until a short time before the year 1891; that on January 12, 1891, said John Downey filed his bill of complaint in the chancery court of Perry county, asking for a divorce from the complainant on the ground of voluntary abandonment, and that on February 24, 1891, a decree was rendered a vinculo; that before the granting



of said divorce the defendant had always provided for her, and that she is now without any means of support; and therefore prayed that a decree be rendered requiring the defendant to furnish maintenance and support for her. The defendant filed his plea to said bill, and set up as a defense the decree a vinculo, granted by the court, and that by said decree either party was allowed to again contract in marriage; and that since the said decree was rendered the defendant, the said John Downey, had again married, and was then living with his lawful wife. The defendant also demurred to the bill, the principal ground of which was that the bill shows upon its face that the complainant and the defendant had been divorced, and that said decree of divorce was still of force, and that the said Sarah Downey made no claim for alimony or support in said divorce proceedings. Upon the submission of the cause upon the sufficiency of the plea and upon the demurrer the court held the plea insufficient, and overruled the demurrer. Hence this appeal.

William F. Hogue, for appellant.

In the absence of a statutory provision it is doubtful if alimony would be allowed in cases of absolute divorce, (1 Amer. & Eng. Enc. Law, p. 478; 2 Bish. Mar. & Div. § 376,) and never where the wife was in fault, (9 Amer. & Eng. Enc. Law, pp. 816, 831, and notes; Gray v. Gray, 15 Ala. 779; Bish. Mar. & Div. [3d Ed.] § 564.) As to whether a suit for alimony may be maintained after the granting of an absolute divorce the cases are in conflict, but the weight of authority is largely in the negative. Bish. Mar. & Div. (3d Ed.) § 567; 1 Amer. & Eng. Enc. Law, pp. 479, 839, 840, note 6; 5 Amer. & Eng. Enc. Law, p. 838, note 2; Id. p. 839, note 6; Id. pp. 884, 885; Boykin v. Rain, 28 Ala. 332; Murray v. Murray, 84 Ala. 363, 4 South. Rep. 239; Hinson v. Bush, 84 Ala. 368, 4 South. Rep. 410. The decree of divorce determines the rights of the parties. 2 Daniell, Ch. Pr. 968; 3 Brick. Dig. p. 401, §§ 561, 568; Id. p. 580, § 84. The provisions of Code, § 2332, are plainly against this suit, as it authorizes the allowance of alimony only "upon granting a divorce."

J. H. Stewart, for appellee.

The court of chancery has jurisdiction to grant alimony to a divorced wife after the decree has been rendered. Code, §§ 2332, 2340; Glover v. Glover, 16 Ala. 440; Hinds v. Hinds, 80 Ala. 226; Wray v. Wray, 33 Ala. 187; Mims v. Mims, Id. 98; Murray v. Murray, 84 Ala. 364, 4 South. Rep. 239; Shotwell v. Shotwell, 1 Smedes & M. Ch. 65; McKarracher v. McKarracher, 3 Yeates, 56; Earle v. Earle, 27 Neb. 277, 43 N. W. Rep. 118; Lyon v. Lyon, 21 Conn. 185; Crane v. Meginnis, 1 Gill & J. 463; Richard-

son v. Wilson, 8 Yerg. 67; Olney v. Watts, (Ohio,) 3 N. E. Rep. 354; Prescott's Case, 59 Me. 146-150; Stratton's Case, 78 Me. 481; Call's Case, 65 Me. 407; Cooke v. Cooke, Phillim. Ecc. 40; Cox v. Cox, 19 Ohio St. 502. The statutes which make it the duty of the chancellor, in rendering a decree of divorce, to provide for the maintenance of the wife, do not take away the original jurisdiction of the chancery court in the matter of alimony. 1 Brick. Dig. p. 647, § 120; Campbell v. Campbell, 37 Wis. 215. Complainant did not appear in the divorce suit, and the question of alimony was not considered. Decrees are not conclusive as to matters not raised and adjudicated. Gilbreath v. Jones, 66 Ala. 129; McCall v. Jones, 72 Ala. 368.

McCLELLAN, J. The question presented on this record, namely, whether a quondam wife may, after a decree of absolute divorce from the bonds of matrimony, granted at the instance of her husband for misconduct on her part, and which allows each of the parties to remarry, maintain a bill for alimony, is one upon which there is great conflict in the adjudged cases of other jurisdictions, as will appear from a synopsis of the briefs of counsel in the report of this case. Most, if not all, of the text writers who discuss the point hold that alimony will not be allowed on a separate proceeding after divorce a vinculo. 1 Amer. & Eng. Enc. Law, p. 479; Schouler, Husb. & Wife, § 459; Bish. Mar. & Div. § 376 et seq. Indeed, the general rule is that courts of equity have no jurisdiction to grant alimony at all except in and as incident to a bill for divorce absolute or a mensa et thoro. 2 Pom. Eq. Jur. § 1120. But this rule has been departed from by this court, and the doctrine has come to be established with us "that courts of equity exercise a jurisdiction over the subject of alimony not merely incidental, [to proceedings for divorce,] but original, [and wholly separate and apart from proceedings for a dissolution of the bonds of matrimony or for separation,] in cases where the wife's right to maintenance exists." Glover v. Glover, 16 Ala. 440; Kinsey v. Kinsey, 37 Ala. 393; Hinds v. Hinds, 80 Ala. 226; Murray v. Murray, 84 Ala. 363, 4 South. Rep. 239. None of these cases, however, and none that have ever been decided by this court, directly or indirectly support the position asserted by the present bill. On the contrary, the doctrine declared in the case of Glover v. Glover, and reiterated in the subsequent cases cited, is rested on considerations which do not apply in the case at bar. The bills in all those cases were filed by the wives of the several defendants, and not, as here, by a person who had been, but was not at the time of instituting her suit, the wife of the defendant. It was conceded in each of those adjudications that upon general principles of equity jurispru-

dence, as declared and enforced prior to the first of them, alimony was not allowable except as an incident to relief in a proceeding for divorce; but the court, in effect, extended equity jurisdiction to the allowance of alimony, though no dissolution of the bonds or decree of separation was prayed, expressly on the ground that it is the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty. *Hinds v. Hinds*, supra, and cases there cited. Does this ground exist on the averments of the present bill? Do the complainant and respondent therein sustain the relation of husband and wife to each other? Clearly not. Can there be any duty resting on one as a husband who is not a husband to support another as a wife who is not a wife? Certainly not on general principles, which have never been departed from to this extent, unless the duty becomes fixed and decreed to be performed while the relation of husband and wife still exists, or as a part of the judgment dissolving it. Certain it is that, to the extent this court has changed the general rule, it has been actuated by reasons which do not obtain after the relation of husband and wife has been destroyed by the valid decree of a competent tribunal entailing the release of each party from all the duties incident to the relation. And were we now to uphold the claim advanced by this bill it would be to further emasculate principles of equity jurisdiction without the reasons therefor which underlie the adjudications referred to, and to use those adjudications to help us to a result towards which they do not tend, and for which they were never intended to afford justification. And even if this were wholly an open question in Alabama, we should not extend the departure from well-established doctrines taken in the case of *Glover v. Glover*, or rather we would not initiate a new departure, for such it would be, since it could not be referred to the considerations leading to that decision, from those doctrines, but prefer to reaffirm them, as applicable to all cases not clearly within the legitimate operation of that adjudication, and hold that in cases like the present one no alimony is allowable, because not prayed as an incident to a decree of divorce. The question, however, is not an open one in this court. It was long since determined here that a decree of divorce a vinculo puts an end to the relation of marriage as effectually as would result from the death of either of the parties, and that, as a consequence, all duties and obligations necessarily dependent upon the continuance of that relation immediately cease; and this was held with reference to the liability of a quondam husband, who had been divorced by a court of this state, to pay his former wife one-third of his annual income so long as they both should live unreconciled, which had previously been de-

creed by the courts of another state in a proceeding by her for divorce from bed and board; this court holding that he was liable, the foreign decree to the contrary notwithstanding, only for that part of the alimony which accrued prior to the domestic decree dissolving the bonds of matrimony, and the ground of the decision was, as above indicated, that upon the rendition of that decree he ceased to be the husband of the plaintiff, and thereafter no duty whatever in respect of her support and maintenance rested upon him. *Harrison v. Harrison*, 20 Ala. 629, 649. Following this case, and citing *Boykin v. Rain*, 28 Ala. 332, 343, as sustaining the same principle, is the quite recent one of *Jones v. Jones*, (Ala.) 11 South. Rep. 11, the facts of which were that William W. Jones secured the passage of an act by the general assembly of 1888-89 releasing him from the bonds of matrimony then and theretofore existing between him and Josephine E. Jones, and providing that the divorce thereby (attempted to be) granted should have the same effect as a divorce granted by the chancery court, and further providing that said Jones is hereby permitted to marry again. A proviso to this act was as follows: "This act shall not affect in any manner the rights of the said Mrs. Josephine Jones in the courts of this state in the recovery of alimony in any proceeding in any court of this state for a divorce from the said William W. Jones." Acts 1888-89, p. 361. Subsequently Mrs. Jones, assuming that she was not absolved from the bonds of matrimony by this act, filed her bill against William W. Jones for divorce and alimony. The relief prayed was granted by the chancery court, and an appeal taken to this court. Here it was held that, if the legislative divorce was valid, and of the efficacy of a decree in chancery, the bill could not be maintained for either divorce or alimony, because as to the first relief there had already been a dissolution of the bonds of matrimony, and this notwithstanding the contemplation of the act was clearly to the contrary as to Mrs. Jones; and as to the second (alimony) the divorce a vinculo of the husband put "an end to the relation of marriage, and, as a consequence, so far as he was concerned, the divorce having been granted in his favor, all duties and obligations necessarily dependent upon the continuance of that relation [including, of course, the duty of support and maintenance through an allowance of alimony or otherwise] immediately ceased." Construing the proviso quoted above, the court assumed the power of the legislature, if it had power at all to grant a divorce, to save the wife's claim to alimony, but, holding that, unless there was an efficacious saving clause to this end, the claim would be entirely cut off, held further, that the clause intended to have that effect in this act was inoperative because thereunder it could only be asserted

in a bill for divorce, which could not be maintained after the dissolution of the marital relation at the instance and in favor of the husband. It was, however, held that the act was unconstitutional, and wholly inoperative to annul the bonds of matrimony; and it was upon this theory alone—that the husband had not been divorced—the bill of the wife for divorce and alimony was sustained, and the relief therein prayed granted to her. *Jones v. Jones*, (Ala.) 11 South. Rep. 11. We regard this as an adjudication of this court against the equity of the present bill. It is in line with the general principles declared by us above, and not opposed to any provision of our statute, and, following and reaffirming it, we hold that there is no equity in this bill of complaint. The decree of the chancery court is reversed, and a decree will be here entered dismissing the bill. Reversed and rendered.

(99 Ala. 177)

### BRADLEY v. STATE.

(Supreme Court of Alabama. July 24, 1893.)

#### CONSTITUTIONAL LAW—INTOXICATING LIQUORS.

Act Feb. 28, 1887, (Sess. Acts, p. 665, § 1.) provides that any one selling liquor in certain townships shall be punished, etc. Section 3 provides for refunding money paid for licenses in those townships. *Held*, that the subject-matter of the latter section, not being embraced in the title, was unconstitutional, but, as the first section can be upheld without reference to section 3, a conviction under it will be upheld.

Appeal from circuit court, Crenshaw county; John P. Hubbard, Judge.

Dave Bradley was indicted, tried, and convicted for selling spirituous, vinous, or malt liquors contrary to law, and appeals. Affirmed.

Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. Defendant was indicted under the act approved February 28, 1887, (Sess. Acts, p. 665,) an omnibus local prohibition law. Its provisions, as applicable to this case, are that "any person who sells, gives away, or otherwise disposes of any spirituous, vinous, or malt liquors," etc., "within townships 11 and 12 of beats 1 and 2, Crenshaw county, \* \* \* must, on conviction, be fined not less than fifty dollars, and may also be sentenced to hard labor for the county for not less than thirty days nor more than three months." The second count of the indictment in this case strictly conforms to the statute. All of the provisions of section 1 of said statute are embraced within the title to the enactment. Section 3 has provisions that are not covered by the title, viz. it provides for refunding to persons who have theretofore obtained licenses to retail liquors

within the prohibition areas three-fourths of the several amounts paid by them in procuring their licenses. It also contained an appropriation clause of moneys to meet such payments. The defendant was tried and convicted under the second count of the indictment. There was a demurrer to this count, alleging that the third section of the act, under which the trial was being had, made the act unconstitutional, in this: that it introduced a subject which was not expressed in the title nor included within the purview of its terms. Const. art. 4, § 2. We think that section does bring into the enactment a subject that cannot be held to be embraced within the title. The question then arises, does this vitiate the whole statute? We have frequently considered this provision of the constitution. In *Ballentyne v. Wickersham*, 75 Ala. 533, we summarized most of the principles decided by this court. Those provisions are that this provision of the constitution is mandatory; that the title of a bill may be very general, and need not specify every clause of a statute, it being sufficient if they are all referable and cognate to the subject expressed; but if clauses are contained in the act which are not so correlated to the subject expressed in the title as to appear to follow as a natural and legitimate complement, they cannot stand. A statute embracing two subjects, both of which are expressed in the title, falls within the inhibition, and the whole statute is unconstitutional and void. In *Powell v. State*, 69 Ala. 10, a case presenting the question we now have in hand, we said: "If they [the two clauses] are perfectly distinct and separable, and are not dependent the one on the other, the courts will permit the one part to stand, though the other may be expunged as unconstitutional, provided effect can thus be given to the legislative intent." *Lowndes Co. v. Hunter*, 49 Ala. 507, presented the constitutional question we are considering on an issue not distinguishable in principle from the one now under consideration. In that case we gave effect to the clause that was expressed in the title, notwithstanding the other clause was without the purview of the title of the act. See, also, *Rogers v. Torbut*, 58 Ala. 523; *Ex parte Cowert*, 92 Ala. 94, 9 South. Rep. 225. We hold that the punitive clause of this statute can be upheld without a reference to the other clause, and hence affirm the judgment of the circuit court in overruling the demurrer to the indictment. There is nothing in any of the other questions raised. The proof fully justified a conviction of the defendant. *Segars v. State*, 88 Ala. 144, 7 South. Rep. 46; *Mays v. State*, 89 Ala. 37, 8 South. Rep. 28. The judgment of the circuit court is affirmed.

(101 Ala. 51)

FOX, Mayor, v. McDONALD.

(Supreme Court of Alabama. June 20, 1893.)

CONSTITUTIONAL PROVISIONS—CONSTRUCTION—APPOINTMENTS TO OFFICE—POWERS OF THE EXECUTIVE—POLICE COMMISSIONERS—APPOINTMENT BY PROBATE JUDGE.

1. Constitutional provisions are to be expounded in the light of conditions existing at the time of their adoption, in connection with former provisions and historical facts relating to the origin of our political institutions, and the practice under them.

2. The constitutional provision in regard to the distribution of the powers of government into three departments, and forbidding the exercise by an officer of one department of any act properly belonging to another, "was not intended to declare that every act pertaining to government, and the regulation of the social and property rights of the citizen, should be exercised exclusively by the legislative, executive, or judicial department, or some member of it, according as the act possessed a legislative, executive, or judicial character."

3. The power to appoint to office, or to fill vacancies, is not inherently an executive function, and belongs to the governor only when conferred by law.

4. The act approved December 12, 1892, "to establish a board of commissioners of police for the city of Birmingham," which confers on the probate judge of Jefferson county the power to appoint the commissioners, is not unconstitutional on that account.

5. Nor is said act unconstitutional because it does not expressly provide that the commissioners to be appointed shall be residents of the city, the intention that they shall be residents being manifest on the face of the statute itself. Coleman, J., concurring in the conclusion, but not in the reason therefor.

6. Under the provisions of said statute, the terms of the several police officers serving at the time of its passage terminated so soon as the police commissioners were appointed; their appointment necessarily putting an end to the power of the former officer under whom said police officers held. Nor is the statute unconstitutional on the ground that the title does not express this.

7. It was the duty of the mayor of the city to take judicial notice of the appointment of the commissioners, and of their organization and selection of necessary officers, when properly certified to him; and he could not lawfully refuse to administer the oath of office to an officer so appointed and certified, nor inquire into the regularity of his appointment.

(Syllabus by the Court.)

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Petition by Thomas C. McDonald for a writ of mandamus to be issued to David J. Fox, mayor of Birmingham, commanding him to administer to petitioner the oath of office as chief of police of that city. The city court ordered the writ to issue, from which order the respondent appeals. Affirmed.

Gregg & Thornton, Brooks & Brooks, and Jas. E. Hawkins, for appellant. Cabaniss & Weakley, for appellee.

HEAD, J. On December 12, 1892, the general assembly passed "An act to establish a board of commissioners of police for the city of Birmingham, Alabama," which act provides

for the appointment by the probate judge in and for Jefferson county of a board of commissioners of police for said city, consisting of five persons, and defines its powers and duties, among which are to appoint a chief of police, and such other police officers and policemen as is or may be prescribed by city ordinance, and to exercise full direction and control of the officers and members of the police force, in conformity to existing and future laws and ordinances on the subject. Accordingly, the probate judge appointed five persons, who entered upon the duties of their offices, and, as a board, appointed T. C. McDonald to the office of chief of police, who thereafter presented himself to David J. Fox, the mayor of the city, for qualification, and demanded that the oath of office be administered to him; it being the duty of the mayor, under city ordinance, to administer the oaths of office to the officers of police. Fox declined to administer the oath, and McDonald applied to the city court of Birmingham for the writ of mandamus compelling him to do so. From an order of the court granting the peremptory writ, Fox appealed to this court.

This act is assailed by the appellant as unconstitutional on several grounds. We will notice first the chief contention, that it offends sections 1 and 2 of article 3 of the constitution. These are as follows: "Article 3. Distribution of Powers of Government. Section 1. The powers of the government of the state of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. Sec. 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." It is contended that the act in question is violative of these provisions, for the reason that the probate judge, upon whom the power of appointing the commissioners is conferred, is of the judicial department of the state government, while this power of appointment, so conferred upon him, properly belongs to the executive department, within the meaning of the constitutional provisions quoted. To solve the question thus presented, we must learn what these provisions mean. Noticing them analytically, we observe, first, that the general purpose of the article is the distribution of the powers of the government of the state; and to that end, it is declared—First, that those powers shall be divided into three distinct "departments;" secondly, that each of these "departments" shall be confided to a separate "body of magistracy," to wit, those powers which are legislative to one, those which are executive to another, and

those which are judicial to another; and, thirdly, that no person, or collection of persons, being of one of those "departments," shall exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted. Thus we see that the powers of government distributed are those which are divided into the three departments, and, by these three divisions or departments, confided to separate bodies of magistracy.

First, then, what are we to understand by the terms, "departments" and "body of magistracy," as they are here used? How are these bodies of magistracy, to whom these powers are to be confided, to be created and made known? Of whom or what shall they consist? We get definite and complete information upon this subject from the three succeeding articles of the constitution itself, viz.: "Article 4. Legislative Department. Section 1. The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives." "Article 5. Executive Department. Section 1. The executive department shall consist of a governor, secretary of state, state treasurer, state auditor, attorney general, and superintendent of education, and a sheriff for each county. Sec. 2. The supreme executive power of this state shall be vested in a chief magistrate who shall be styled 'The Governor of the State of Alabama.'" And: "Article 6. Judicial Department. Section 1. The judicial power of the state shall be vested in the senate, sitting as a court of impeachment; a supreme court; circuit courts; courts of probate; such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish; and such persons as may be, by law, invested with powers of a judicial nature."

The term "departments," it will be observed, is first used to denote the three parts or divisions into which the powers of government are to be divided; but in the context it is used interchangeably with the term "body of magistracy," to denote the governing bodies to which the powers of government are respectively confided. Here, then, we have a department or body of magistracy consisting of a senate and house of representatives, to which is confided the legislative power; a department or body of magistracy consisting of a governor, secretary of state, state treasurer, state auditor, attorney general, and superintendent of education, and a sheriff for each county, to which is confided the executive power, the supreme executive power being vested in the governor; and a department or body of magistracy consisting of the senate, sitting as a court of impeachment; circuit courts; courts of probate; such inferior courts of law and equity, to consist of not more than five members, as the general assembly may

from time to time establish; and such persons as may be, by law, invested with powers of a judicial nature,—to which is confided the judicial power intended by the constitution to be distributed. When we speak, therefore, of the legislative department, let us be understood to mean, as the constitution intends, the senate and house of representatives; of the executive department, the governor and other officers above named with him; and of the judicial department, the senate, sitting as a court of impeachment, the courts, and so forth, above named, as constituting that department. Keeping these definitions in view, we can the better determine the vital question arising upon the contention now under discussion in this cause, which is, what powers of government does the constitution intend shall be confided to the exercise, respectively, of these several governing bodies? Now, it must be conceded that the powers thus vested in these several departments are intended to be committed to their exclusive exercise; and this, independently of the provision that no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others. Thus, for instance, the legislative power intended to be vested in the general assembly cannot be delegated to any other body, whether such body be of either the other defined departments or not, but must be exercised exclusively by the general assembly itself. So, also, an executive power intended to be vested in the executive department cannot, by legislation, be vested in any other person or body, whether such person or body be of either of the other departments or not. For instance, the pardoning power, or the power to fill vacancies in certain specified offices, being, by the constitution, vested in the governor, cannot, by legislation, be transferred to another, but must be exercised by the governor exclusively. As this is so in reference to acts expressly confided to a particular department, so, also, must it be true with reference to acts which, by construction or implication, are confided to that department. To repeat, all acts expressly or impliedly assigned to a department by the constitution must be performed by that department, and the power to perform them cannot be conferred elsewhere. Cooley, Const. Lim. marg. p. 115.

We return, then, to the question, what powers does the constitution intend shall be thus confided to the exclusive exercise, respectively, of these several governing bodies? The insistence in argument of counsel for appellant, or that to which it leads, is that, except in cases otherwise provided by the constitution itself, every act which is legislative in its nature, and which pertains to, or in any wise affects, the government of the citizen, or which controls and regulates the conduct of citizens in their mutual

intercourse, wheresoever, within the state, such government or control is to be accomplished, and for whatsoever such accomplishment is intended, must be exercised by the state legislative department; that all acts which are of a judicial nature, affecting the government of the citizen, or pertaining to the enjoyment, enforcement, or administration of the laws of the land, must be exercised by the state judicial department, or some member of it; and, likewise, that all such acts which are of an executive nature must be exercised by the state executive department, or one of the designated officers composing it. The argument is that the nature of the act to be performed must in every instance determine the question; and that nature being found to be legislative, executive, or judicial, the performance of the act must be assigned to the appropriate state department. We are quite clear the contention takes a step too far. Now, it is certain that all powers which are, by the constitution itself, expressly or by necessary implication, referred to the exclusive exercise of these departments, must be so exercised. There are many such provisions, but none of them provide for the appointment of officers of the kind here involved, created by legislative enactment. All other powers, not expressly designated in the constitution itself, intended to be confided to the exclusive exercise of the departments thereby created, must be ascertained by construction. It is a well-settled principle that constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption; and we look at the antecedent government, consider its system as a whole and in its several parts, and the experiences and practices of its administration, and we consider and weigh the evils of the old system, which the people intended to cure by the new. Thus aided, we interpret these provisions which require construction, and determine what the intention of the framers of the instrument was, and give effect to that intention; and it not infrequently occurs, in the exposition of written laws, both constitutional and statutory, that the letter of a provision will be justly made to yield to a manifest intention in opposition to it derived by construction alone. When we take our constitution, therefore, and read it in the light of this history, we see plainly that it was not intended to declare that every act pertaining to government, and the regulation of the social and property rights of the citizen, should be exercised exclusively by the legislative, executive, or judicial department of the state government, or some member of it, according as the act possessed a legislative, executive, or judicial character, for we find there are many such acts especially peculiar to the very nature of our system, and necessarily inherent in it, which, time out of mind, have not been exclusively exer-

cised by these departments, and which, for the ease and efficiency of our system, could not be so exercised. For illustration, confine literally all the power of a legislative nature to the general assembly, and we strike down at once all governments of towns and cities by and through municipal corporations, whose very existence and efficiency depend upon the legislative, executive, and judicial powers with which, by their nature, they must be clothed, and which they have ever, under the legislative authority of the state alone, been accustomed to exercise. In the light of long-established usage and experience, we construe the constitution, and determine that its framers never intended to interfere with the right of municipal corporations, under legislative sanction, to exercise these functions of government. It is true that under the present constitution it may be said that the right to create municipal governments, with their usual powers, is recognized or provided for, but with the same provisions distributing the powers of government as those now in force, contained in the constitutions of 1819, 1861, and 1865, and with no mention in those instruments of authority in the general assembly to create municipal corporations, the general assembly, from 1819 to the present time, has exercised that authority, and the corporations so created have exercised the powers so conferred, without objection or suggestion from any source that such exercise was not within constitutional authority, or the assumption that all legislative, executive, and judicial power was, by the constitution, confided to certain other designated bodies of magistracy. When we read upon this subject, we find the books teach us that the spirit of localized government, by local territorial subdivisions, carried on through subordinate governmental agencies, found early root and growth in the notions of English liberty and polity; and we are told that from an immemorial or early period the local territorial subdivisions of England, such as shires, towns, and parishes, enjoyed a degree of freedom, and were permitted to assess upon themselves their local burdens, and to manage their local affairs; and Judge Dillon declares that our ancestors, in the settlement of this country, brought these notions with them, and that they found here a field of unexampled extent for their free development. Accordingly, he says, the system of intrusting the direction of local affairs to the local constituencies had from the earliest colonial periods been carried on by us to a much greater extent than in England; and, he observes, as you pass from one end of this country to the other, alike in the older regions and in the newest organized settlements, you find the affairs of each road district, school district, township, county, town, and city locally self-managed, including the administration of local justice. This policy of creating local police and municipal cor-

porations, he declares, is exhibited in all our legislation, and expressly or impliedly guaranteed in our state constitutions. And Judge Cooley, speaking of the powers of legislation commonly bestowed upon municipal corporations, says that such bestowal is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. Cooley, *Const. Lim. marg.* p. 118. The conventions which framed our several constitutions, therefore, had no need to expressly reserve to municipal corporations the legislative, executive, and judicial power so long wont to be exercised by them, when, in the distribution of the powers of the government of the state, they declared that the legislative, executive, and judicial power should be confided to the respective departments or bodies of magistracy by them created and defined. The reservation arose by implication, out of the existing order of things.

Again, if all functions of government of a legislative, executive, or judicial character properly belong to, and are therefore to be exercised exclusively by, the several departments created by the constitution, what shall become of the multiform powers and duties which, by legislative enactment, without express constitutional authority, have so long been conferred upon, and exercised by, the various officers appointed to perform functions of government in the several counties, and who are not made members of either of those departments? Has it ever been thought that the executive and ministerial, and indeed, in some instances, the judicial or quasi judicial, functions of the tax assessor, tax collector, county treasurer, coroner, county surveyor, and clerks of courts, to which may be added the officers and boards of control of our state institutions for the care of the insane and deaf, dumb, and blind, and our state and county medical boards for the preservation of the public health, properly belong to the several state bodies of magistracy created by the constitution, within the spirit and intent of that instrument, and must therefore be confided to the exclusive exercise of those bodies? None will so declare. Indeed, we have in our system, in opposition to the letter of the constitutional provisions under review, striking illustrations of the blending of legislative, executive, and judicial power in the same persons or bodies, which it has not been, and will not be, supposed our several constitutions intended to inhibit. In Clay's Digest,

and in each compilation of our laws since, we find the creation of a court of county commissioners. This body is an inferior court created by law, and belongs, under express provision of each of our constitutions, to the judicial department of government, yet we find, in its very creation, it was, and has ever since been, endowed with legislative and executive powers. In fact, its chief duties are of those characters. It is given the power to levy and assess taxes for the support of the county government, which is a legislative function. Cooley, *Const. Lim. marg.* pp. 479, 488. It is given power to direct and control the property of the county, to examine and audit the accounts of the receiving and disbursing officers of the county, to make rules and regulations for the support of the poor; and it is given plenary and executive powers over the erection and maintenance of public roads, bridges, and ferries, and the appointment of the necessary officers in that behalf. These are functions which do not inherently pertain to the judiciary, yet none will say, in view of their long-continued and useful exercise by the court of county commissioners, without let or hindrance, that the constitution, in distributing the powers of government, intended to inhibit such exercise. So, also, the sheriff, who is expressly made a member of the executive department, has ever been empowered, by legislation, to perform the judicial function of approving bonds necessary to be taken by him in the administration of the laws. Clerks, registers in chancery, commercial notaries, and commissioners of deeds, under constitutions in terms confining judicial power to the courts, have long exercised, under legislative sanction only, the power of taking acknowledgments of conveyances, which this court has declared to be of a judicial nature. The coroner is so far an executive officer that he may execute process upon, and arrest, the sheriff himself, who is, by the terms of the constitution, a member of the state executive department; and yet it has never been supposed that he may not, with constitutional favor, perform the judicial function of holding inquests. Other illustrations might be given, but these suffice to make clear the principle that the constitution must receive an enlarged and liberal interpretation, and the intention of its framers ascertained upon a broad view of the history and experience, the needs and usages, of the time, and the great general purpose they had in view, of framing a comprehensive and beneficent government. Thus viewed, we irresistibly conclude that it was not the intention of the constitution to declare that all these powers and duties, so indispensable to efficient government, and so long exercised, under legislative sanction only, by these officers and agencies of legislative creation, properly belong to the legislative, executive, or judicial body of magis-

tracy created by the constitution, because alone they may partake of a legislative, executive, or judicial nature.

We come then to the concrete question, does the power to fill vacancies in office by appointment "properly belong" to the executive department of the state government, to be exercised exclusively by that department, within the meaning of the constitution? It may be regarded as a fundamental policy of our system of state governments, in this country, that the selection of persons to perform the offices and functions of government shall be left to the people themselves, to be exercised at the ballot box. Indeed, the right and attribute of the people in respect of the selection of their own officers by methods which they may prescribe in their written constitutions and laws are so firmly fixed in our institutions that the people themselves could not throw them off, to the extent of destroying our republican forms of government, for the people of the states have confided to the central government of the United States the power and duty to guaranty to every state in the Union a government republican in form. Section 4, art. 4, Const. U. S. The inherent nature and essence of the act of selecting officers of government, therefore, in view of this established policy, describe it as one properly belonging to the people, through the ballot, and not to any particular department of government, to be exercised by representatives of the people. The filling of vacancies in office pending the action of the people, by appointment of their representatives, clothed by law with that authority, is, as a rule, an expedient, merely, evoked by the convenience and necessities of government growing out of the nature of our system. In the nature of things, the people cannot be always called upon to act immediately when the selection of a person is necessary to the exercise of a function of government. Hence, it has been customary and essential to provide other means of appointment in cases to which this necessity gives rise. Furthermore, in our experience, wisdom has dictated that particular offices be filled exclusively by appointment of some governmental agency other than the vote of the people themselves; and this, and the agencies for such appointments, and the methods of filling vacancies in offices elective by the people, have been expressly manifested and prescribed in our constitution or laws. It was necessary that they be so prescribed, for otherwise the right of such appointment resided nowhere. It belonged to no department of the government. With us, the governor has no prerogatives. He must find warrant in the written law for his every official act. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial, department; and when we go back to our

constitutions and laws, in this state, from the beginning of the state government to the present, we find it has been the policy to distribute this appointing power among the several departments of the state. We need not specify. The instances will readily occur to the minds of those familiar with the constitutions and laws. It may be true, that the governor has been invested with the greatest share of this power, but no principle or policy has been declared that the power inherently belongs to him. And we may remark that the fact that all our constitutions, in assigning appointive power to the governor, have specifically designated the particular officer to whom it applied, furnishes cogent argument that the people did not regard the power as necessarily or inherently belonging to him.

In what we have said, we have premitted inquiry whether or not the act of appointing an officer is inherently of an executive character; and we have endeavored to show that, whether so or not, it is not such an act as, upon a proper construction of the constitution, properly belongs to the executive department. The weight of authority joins issue upon the proposition that it is inherently of that character. The supreme court of California declares it possesses judicial characteristics. Says that court: "The person to be appointed is required to have certain qualifications. He must be a citizen of the United States, and of the state, and a resident and qualified voter of the city and county, and he must be of good repute for honesty and sobriety, and he is required to produce evidence to this effect. \* \* \* The examination of these questions, passing upon the sufficiency of the evidence, and determining whether the candidates possess the requisite qualifications, are certainly functions partaking essentially of a judicial character." *People v. Provines*, 34 Cal. 520. In *People v. Morgan*, 80 Ill., on page 562, it is said: "The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function, unless made so by the organic law or legislative enactment." In *Mayor, etc., of Baltimore v. State*, 15 Md. 376, it is said: "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken, namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government, it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner, and by



instrumentalities, specially provided in the constitution." In *People v. Freeman*, 80 Cal. 233, 22 Pac. Rep. 173, that court again held that the power of appointment to office is not essentially an executive function, and may be regulated by law. Judge Christiancy, in *People v. Huribut*, 24 Mich. 44, had under consideration whether the legislature could appoint persons to fill offices created by it, and his purpose was to determine whether such appointment could be treated as a legislative act which it was competent for the legislature to perform; and in discussing the question he says: "Besides the power to make general rules for the government of officers and persons, and regulating the rights and classes of persons, or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between those of a judicial character, on the one side, and the executive, on the other, and which are not, and cannot be, marked off from these by any clear line." And further on he says: "As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard, in the abstract. What would come within the executive power, in our form of government, would fall within the legislative, in another, and vice versa. The question here is whether, under our constitution, it is executive or legislative; and as the constitution has not confided the appointment of those or of the like officers to the executive authorities, and has left it to the legislative discretion, whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than a legislative power." In harmony with these decisions, see *State v. Constantine*, 42 Ohio St. 441; *People v. Woodruff*, 82 N. Y. 364. There are decisions to the contrary: *Taylor v. Com.*, 3 J. J. Marsh, 401; *State v. Kenon*, 7 Ohio St. 561; *Achley's Case*, 4 Abb. Pr. 35; *State v. Noble*, 118 Ind. 350, 21 N. E. Rep. 244, and other cases from that state. These Indiana cases give the question full discussion, and they appear to be the only well-considered cases in support of their doctrine. Mr. Freeman, in an exhaustive note in 13 Amer. St. Rep., on page 125, (*People v. Freeman*, [Cal.] 22 Pac. Rep. 173,) reviews all the authorities upon this subject, and states his conclusion from them in the following language: "The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of

persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislative, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary." What he has said meets with our approval.

It is again objected that the act is unconstitutional in that it denies to the city the right of local self-government. This contention is based on the power given the probate judge to appoint the commissioners, and upon the further assumption that the act empowers him to appoint persons who are not members of the municipality,—who do not reside within the city. There is no force in the objection, so far as concerns the designation of the probate judge as the appointing power. We have reached the conclusion that the probate judge may lawfully appoint the commissioners. With that act, his duties end. He takes no part in administering the city government. The case is exactly the same as if the appointing power had been conferred upon the governor, instead of the judge of probate; and we apprehend it would not be contended in that case that the local government of the city was, for that reason, interfered with. The persons appointed commissioners exercise the functions of government conferred upon them by the act, and not the person who appoints them. But the other proposition may deserve more serious consideration. Upon mature reflection, we do not deem it necessary to decide what the effect upon the act would be, in respect of its constitutionality, if the construction of the act thus assumed be the correct one, for we reach the conclusion that it was not the intention of the legislature to authorize the appointment of persons who are not members of the municipal corporation for whose use the means of local government were, in part, being provided. The act is not carefully drawn. It is noticeable for the meagerness of its provisions, as well as the indefiniteness of some of those which are inserted. With this character, it is before us for construction. It is an act which relates alone to the local government of the city of Birmingham. Its controlling purpose, as all must know, was to provide an efficient enforcement of the police powers of the city. To this end the legislature knew and intended that the commissioners to be appointed should be persons familiar with the governmental affairs of the city, and the needs and wants of its police system, and who should be identified with the city's interest. The commissioners are required to exercise full direction and control of the officers and members of the police force. They are required to hold meetings at all times when the public interest of the city may require. They are required to exercise constant supervision of the conduct of

the police officers, and to prefer accusations against them for wrongs and delinquencies committed by them, which would justify their suspension or removal. These duties, which manifest themselves as the moving causes of the enactment, unmistakably imply necessity for the appointment of persons resident in the city, and interested in its welfare, and their constant presence therein, without which their duties could not be well performed. Suppose the probate judge had appointed residents of the county of Mobile, for instance, to manage the police affairs of the city of Birmingham. Would any one suppose, or could it be legitimately contended, that the legislature intended by this act to confer any such authority? The answer would at once be, no; that the intention was that citizens of the municipality to be affected by the legislation be selected to perform these duties. Suppose, again, the legislature should create an office for the exercise of some state governmental function, and provide that the person to fill it should be appointed by the governor, without providing that he shall be a resident of the state. Could it be contended that the governor was empowered to appoint a resident of another state? And would the act be declared unconstitutional upon the assumption that, for that reason, it infringed local self-government? We apprehend it would be at once construed that the governor must appoint a resident of this state. Legislative enactments are always presumed to be of constitutional authority. It must clearly appear that they offend some provision of the constitution before the courts are authorized to set them aside. If a construction may be fairly indulged which will wrest them from the attack of giving offense to a constitutional limitation, that presumption shall be indulged. We are therefore of the opinion that the failure of the act to provide, in express terms, that the commissioners shall be residents of the city, is due to legislative oversight, which is supplied by the general intention of the legislature that they shall be such, manifest upon the face of the act itself.

It is again objected that the act is unconstitutional because, by its provisions, the terms of the present police officers are cut off, when that object is not expressed in the title. This contention may fairly raise the question whether, upon a proper construction of the act, the tenures of the present incumbents were cut off; but, whether so or not, the parties have joined in a request that we construe the act, and announce our opinion upon that question. It is a principle self-evident, as well as declared in all the authorities upon the subject, that legislative enactments, and each and every provision therein, go into immediate operation, unless by force of some general law, or provision contained in the act itself, the operation is postponed to some future period or event; and the special provision which would create

such postponement must be stated in express words to that effect, or in terms so clear and certain as to admit of no other rational interpretation. The principle of this strictness results from the obvious necessity that all men should know with certainty when our laws take effect. *Lane v. Kolb*, 92 Ala. 636, 9 South. Rep. 873, and cases cited. Applying this rule to the act in question, and it cannot admit of doubt that the act went into effect on the day of the first regular meeting of the mayor and aldermen of Birmingham, in January, 1893,—the time fixed in the act for the appointment of the commissioners. There are no provisions which show, with the degree of certainty the rule requires, an intention to further postpone its operation. This is true, not only with respect to the act as a whole, but to each and every provision thereof. The result is that the power of the commissioners to appoint the police officers immediately arose, and all authority of the mayor and aldermen over their appointment and retention in office ceased. The persons in office being in by virtue of the appointive power of the mayor and aldermen, the abrogation or withdrawal of that power, and the substitution of a new appointive power in another body, necessarily, ipso facto, annulled the tenures of their appointees, there being nothing in the act retaining them in office. *Lane v. Kolb*, supra; *State v. Board of Public Lands*, etc., 7 Neb. 42. The rule is analogous to that which obtains in reference to agency. When the authority of an agent, who is empowered to appoint subagents, is revoked by the principal, the authority of all existing subagents, so appointed, is likewise revoked. *Mechem*, Ag. § 270. These principles are so undeniable that it is unnecessary to do more than state them. The conclusion here reached does not determine that the act is unconstitutional upon the ground alleged,—that the purpose to accomplish such a result is not clearly expressed in its title. The title is, "An act to establish a board of commissioners of police for the city of Birmingham, Alabama." This implies the insertion in the act of all powers reasonably necessary to an efficient administration of the police department of the city by commissioners, which obviously includes power in the commissioners to appoint police officers. Such power, as we have already shown, has the effect, in itself, of cutting off the terms of incumbents. It follows, logically, from these unassailable propositions, that the title of the act was sufficiently comprehensive in the particular in question. *Board v. Barber*, 53 Ala. 589.

The next question arising is, what was the mayor's duty when McDonald presented himself for qualification? This record shows that it does not admit of serious question that the mayor had most ample notice and knowledge, official and personal, of McDonald's appointment. It was competent and necessary for the commissioners to organize

for systematic work, by electing a presiding and a clerical officer. They did so by electing a chairman and secretary. The act says they must appoint a "clerk." This they did by appointing a person charged with the duties of a clerk. That they designated him by the synonymous title of "secretary" is wholly immaterial. The duties of the officer were the same, whether you call him clerk or secretary, and the nature of those duties is clearly implied in either designation. The law regards the substance, not the forms, of things. The mayor of the city, as a principle of law, was bound to take official notice of the appointment of the commissioners, and of the necessary officers of their board, by them elected. He knew, therefore, that Mudd was chairman, and Boggan secretary or clerk. These officers duly certified to him McDonald's appointment. Besides, the proof is most abundant that the mayor personally knew all the facts, and made no pretense that he did not, but based his refusal to act, either upon the assumed unconstitutionality of the act, or the mistaken conception that the tenures of those in office were not cut off. The trial of the title to the office was not within his jurisdiction. That must have been left to other tribunals. It was enough for him that McDonald presented a prima facie showing of his appointment, emanating from the appointing power. This was done, and the oath of office should have been administered.

There is clearly no merit in the suggestion that five days from McDonald's appointment had expired when he presented himself, for he had been reappointed within the five days. It is said there was no reappointment, but a ratification, merely, of the original appointment, which, upon the principles of the law of ratification, had relation to the time of the appointment ratified. This is a mistaken view. There is no such principle as the ratification by the appointing power of the prior appointment of a public officer. If a person has been informally appointed, and has done official acts under it, or if he has acted without qualification, his acts are validated by law as those of an officer de facto, and no extent of ratification by the appointing power could add anything to their validity. So, also, if a person duly appointed fails to qualify within the time prescribed by law, and thereby forfeits his right, a vacancy arises, which the appointing power may fill. His failure to qualify cannot be "ratified." The appointing power can only fill the vacancy. Though the action of the commissioners, in the present instance, was put in the form of a ratification, its necessary legal effect was that of a reappointment. It was a clear act of the commissioners, manifesting that thenceforth McDonald should be chief of police, and this was duly certified to the corporate authorities. Nothing more was necessary to constitute an appointment.

The act required to be performed by the

mayor was purely ministerial. There was no other adequate remedy to secure the right than mandamus. The city court properly granted the writ, and its judgment is affirmed.

(101 Ala. 242)

FRIEDER et al. v. B. GOODMAN  
MANUF'G CO.

(Supreme Court of Alabama. July 27, 1893.)

APPEAL—TRANSCRIPT—EXCEPTION—HOW PRE-  
SERVED.

1. A clerk of the trial court, in making a transcript to be used on appeal as the record of the orders of the court and the proceedings of the trial, should not incorporate therein any matter or any comments or notes of his own, and such matter or comments will not be considered on appeal.

2. A clerk of a trial court has no authority to take from the files of any suit an original paper, and send it to the supreme court, except on the order or rule of the judge or chancellor, and when, in their opinion, it is necessary.

3. The record of an exception cannot be preserved by making a minute, signed by the attorney, immediately following the ruling of the court, in which it is stated that the party against whom the ruling was made reserved an exception.

4. In the absence of a bill of exceptions, the rulings of the trial court on motions not entered on the minutes, as shown by the record, cannot be considered on appeal.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

Action of attachment by the B. Goodman Manufacturing Company against the Southern Suspender Manufacturing Company, to which William Frieder was afterwards made a party defendant, as the sole owner of the stock of the defendant company. From a judgment for plaintiff, defendant appeals. Affirmed.

The original complaint, affidavit for attachment, bond, and writ of attachment were against the Southern Suspender Manufacturing Company. Motion was afterwards made by the plaintiff to amend its complaint, affidavit, bond, and writ of attachment in said cause by inserting the name of William Frieder, who was the sole owner and proprietor of the Southern Suspender Manufacturing Company; and in said motion the plaintiff averred that the Southern Suspender Manufacturing Company was formerly a body corporate, but that all of its stock and property had passed into the ownership of William Frieder, and that the said Frieder continued to make contracts and to do business in the name of the Southern Suspender Manufacturing Company. The plaintiff also moved the court to allow the sheriff to amend his return to the writ of attachment so as to show that the notice of the levy of said attachment was served upon William Frieder. These motions were granted. The transcript contains no bill of exceptions, nor are the complaint, affidavit, bond, and writ of attachment, as amended, set out in the transcript. The assignments of error are that the court

erred in granting the motions of the plaintiff to allow the amendments of the complaint, affidavit, bond, writ of attachment, and sheriff's return, and that the court erred in rendering judgment against William Frieder.

Wm. Cochran Fitts, for appellants. J. M. Foster, for appellee.

COLEMAN, J. This cause was submitted to be considered, first, upon the motion of the appellee for a writ of certiorari to the clerk of the circuit court, commanding him to certify to this court a perfect record; and, if this motion is overruled, then the cause is to be considered upon its merits. Affidavits are submitted in support of the motion, and also a counter affidavit by the appellants. We here observe that a clerk, in making out a transcript to be used on appeal as the record of the orders of a court and the proceedings of a trial, should never incorporate any matter or any comments or notes of his own in the transcript. He performs his entire duty when he transcribes the orders and judgments of the court as they are entered. There is no bill of exceptions in this case. We find an entry made by the clerk to the effect "that the amendments made in pursuance to the rulings of the court are shown forth in this record by being underscored with red ink." There is nothing in the record of the orders of the court which authorized the clerk to insert any such note as a part of the transcript. It is further stated by the clerk that "the original affidavit, bond, and writ of attachment, as changed by amendment, are here attached by the clerk for the inspection of the supreme court." The clerk has no authority to take from the files of any suit an original paper, and send it to this court. It is only upon the order or rule of the judge or chancellor, and when, in their opinion, it is necessary, that such original paper is transmitted to this court. Proper orders are then made for its preservation. See rule 23, (20,) page 803 of the Code.

Just after an entry of record, granting a motion made by plaintiff to amend the attachment proceedings, the following entry appears: "At the time of the granting of this motion the defendant reserved an exception to the granting of the same." To this the attorney's name taking the exception is signed. It is the duty of the court to note the exceptions to his ruling, and this is the evidence that an exception has been reserved. The attorney's name of record entry has no office to perform in securing or preserving an exception to the ruling of the court allowing an amendment.

The appellants certainly had the right to have a copy of the original attachment papers made a part of the record; and upon this motion, with proper showing, this court would have ordered the clerk to send

up a complete and perfect record; but their attitude is that of resisting the motion of the appellee for a certiorari. Under the view we take of the case, the objections to the record designated by the appellee do not injuriously affect its interest. The appearance in court of William Frieder by his authorized attorney is, for all purposes, as effective as service of summons. The voluntary contributions to the transcript record by the clerk, whether emphasized by red ink, or in the matter of directing the attention of this court to "original papers," will not be considered.

Questions upon orders of the court allowing amendments, upon motion of the plaintiff, have been argued in briefs of counsel, but these questions are not presented in such a way as to authorize this court to consider them. They should have been presented by bill of exceptions. There is nothing of record to show what was moved for, and what allowed. Motions entered upon the motion docket are no part of the record, unless entered on the minutes, or shown by bill of exceptions, neither of which was done, as appears from the record before us.

The judgment must be affirmed.

(39 Ala. 145)

#### WILEY v. STATE.

(Supreme Court of Alabama. June 20, 1893.)

#### HOMICIDE—SELF-DEFENSE—EVIDENCE.

On a prosecution for murder, where defendant relies on self-defense, and has introduced evidence that deceased, who was his wife, was of a dangerous character, and that on approaching her to take her home, at a time when she had been drinking, she cursed him, and threw her hand toward her bosom, and stepped towards him, when he shot her, it was error to exclude evidence offered by him that deceased owned a pistol, and was in the habit of carrying it in the bosom of her dress, and that he knew these facts.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Oliver Wiley was convicted of murder, and appeals. Reversed.

W. L. Parks, for appellant. Wm. L. Martin, Atty. Gen., for the State.

MCOLLELLAN, J. The appellant was indicted, tried, convicted, and sentenced for life, for the murder of his wife, Dora Wiley. The killing by him was not controverted, but he relied on self-defense. The evidence for the state tended to show that, a short time before the killing, the defendant "had made several threats that he was going to kill Dora, his wife, if she did not go home and cook his supper, and said that he was going to ask her to go, and if she did not, when he asked her, he would kill her. Said threats were made at the time when, and after, the defendant had gone to several to borrow a pistol. That defendant did borrow a pis-

tol, and went to where deceased was, \* \* \* and asked her to go home and cook his supper. Deceased refused to go, and defendant shot her with a pistol, which resulted in her instant death. That no weapon was found on the person of the deceased, and when she was shot she had a pocket handkerchief and bunch of keys, which she was holding in her hand, and that her hands were down, and in front of her person, and that she was standing still, when she was shot." The defendant testified in his own behalf that he borrowed the pistol, but for the purpose of shooting a dog. He denied having threatened deceased, and said that he had been threatened by her several times during the day, but admitted that he had been with her much of the time during the day, and that about a half hour before the killing he went off, about a quarter of a mile, and borrowed the pistol, with which he shot deceased, and approached her to get her to go home with him, as she had been drinking, and that when he approached her she cursed him, and threw her hand towards her bosom, and stepped towards him, and he shot her. "Defendant also proved that deceased was a woman of dangerous character." The defendant then "proposed to prove by his own testimony, and would have shown, that deceased owned a pistol, and was in the habit of going armed with her pistol; that she carried it in the bosom of her dress, and defendant knew these facts." The court refused to admit this evidence, and an exception to this ruling presents the only point reserved for our consideration.

The action of the court was clearly erroneous. The facts proposed to be adduced directly tended to support the defendant's theory of self-defense. The deceased was a woman of dangerous character. The jury might have found, if they believed the defendant, that when he shot her she was advancing upon him in an angry and threatening manner, throwing her hand to her bosom. In connection with this evidence, which was admitted, the testimony which was excluded would have gone to show the imminency of defendant's peril of life or grievous bodily harm, considering the situation from this point of view. Her ownership of a pistol, the fact that she habitually carried it in the bosom of her dress, the knowledge on the part of the defendant of these facts, put this evidence on the footing of an offer to prove, where a man has been killed, that the deceased threw his hand to his "pistol pocket" as he advanced upon the slayer; and it has never been doubted that such evidence is competent. It is, indeed, exceedingly common, in murder trials. We have nothing to do with the weight of the evidence. That was a question purely for the jury, and it should have been submitted to them, along with all the other evidence in the case.

Reversed and remanded.

(39 Ala. 279)

STATE, to Use of CHEROKEE COUNTY,  
v. CALHOUN et al.

(Supreme Court of Alabama. June 22, 1893.)

RECOGNIZANCE OF WITNESS FOR STATE—SURETIES.

Under Crim. Code, § 4294, providing that a justice of the peace may compel a witness for the prosecution in a criminal case to enter into bond for his appearance, with sufficient sureties, but such sureties must not be required when the witness does not reside in the state, the justice has not power to compel a bond with sureties where the witness resides in Georgia, and such a bond, while binding on the principal, would be invalid as to the sureties.

Appeal from circuit court, Cherokee county; John B. Tally, Judge.

This was an action brought in the name of the state of Alabama, for the use of Cherokee county, against Patrick Calhoun and the sureties on his appearance bond. There was judgment for the defendants, and plaintiff appeals. Reversed and remanded.

On the hearing of all the evidence, the court refused to give the general affirmative charge for the plaintiff, to which ruling the plaintiff duly excepted; but the court, at the request of the defendants, gave the general affirmative charge in their behalf, and to the giving of this charge the plaintiff duly excepted.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. This is an action by summons and complaint upon the following undertaking: "We, Patrick Calhoun," etc., "witnesses against J. D. Williamson and Jack King, charged with a public offense, do each agree to appear at the next circuit court of Cherokee county to give evidence against J. Williamson and Jack King, and, failing so to do, to pay the state of Alabama four hundred dollars. Dated this 30th of September, 1887." This obligation was signed by the defendants, and approved by the justice of the peace, who required the obligors to make bond for their appearance. The bond is framed in exact accordance with section 4293 of the Criminal Code.

The authority of the justice of the peace to require witnesses to enter into an obligation of the purport of the one sued upon is derived from, and finds justification alone in, section 4294 of the Code, which is as follows: "Whenever the magistrate has good reason to believe that a witness for the prosecution will not appear to testify, he may order such witness to enter into an undertaking to appear and testify in a larger sum, and with sufficient sureties; but such surety must not be required from any witness who does not reside in this state, and within fifty miles of the place where the examination takes place." The case was tried upon an agreed state of facts. These are that the witnesses did not appear according to the bond, and that they were at the time, and have ever since remained, citizens of the state of Georgia. It thus appears

that the justice of the peace, in requiring the witnesses to enter into an undertaking, under the section we have quoted, exceeded his authority, and imposed upon them an obligation not authorized by law. If the justice of the peace had required of the witnesses to enter into bond for their appearance, as he might have done, under section 4292 of the Code, in the sum of \$100 without surety, as he was therein authorized and required to do, the undertaking would have been valid, and, upon breach of condition, would have supported an action against them for that amount. The words "in a larger sum," in section 4294, Code, supra, evidently refers to the sum of \$100, fixed by section 4292 of the Code; but when a larger sum is fixed, and surety is also required, the section itself limits the power of the justice to coerce suretyship to cases where the witnesses are residents of the state, and live and are residing within 50 miles of the place where the examination takes place. Upon the agreed facts, the sureties were entitled to the general affirmative charge. Obligations of this character are joint and several. Crim. Code, § 4427; *Kilgrow v. State*, 76 Ala. 101. The justice of the peace was authorized, under section 4294 of the Code, to demand a bond of the witness "in a larger sum." The obligation was binding upon the principal, and as to him the state was entitled to recover.

Reversed and remanded.

(100 Ala. 610)

**PAIGE et ux. v. BROADFOOT.**

(Supreme Court of Alabama. June 22, 1893.)  
VENDOR'S LIEN—PLEADING—VERIFICATION—MARRIED WOMEN.

1. A bill to enforce a vendor's lien alleging that the purchase-money notes were made payable to complainant need not allege that they still belong to her, this being presumed.

2. A bill to enforce a vendor's lien describing the land as 12 acres situated in the southwest corner of a certain quarter section, being 1,581¼ chains east and west by 758¾ chains north and south, is bad for indefiniteness in the description.

3. Chancery rule 13, requiring complainant to point out what shall be answered, is complied with by a footnote to the bill requiring answer to the allegations in paragraphs numbered from 1 to 5, inclusive.

4. Where the bill does not explicitly waive oath the answer must be sworn to.

5. A bill filed by a woman need not show whether she is married or single.

Appeal from city court of Decatur; William H. Simpson, Judge.

The bill in this case was filed by Catherine E. Broadfoot against John Paige and his wife, and sought to enforce a vendor's lien on certain property. The appeal is prosecuted from a decree of the chancellor overruling certain demurrers interposed by the defendants. Reversed and remanded.

The description of the property upon which the lien is sought to be fastened is sufficiently stated in the opinion. After alleging the sale of said property to John Paige by

the complainant, and the execution by said Paige of his two promissory notes for the deferred payments to the complainant, the bill further alleged that the complainant did convey the described premises to the said defendant "by a good and sufficient deed, in which her husband, P. M. Broadfoot, joined," and said deed was duly acknowledged both by her husband and herself. The defendants interposed a demurrer, and assigned the following grounds: (1) Because the bill fails to aver that the notes described in the said bill were at the time of the filing of the bill the property of the complainant. (2) That the bill fails to aver that complainant was able or undertook to make a valid deed of the property to the defendants. (3) Because the description of the land as found in the bill is not sufficiently described so as to inform defendants what land the complainant undertook to subject to the payment of the money alleged to be due complainant. (4) Because in the prayer of said bill the complainant did not give to the respondents notice, as required by rule 13 of rules of chancery practice, what they are required to answer, or whether they should answer under oath or not. (5) Because the bill shows on its face that the complainant is a woman, but it does not aver whether she is a married woman or a single woman, and it is not averred whether the property alleged to have been sold by her to the respondents, or the notes referred to in her bill, belonged to her separate estate. These demurrers were filed on March 2, 1893, and on April 3d the complainant amended the prayer of her bill so as to require the defendants to answer "whether the allegations of said bill are true; if not, wherein are they untrue," but not under oath. The footnote to the said bill was also amended by adding thereto, "but not under oath." On the submission of the cause upon the demurrers they were overruled.

S. T. Wert, for appellant. E. W. Godbey, for appellees.

**HARALSON, J.** 1. The allegations of the bill as to the ownership of the note is that they were made payable to the complainant, and, nothing appearing to the contrary, the presumption is they continued to be hers. Besides, her ownership of the notes she sues on cannot be put in issue without a plea denying her ownership of them, verified by affidavit. *Hooper v. Strahan*, 71 Ala. 79; *Bonner v. Young*, 68 Ala. 35; Code, § 2770.

2. The second ground of demurrer is based on the lack of allegations which plainly appear on the face of the bill.

3. The land is described in the bill as "12 acres situated in the S. W. corner of the S. E. quarter of S. 5, T. 6, R. 4 west, being 1,581¼ chains east and west, and 758¾ chains north and south, in Morgan county, Alabama." A parallelogram of such dimensions

contains considerably over 100,000 acres. The 12 acres on which the lien is sought to be declared and enforced is lost in bewildering uncertainty. We take it there is a mistake in the transcript, but we have nothing else by which to go.

4. The footnote to the original bill required the defendant to answer "all the allegations in the foregoing bill in the paragraphs numbered from 1 to 5, inclusive." This was a compliance with the thirteenth rule of chancery practice, and, oath not having been waived, the answer was required to be sworn to. *McKenzie v. Baldrige*, 49 Ala. 564; Code, § 3424. The objection taken to the bill that it did not conform to said rule of chancery practice was without merit. After the demurrer on this ground, and before it was passed on, an amendment, by leave of court, was filed, waiving oath to the answer, and the demurrer as originally filed was not refiled, nor was any new demurrer filed to the bill as amended. If the bill had been defective in the alleged matter of form without the amendment, (which is not the case,) and its defect had been cured by amendment, the former demurrer, not having been refiled after amendment, was *functus officio*, and could not be considered. *Voltz v. Voltz*, 75 Ala. 569.

5. A bill filed by a woman need not show whether she is married or single. This bill shows complainant was a married woman, however, and that the notes sued on were her separate estate; and alleges that on the 14th day of January, 1888, she conveyed the land mentioned in the bill to defendant John Palge by a good and sufficient deed, in which her husband, P. M. Broadfoot, joined, and which was duly acknowledged both by herself and her husband.

All the grounds of demurrer, except the third—the one having reference to the description of the land—were without merit, and, as for them, the demurrer was properly overruled; but it should have been sustained on account of the said indefiniteness of description of the property on which the lien is sought to be enforced.

Reversed and remanded.

(39 Ala. 194)

#### WILSON v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

#### CRIMINAL LAW—WARRANTS.

1. A warrant of arrest, directed "to any lawful officer of the state," as provided by Crim. Code, § 4259, does not require the addition of the words "of Alabama."

2. Even if the absence of such words made the warrant defective, this would not be any ground for quashing the complaint.

3. It is no objection to a warrant that it is made returnable to the "Pike county criminal court of said county" instead of to "the criminal court of Pike county."

Appeal from criminal court, Pike county; William H. Parks, Judge.

John Wilson was convicted of assault, and appeals. Affirmed.

The appellant was convicted for an assault with a weapon. On the hearing of the cause the defendant moved to quash the warrant on the ground that it was not in the proper form, and that it was not returnable "to the criminal court of Pike county." The court overruled the motion, and the defendant duly excepted. Upon the introduction of all the evidence, which tended to prove the defendant guilty as charged in the complaint, the court refused to give, at the request of the defendant, the general affirmative charge in his behalf, to the refusal to give which the defendant duly excepted.

D. A. Baker, for appellant. William L. Martin, Atty. Gen., for the State.

COLEMAN, J. The plaintiff was tried and convicted of an assault with a knife. The prosecution began by complaint made before a justice of the peace, returnable to the "Pike county criminal court of said county to answer said charge." The warrant for the arrest was directed by the justice of the peace "to any lawful officer of the state." It is insisted that the warrant should have been directed to any lawful officer of the state of Alabama. The warrant follows the form given in the Code. See section 4259, Crim. Code; also section 4397. This objection, if the warrant had been defective in the matter complained of, would not be a ground for quashing the complaint, which is sufficient. It could be argued with equal force that an indictment in regular form should be quashed because the *capias* under which the indicted party was arrested was defective.

The next objection has even less merit, to wit, that the warrant was not made returnable to "the criminal court of Pike county." It was made returnable to the "Pike county criminal court of said county." We are unable to discover the merit, if any exists, in this objection.

The next exception is to the refusal of the court to charge the jury "that, if the jury believe the evidence, they should acquit the defendant." There was legal evidence before the jury which, if believed, clearly showed the defendant's guilt. The charge was properly refused. Affirmed.

(36 Ala. 12)

#### ELMORE v. STATE.

(Supreme Court of Alabama. July 27, 1893.)

#### CRIMINAL LAW—COMPETENCY OF EVIDENCE—ESCAPE OF DEFENDANT.

On a criminal trial, though evidence that after arrest, and while awaiting trial, defendant broke out of jail and escaped, is not of itself sufficient to warrant a conviction, it is competent to be submitted to the jury.

Appeal from circuit court, Marengo county; James T. Jones, Judge.

Henry Elmore was convicted of grand larceny, and appeals. Affirmed.

On the trial of the cause, as is shown by the bill of exceptions, the state introduced as a witness one T. J. Beck, who testified that while he was deputy sheriff of Marengo county, in the years 1891 and 1892, the defendant was under an indictment for the offense for which he was at that time being tried; that he was taken from the jail under bond, but was afterwards recommitted to jail; and that after said commitment he broke out of jail, escaped, and fled, and was afterwards recaptured. The defendant moved the court to exclude from the jury the statements of the witness "that he broke out of jail, escaped, and fled," on the ground that it was irrelevant and illegal testimony. The court overruled this motion, and the defendant excepted. This is the only question presented on this appeal.

Gesner Williams, for appellant. William L. Martin, Atty. Gen., for the State.

**HARALSON, J.** The breaking out of jail and escape of one under indictment for crime may arise from conscious guilt and the fear of trial therefor, and the dread of the punishment to follow; or it may be that the defendant, conscious of innocence, may dread trial lest he be convicted; or, again, with such consciousness of innocence, being confined in prison, and unable to give bail, he would seek freedom in flight from the discomforts of such imprisonment. Different individuals might act differently under the same circumstances, owing to the difference in their minds, dispositions, and characters. Whether or not the motive for such an escape has its origin in the consciousness of guilt and the dread of being brought to justice, or whether it can be explained and attributed to some other innocent motive, are questions for the determination of the jury, under all the evidence in the cause. Of itself, such evidence would not warrant conviction; but it is relevant, and the weight to which it is entitled is for the jury, under proper instructions from the court. *Bowles v. State*, 58 Ala. 335; *Sylvester v. State*, 72 Ala. 201; *Ross v. State*, 74 Ala. 532; *Carden v. State*, 84 Ala. 417, 4 South. Rep. 823. There was no error in the admission of the evidence excepted to. Affirmed.

(101 Ala. 426)

#### COSTELLO v. MONTAGUE.

(Supreme Court of Alabama. July 27, 1893.)  
PARTNERSHIP—ACCOUNTING IN EQUITY—REFERENCE.

To a bill for an accounting between partners after dissolution, defendant alleged that the partnership matters were so conducted that it was impossible to state an account approximately correct. The only evidence on this question was the testimony of the parties, which, in some respects, was irreconcilable. *Held*, that ordering a reference was not error, as other evidence might be introduced on the

reference clearly showing a balance in favor of one of the parties, though it be impossible to make an absolutely accurate statement of accounts.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Bill by William H. Montague against C. H. Costello for an accounting between partners. From a decree ordering a reference, defendant appeals. Affirmed.

The bill averred that William H. Montague and C. H. Costello, in February, 1888, entered into a partnership for the purpose of carrying on a retail boot and shoe business in the city of Mobile; that the business continued until November 3d, when it was broken up by fire; that the firm debts had all been paid, and the solvent accounts collected; and these facts were admitted by the defendant. It was shown that each partner was to get back what he put into the firm, and the balance was to be equally divided; that there was no partnership account kept, but each of the partners drew out money as he needed it, and that neither objected to this; that the insurance companies had paid them about \$15,000 for their loss, and that they realized about \$10,000 from the damaged goods which were returned to them by the insurance companies. The bank account of the firm, and many of the checks on such account subsequent to the fire, were introduced. It was also admitted that there had never been any settlement of the partnership affairs. The defendant set up that there had been an agreement between him and complainant that the partnership affairs should be considered as settled, and he also contended that there should be no decree of reference because the proofs showed that no credit account could be stated. On the final submission the chancellor ordered a reference to the register to state the account, and it is from this decree that the present appeal is taken.

Gregory L. & H. T. Smith, for appellant. Faith & Ervin, for appellee.

**COLEMAN, J.** The main purpose of the bill was to compel a settlement of the partnership of William H. Montague & Co., a firm composed of William H. Montague and C. H. Costello. It alleges the dissolution of the firm, that there are no debts unpaid, and that there has never been a settlement of the partnership affairs. At the hearing the chancellor ordered a reference to the register to state an account of the partnership transaction between the partners. This appeal was prosecuted from the decree ordering a reference. There was no demurrer to the bill, or objection for want of equity. The respondent, Costello, answered the bill, and in his answer embodied a plea to the effect that, by mutual agreement, the parties, between themselves, had settled and closed the partnership matters. We agree with the chancellor that the evidence does



to sustain the plea, and it is not insisted on in argument. The real defense to the prayer is that the partnership matters were so loosely and negligently conducted that it is impossible to state an account which will be approximately correct. On this no witnesses were examined, except the parties themselves. In some respects their testimony is irreconcilable. But this condition of the evidence cannot interfere with a proper determination of the disputed facts. There are certain presumptions of law, and rules as to burden of proof, which declare legal conclusions in favor of the one or the other side when the evidence is evenly balanced for and against a disputed fact. Cases have arisen where all the parties kept their accounts so loosely and confused that the courts refused to undertake to adjust their matters, and to state an account between them, but it would require an extreme case to justify this conclusion in advance of an attempt to state the account. On a reference the register may receive other evidence than that before the court when the reference is ordered, and a decree of confirmation will not be refused, if the evidence should clearly show a balance in favor of one partner, because it was impossible to make a precisely accurate statement of accounts. 17 Amer. & Eng. Enc. Law, p. 1274. The bill may not be as definite in its averments as good pleading requires, but it was not objected to on this account, and, under the pleading and facts thus far disclosed in the record, there was no error in the decree ordering a reference. *Glover v. Hembree*, 82 Ala. 324, 8 South. Rep. 251; *Haynes v. Short*, 88 Ala. 562, 7 South. Rep. 157.

Affirmed.

(32 Fla. 251)

#### WILLIAMS v. STATE.

(Supreme Court of Florida. July 10, 1893.)

##### APPEAL—RESERVING EXCEPTIONS.

1. Where charges given to the jury are assigned as error, they cannot be considered, unless excepted to in the court below, in some one of the modes provided by law.

2. Assignments of error, based upon alleged erroneous rulings during the progress of the trial, cannot be considered, upon writ of error, unless such rulings were excepted to.

(Syllabus by the Court.)

Error to circuit court, Marion county; Jesse J. Finley, Judge.

Joe Williams was convicted of murder, and brings error. Affirmed.

J. D. McConnell, for plaintiff in error.  
William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was indicted, tried, and convicted at the spring term, 1893, of the circuit court for Marion county, of murder in the first degree, with recommendation to mercy, and sentenced to the state prison for life. Upon the overruling of his motion for new trial below, he brings the cause here by writ of error.

The sole ground urged here by the plaintiff in error, for a reversal of the judgment and sentence, is that the court below erred in charging the jury "that testimony tending to show an alibi was not to be considered, unless it established the fact by a preponderance of evidence." We have examined the charges given by the court to the jury carefully, but fail to find in the record here any such charge, nor anything in any of them that even intimates any such doctrine. But, even if there was, we cannot find that any of the charges given by the court were excepted to in any way whatsoever, which, under the well-established rule here, would preclude us from considering them.

No exceptions were taken during the trial, upon which errors have been assigned. Consequently, we cannot consider any assignment of error based upon alleged erroneous rulings during the progress of the trial, to which no exception was taken or noted. We have carefully considered the entire record, and find no error therein that would justify any interference with the judgment and sentence appealed from. The evidence, though conflicting, as to the whereabouts of the defendant at the precise time of the homicide, is ample, and clearly sufficient to sustain the verdict found. This being true, it is beyond our province to disturb it. The judgment and sentence of the court below are therefore affirmed.

(32 Fla. 255)

#### TERRELL v. WEYMOUTH.

(Supreme Court of Florida. July 10, 1893.)

##### PARTITION—ADMINISTRATOR CANNOT MAINTAIN—RIGHTS OF INFANTS—ESTOPPEL.

1. An administrator has no authority to institute or maintain proceedings in equity for the partition of land in which his intestate was interested.

2. Where minors are interested in land involved in a partition proceeding, such proceeding, and all orders made therein, are void, as to such minors, unless they have been made parties thereto by service upon them personally.

3. Equitable estoppel by conduct, so far as it relates to the trial of title to land, is that doctrine by which a party is prevented from setting up his legal title because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.

4. Estoppel depends upon the facts and circumstances of each case.

5. The land in controversy, in which the plaintiff and his brother and sister were originally equally interested, was sold for partition under proceedings that were void, as to all of them, by reason of their not being made parties thereto, but at such partition sale the brother and sister of the plaintiff, through their guardian, purchased the entire property; and the plaintiff afterwards, on coming of age, received from his guardian, to whom it was paid, his full proportion of the proceeds of such sale. After such sale the plaintiff's brother died intestate, leaving the plaintiff and his sister his sole heirs at law. A short while before the plaintiff became of age, his sister, claiming to own a half interest in said land by virtue of her purchase at such partition sale, and an ad-

ditional one-fourth interest therein by descent from her deceased brother, sold and conveyed the three-fourths interest therein, thus claimed by her, to one J. G. S.; and the plaintiff, on arriving at his majority, sold and conveyed the remaining one-fourth interest in the land to the said J. G. S., asserting to J. G. S., at the time of the delivery of the deed, that such one-fourth interest, so conveyed, was the interest that he derived by descent from his deceased brother, and that it was all the interest that he did or could own therein. Nearly seven years after such conveyance by the plaintiff to J. G. S., the plaintiff paid into the registry of the court, by whose order the land had been sold for partition, the amount of money, with interest, received by him as his proportion of the proceeds of such partition sale, and brought ejectment against the defendant, who derived title from J. G. S., to recover a one-twelfth undivided interest in the land to which he would have been entitled, in addition to the one-fourth interest expressly conveyed by him to J. G. S., in the event he could successfully avoid such partition sale to his sister and deceased brother. *Held*, that his declarations to J. G. S. at the time of his conveyance to him of the one-fourth interest, coupled with his admission of knowledge of the conveyance by his sister of the other three-fourths interest to the same vendee, and his unexplained acquiescence therein for nearly seven years after arriving at full age, amounted, under the circumstances, to an acquiescence in, and ratification by him of, such partition sale, and that he was estopped from assailing it as against his grantee, J. G. S., and his assigns.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; John D. Broome, Judge.

Ejectment by Franklin L. Terrell against Fred. A. Weymouth. Defendant had judgment, and plaintiff appeals. Affirmed.

J. M. Cheney and Arthur F. Odlin, for appellant. O. F. Akers and Geo. R. Newell, for appellee.

TAYLOR, J. The appellant, on the 29th of February, 1888, sued the appellee, in ejectment, in the circuit court of Orange county, for the recovery of the possession of an undivided one-twelfth interest and estate in and to the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 36, township 22 S., range 29 E., containing 40 acres. The parties, by agreement, waived a jury, and submitted the cause to the judge of the court below for adjudication upon both the law and facts. The trial resulted, in a judgment in the defendant's favor, and the plaintiff appeals here.

From an agreed statement of facts, it appears that Lucinda Terrell, the mother of the plaintiff, died in August, 1860, owning, in her own separate right, the whole of the N. W.  $\frac{1}{4}$  of said section 36, of which the land in controversy is a part. That she left four heirs at law, viz. her husband, George W. Terrell, Mary Hughey, and Barnard Hughey, two children by a former marriage, and Franklin Terrell, (the plaintiff,) her child by her last husband. That the husband, George W. Terrell, conveyed his undivided one-fourth interest in said land to one Henry Robinson. That Robinson afterwards died, and Catherine F. Reaves became his ad-

ministratrix. That the said Catherine F. Reaves, as administratrix of Robinson, on October 16, 1873, filed a petition in the circuit court of Orange county for the partition of said land against William J. Brack, as guardian ad litem for the minors, Mary Hughey, Barnard Hughey, and Franklin L. Terrell. That a decree for the sale of said land for partition was rendered in said suit, and three commissioners were appointed to make the sale thereof, and that said commissioners sold the same for partition on September 4, 1874; James P. Hughey, as guardian for the two minor heirs, Mary Hughey and Barnard Hughey, becoming the purchaser of 123 acres, that included the lands sued for herein, and taking a deed to himself, for their benefit, as guardian. That the plaintiff, Franklin Terrell, arrived at the age of 21 years on the 23d day of June, 1881, and then had a final settlement with his guardian, in which he received from his guardian the amount of his full pro rata share of the money arising from the sale of said land under said partition proceedings, but did not know at the time that the money came from the sale under said partition proceedings. That a short time before bringing this suit he paid the amount so received into the registry of the court below, with interest from the date of said partition sale, as a tender or refunding. That the plaintiff would be 28 years of age on June 23, 1888. That in 1877 Barnard Hughey, one of the wards for whom James P. Hughey, as guardian, purchased said land, died a minor, unmarried, and without having conveyed his interest in said land, and leaving as his sole heirs at law his sister of the full blood, Mary E. McCall, (nee Mary E. Hughey,) and the plaintiff, Franklin L. Terrell, who was his half-brother. That on the 23d day of June, 1881, upon coming of age, the plaintiff conveyed, by warranty deed, to one John G. Sinclair, from whom the defendant derives his title, an undivided one-fourth interest in and to the 40 acres of land out of which the undivided one-twelfth interest is sought to be recovered herein, for the consideration of \$200, and that Mary E. McCall, (nee Hughey,) the plaintiff's half-sister, and her husband, conveyed to the said John G. Sinclair, by deed, the other three-fourths interest in said 40 acres. That the defendant, and those under whom he claims, have been in the quiet and adverse possession of said land, under claim of title, since the partition sale to James P. Hughey, as guardian, on September 4, 1874, and that the defendant is a purchaser for value; the plaintiff admitting that there is a regular chain of title from the said James P. Hughey, guardian, down to and in the defendant. By the agreement both parties were to have the privilege of introducing other evidence outside of the above facts agreed upon.

The plaintiff introduced in evidence the

original record of the proceedings in the partition suit instituted by Catherine F. Reaves, as administratrix of the estate of Henry Robinson, deceased, against W. J. Brack, as guardian ad litem for the three minor heirs of Lucinda Terrell, deceased, including the petition, various orders appointing commissioners in partition, the report of the commissioners, of their inability to divide the land in severalty without detriment to the interests of the parties entitled; the decree of the court, ordering the sale for partition; the report of the sale, and decree confirming the same. The plaintiff's object in introducing this record was to show that said partition sale was void because the minor heirs of Lucinda Terrell, including himself, were not properly made parties thereto, and because the petitioner, Catherine F. Reaves, in her capacity as administratrix of the estate of Henry Robinson, deceased, could not, alone, maintain proceedings for the partition of lands in which her intestate was interested.

If this partition sale was valid, then, by the purchase thereof, the two minors, Mary E. Hughey and Barnard Hughey, the half-sister and half-brother of the plaintiff, became vested with the title to the entire tract of land left by their mother, each of them acquiring a one-half interest therein; and upon the death of Barnard, while still a minor, and without issue, his thus acquired one-half interest descended to his sister, Mary E., and to his half-brother, the plaintiff, Franklin L. Terrell, in the proportion of two-thirds of such half interest to his sister of the full blood, Mary E., and the other one-third thereof to his half brother, the plaintiff, which would have vested in the plaintiff, by descent from his half-brother, a one-sixth interest in the entire tract. But if such sale was a nullity, and void, as to all of said three minors, then each of them owned a one-fourth interest, only, by descent from their mother, Lucinda Terrell; and upon the death of Barnard Hughey, as aforesaid, his one-fourth interest descended in the proportion of two-thirds thereof to his sister of the full blood, Mary E., and the other one-third thereof to his half brother, the plaintiff, entitling Mary E. to her own one-fourth plus two-twelfths inherited from Barnard, equaling eight-twelfths of the whole, and entitling the plaintiff to his own one-fourth plus one-twelfth, inherited from his half-brother, Barnard, equaling four-twelfths of the whole. The plaintiff does not dispute the sale and conveyance by him to John G. Sinclair of a one-fourth interest in the 40 acres in controversy, but seeks by this suit to annul the partition sale, and thereby to make it appear that he only sold and conveyed to John G. Sinclair his one-fourth interest in the 40 acres in dispute, that he inherited directly from his mother, and that he still owns and retains the one-twelfth interest

therein that he is now contending for, that he inherited from his half-brother, Barnard Hughey.

That the partition proceedings and sale were void, we have no doubt, (1) because Catherine F. Reaves, in her capacity as administratrix of Henry Robinson, deceased, had no authority to institute or maintain such proceedings, (*Whitlock v. Willard*, 18 Fla. 156; *Greeley v. Hendricks*, 23 Fla. 366, 2 South. Rep. 620;) and (2) because the three minors interested were not made parties thereto by having process served upon them personally, (*Thompson v. McDermott*, 19 Fla. 852, 29 Fla. 299, 10 South. Rep. 584.) But the appellee contends that the appellant is estopped by his conduct, actions, and declarations since said partition sale, and since arriving at full age, from now assailing or questioning its validity, and that his conduct, acts, and declarations since his arrival at the age of his majority amount to such an acquiescence in, and ratification of, such partition sale, as to preclude him from now gainsaying or attacking its validity. Equitable estoppel, or estoppel by conduct, so far as it relates to the trial of title to land, is defined to be "that doctrine by which a party is prevented from setting up his legal title because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience." *Sedg. & W. Tr. Title Land*, § 843. Whether the plaintiff is estopped, depends upon the facts and circumstances of the case. It appears from the admissions and proofs that upon his arrival at the age of his majority the plaintiff received, in money, from his guardian, in a settlement then had with him, his full pro rata share, as an heir at law of his mother, of the proceeds of the partition sale of the entire tract of land. There is no allegation, or pretence, even, that the land, when sold for partition, did not bring its full and fair value at that time, or that the amount received by the plaintiff from his guardian as his share of the proceeds of such sale was not a full and fair equivalent, at that time, for his interest in the land sold. His half-sister and half-brother, through their guardian, became the purchasers at such partition sale, and thereby became clothed with some semblance of title, by which they believed they became vested with a valid title to a one-half interest and estate, each, in and to said land. The parties have admitted that the plaintiff, at the time that he accepted from his guardian his share of the proceeds of such sale, was ignorant of the fact that the money arose out of, or came from, such sale, but it is not shown how long thereafter the plaintiff continued in ignorance of such fact. John G. Sinclair, from or through whom the defendant derives his title, swears that the plaintiff, at the time he executed to him the warranty deed to

the one-fourth interest in said 40 acres of land, (a part of which is the land in controversy,) represented to him, and told him, that all the interest he could own in said land was a quarter interest therein that he inherited from his deceased half-brother, Barnard Hughey. From the proofs it appears that all the parties acted under the belief that upon Barnard Hughey's death his half-brother, the plaintiff, inherited an equal share of his half interest acquired at the partition sale, as did Barnard's sister of the full blood, Mary E., which would entitle the plaintiff, as he represented to Sinclair, to a one-fourth interest in the whole. This understanding was acted upon, too, by Mary E., since we find her conveying to Sinclair a three-fourths interest in the same 40 acres only a short while before the plaintiff conveyed the remaining one-fourth interest therein. That the plaintiff did represent to Sinclair that his only interest in the land was that which he derived by descent from his deceased half-brother, and that such interest was a one-fourth interest, is not denied. He admits that Sinclair purchased the other three-fourths interest from his half-sister, Mary E. He remains silent, and permits his half-sister to assert title in herself to three-fourths of the property, and, in silence, permits Sinclair to purchase such three-fourths interest from her, and asserts at the same time that he owns only one-half of his deceased brother's half interest, or a fourth of said land, and upon such assertion sells and conveys such interest to Sinclair; waits in silence for nearly seven years, until the land has ceased to be longer known by the government numbers of its original survey, as when sold by him, and has acquired a description as part of a city, before undertaking to assail such partition proceedings. Though the plaintiff may not, in fact, have known, at the time he received from his guardian his share of the proceeds of the partition sale, the source from whence the money came, yet when his half-brother died, and he became the claimant, as his heir at law, of one-fourth interest in the whole tract, as being the equivalent of one-half of the interest that his deceased brother owned therein, he must have known that his brother's interest was a half interest, and how his half-brother acquired such half interest therein,—that it was by means of such partition sale. If he was ignorant thereof, then, under the circumstances, in view of his undenied assertions to Sinclair, such ignorance on his part was inexcusable. Sinclair swears that, when he accepted the deed to the one-fourth interest from the plaintiff, he would never have accepted it, had he not believed, and had not the plaintiff asserted and believed, that such fourth interest was all the interest that the plaintiff had; and this is not denied or contradicted in any way. Holding himself out to Sinclair as being the owner, by descent from

his deceased half-brother, of one-half of such deceased brother's one-half, and actually receiving pay for, and conveying, such interest, as being inherited from such brother, was a recognition and acknowledgment upon his part that his said half-brother did own a half interest in the whole of such tract of land, and such half interest being acquired by such half-brother at such partition sale, amounted, under the circumstances, to such an acquiescence in, and ratification by him of, such sale, that he is now estopped from assailing its validity. The judgment appealed from is therefore affirmed.

(32 Fla. 264)

**CAMPBELL v. CARRUTH et al.**

(Supreme Court of Florida. July 5, 1893.)

**DEED—SUFFICIENCY OF DESCRIPTION—POSSESSION BY GRANTEE—EVIDENCE OF DELIVERY—CONSIDERATION—ESTOPPEL—EXCEPTION OF INSTRUCTIONS.**

1. If the description of the land conveyed in a deed is such that a surveyor, by applying the rules of surveying, can locate the same, such description is sufficient, and the deed will be sustained if it is possible, from the whole description, to ascertain and identify the land intended to be conveyed.

2. Where the other terms of the description contained in a conveyance of land are not sufficiently certain and demonstrative, the number of acres given is an essential part of the description, and may be resorted to in aid of the defective part of such description.

3. Where a deed described the land as being "known on the map of the United States survey as the northwest quarter of the northwest, section 8, township 29 south, of range 16 east, containing 40 acres," held to be a sufficiently certain description of "the northwest quarter of the northwest quarter of" said section 8, in said township and range; and that the omitted words, "quarter of," next preceding the word "section," in the description, would be supplied by construction as a palpable omission.

4. The possession of a deed by the grantee therein is prima facie evidence of its delivery, and the onus probandi in such cases is upon the party gainsaying such delivery.

5. The administrator of a deceased grantor in a deed is estopped, like such grantor himself would be, from denying that there was a consideration for such deed, for the purpose of destroying the effective operation of the instrument as a deed of conveyance of the premises.

6. Where the entire charges given by the court to the jury are excepted to as a whole by one general exception, without specifying any particular charge or part of a charge to which the exception applies, if any of the charges thus excepted to are correct such general exception cannot be considered upon appeal.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. Hanson, Judge.

Ejectment by Archibald Campbell, administrator of the estate of Katurah Campbell, deceased, against William Carruth and Della Carruth. Defendants had judgment, and plaintiff appeals. Affirmed.

Barron Phillips, for appellant. Macfarlane & Pettingill, for appellees.

TAYLOR, J. The appellant sued the appellees in the court below in ejectment for

the recovery of the possession of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 8, in township 29 S., in range 16 E., containing 40 acres, and for mesne profits. The verdict and judgment were in favor of the defendants, and the plaintiff appeals.

Besides the plea of the general issue, the defendants interposed a plea upon equitable grounds, by which it was alleged that the plaintiff's intestate, prior to her death, had executed a deed of conveyance of the land in controversy to one of the defendants and to her sister, who was the former wife of the other defendant, and from whom he inherited an interest in the premises; and that, by a clerical omission of the draughtsman, the land in controversy, intended thereby to be conveyed, was imperfectly described as being "a certain tract or parcel of land lying and being in the county of Hillsborough, state of Florida, known on the map of the United States survey as the northwest quarter of the northwest, section eight, township 29 south, of range 16 east, containing 40 acres, more or less," the omission in the description being of the words "quarter of," next preceding the word "section." The object of the plea was to set up as a defense upon equitable grounds that the defendants occupied a position where they were entitled in equity to a reformation of this deed from the plaintiff's intestate, so as to make it convey the land in controversy, that was by the grantor in said deed intended to be conveyed, and that, being possessed of this equitable right, the plaintiff was not entitled to the possession of the premises sought by this suit. The plaintiff moved the court to strike out this plea upon various grounds looking to the merits of the plea that are unnecessary to be discussed, which motion was denied, and this ruling is the first error assigned. There was no necessity, as will be seen in the discussion of the next two assignments of error, for any reformation of the defendants' deed, mentioned in this plea, in order to make it upon its face as it stood completely available to the defendants as a conveyance of the land sued for. Being possessed of a deed from the plaintiff's intestate that was of itself sufficiently certain in its description of the land thereby intended to be conveyed, and of sufficient certainty of description to show upon its face that it was the land in controversy in the suit without any reformation of its description, this plea, setting up the defendants' right to a reformation thereof in the matter of its description, was entirely nugatory, and served no other purpose than to cumber the record, and should have been stricken out on the motion for that purpose; but as the real issues in the cause seem to have been tried without reference to anything presented by this plea, and the deed, set up for reformation therein, admitted by the court in evidence upon its merits as a sufficiently cer-

tain conveyance of the land in controversy, we cannot see that the trial of the real issues in the cause was thereby embarrassed or confused or affected in any way, and we must therefore hold that the denial of the motion to strike it out was error without injury.

The second and third assignments of error are to the effect that the court erred in construing the instrument mentioned in the foregoing equitable plea to be a deed, and in allowing the same to be admitted and read in evidence on behalf of defendants, over the plaintiff's objection thereto. The instrument questioned has been omitted from the record, and is not before us, neither does the record show any definite grounds for the objection made at the trial below to its admission; but the objection urged here seems to be based entirely upon a supposed uncertainty and insufficiency in the description of the land therein conveyed, in order to make the deed pertinent to the controversy pending between the parties. Upon this ground, we do not think that the court erred in admitting the instrument in evidence as a conveyance from the plaintiff's intestate to the defendants of the premises sued for. The declaration described the land sued for as being the "N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 8, in T. 29 south, of range 16 east, containing 40 acres, in Hillsborough county." This deed, so far as we can determine from the record before us, described the land conveyed thereby as being "known on the map of the United States survey as the northwest quarter of the northwest, section eight, township 29 south, of range 16 east, containing 40 acres, more or less, in Hillsborough county." The idea of the objection seems to be that the omission of the two words "quarter of," next preceding the word "section," vitiates and renders the deed inoperative, for want of certainty in the description of the land conveyed. The rule with reference to the sufficiency of description in a deed is that if a surveyor, by applying the rules of surveying, can locate the land, the description is sufficient; and the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed, (2 Devl. Deeds, § 1012;) and that, where there is a palpable omission in the description of a deed, it may be supplied by construction; and that, where the other terms of the description contained in a conveyance of land are not sufficiently certain and demonstrative, the number of acres is an essential part of the description, and may be resorted to in aid of the defective part of the description, (Hoffman v. Riehl, 27 Mo. 554; Kirkland v. Way, 3 Rich. Law, 4; Bowen v. Prout, 52 Ill. 354; Burnett v. McCluey, 78 Mo. 676; Enochs v. Miller, 60 Miss. 19; Andrews v. Murphy, 12 Ga. 431; Dorr v. School Dist., 40 Ark. 237; Morton v. Root, 2 Dill. 312; Smiley v. Fries, 104 Ill. 416; Pennington v. Flock, 93 Ind. 378.) Ap-

plying these rules to the deed in question, we think that its description is entirely certain and sufficient as a conveyance of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 8, township 29 S., range 16 E. The description given starts out with the assertion that it is according to the United States survey. According to the rules of the United States for the survey of her public lands, it is well known by all persons, whether expert or nonexpert in the science of surveying, that they are first divided by rectangular parallel lines, running north and south, and east and west, into townships, 6 miles square, containing 36 sections of a mile square each, designated by the numbers from 1 to 36, inclusive, each containing 640 acres, which are numbered, commencing in the northeast corner of the township for the first section, from east to west, and from west to east, alternately, with progressive numbers, until the thirty-sixth section is completed; and that these sections are again subdivided by parallel lines, running north and south, and east and west, first into quarters of 160 acres each, designated by the points of the compass as the N. E.  $\frac{1}{4}$ , the N. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$ , of the given section; and that these quarter sections are again subdivided into quarter quarters, or sixteenths, of the whole section, containing 40 acres each, that are designated as N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$ , and S. W.  $\frac{1}{4}$ , respectively, of the quarter of the section to which they belong. Rev. St. U. S. § 2395 et seq. The sections are designated by their numbers, 1 to 36, inclusive, and are never referred to as being the "northeast," or the "northwest" section. It is only when the subdivisions of any given section are referred to that they are designated by the terms borrowed from the points of the compass. So that, when the questioned deed described the land here as being the "northwest quarter of the northwest, section 8," etc., "containing 40 acres," it required no forced construction or unwarranted supplying of absent words to know at a glance that the "northwest quarter of the northwest quarter of section 8, containing 40 acres," was intended. The designation of the section by its own proper designative number—8—in the description given shows at once that the word "northwest," next preceding it, was not, and could not be, intended as a locative designator of the section. But when the number of acres given and the rest of the description are considered together, it becomes clear that the 40 acres intended to be described is that sixteenth part of section 8 known, according to the government surveys, as the "northwest quarter of the northwest quarter." Indeed, so familiar have people generally become with these descriptive terms applied to government lands that, in describing them, it has become quite common to abbreviate, and to omit the use of the words "quarter" and "of," and to leave them

to be inferred and understood; thus: "N. W. of the N. W., section 8, T. 29 S., R. 16 E., containing 40 acres," etc.; and, with such a description, no one can be at a loss to know what land is intended. The description given in the questioned deed, we are satisfied, was sufficiently certain, and the court committed no error in admitting it in evidence upon the ground of any supposed insufficiency or uncertainty of description, and, as before stated, there was no necessity for infusing into the issue any idea of equitable reformation of the deed, in the particular of its description, by plea upon equitable grounds. Some objection, though very indefinitely stated in the record, was made during the progress of the trial to the introduction of this deed, upon the ground that, before its introduction, the defendants had not proved a delivery of it to them by the grantor therein. There was no merit in this objection. The deed, when offered in evidence, came from the custody of the defendants, who were the grantees therein. The well-settled rule is that the possession of a deed by the grantee therein is *prima facie* evidence of its delivery, and the onus probandi in such cases is upon the party gainsaying such delivery. *Tied. Real Prop.* § 813, and citations; *Boody v. Davis*, 20 N. H. 140; 1 *Devl. Deeds*, § 294; *Trust Co. v. Cole*, 4 Fla. 359; *Billings v. Stark*, 15 Fla. 297; *Branson v. Caruthers*, 49 Cal. 374; *Roberts v. Swearingen*, 8 Neb. 363, 1 N. W. Rep. 305; *Tunison v. Chamblin*, 88 Ill. 378.

At the trial, in the cross-examination of defendants' witnesses, the plaintiff attempted by questions to show that no consideration was paid by the grantees to his intestate grantor for this deed to them of the land in question, which attempt was overruled by the court, upon the ground that the plaintiff, as administrator and heir at law of the grantor in such deed, was estopped from denying the recitals in such deed. This ruling is assigned as the fourth error. The deed, as before shown, is not before us, but we gather from other parts of the evidence that it recited a consideration paid of \$100. If so, then the court committed no error in holding that the grantor's administrator, like the grantor himself, was estopped from denying that there was a consideration for such deed, for the purpose of destroying the effective operation of the instrument as a deed of conveyance of the premises. 1 *Rice*, Ev. 476; 2 *Devl. Deeds*, § 834, and authorities cited; *Trafton v. Hawes*, 102 Mass. 533.

The fifth assignment of error is that the court erred in refusing, upon the plaintiff's application, to strike out the evidence of the defendant Della Carruth upon the point as to how she came into possession of the deed from her mother, Katurah Campbell, who, at the time of such testimony, was deceased, the witness having testified that she got the deed from her mother before her death. Had this evidence been brought out by the

defendant herself on her own behalf, there would have been merit in the plaintiff's effort to strike it out, under our statute prohibiting interested witnesses from testifying as to transactions and communications had with persons deceased whereby the interests of the estate of such deceased person will be affected; but the testimony of the defendant here sought to be excluded was voluntarily and deliberately drawn out from the defendant by the plaintiff himself, upon the cross-examination of the defendant as a witness. In the defendant's direct examination, nothing was stated by her that was subject to this objection. The objectionable testimony was given in direct response to cross-questions propounded to her by the plaintiff himself. Having voluntarily elicited objectionable testimony, that tends to benefit his adversary, and to cripple himself, the plaintiff is not in a position to complain, but must abide the result of his own action.

The sixth assignment of error was the giving of several instructions to the jury. There were eight distinct instructions given by the court to the jury, and the plaintiff excepted to them as a whole, by one general exception, without specifying any particular charge or part of a charge to which his exception applied. Finding some of the instructions, thus sweepingly excepted to, to be correct and proper statements of the law applicable to the case, we cannot consider this assignment under the well-established rule of this and other courts. *Dupuis v. Thompson*, 16 Fla. 69; *John D. C. v. State*, Id. 554; *Burroughs v. State*, 17 Fla. 643; *Carter v. State*, 20 Fla. 754.

The seventh assignment of error was the refusal of the court to give four several instructions requested by the plaintiff. We find no exception in the record to the refusal of the court to give these instructions, or any of them. This assignment cannot therefore be considered.

The eighth assignment of error was the giving of one charge by the court. As this particular charge was included in the one general exception to all the charges given, what has been said of the sixth assignment above applies also to this assignment.

Upon a review of the whole case, we are impressed with the fact that the verdict and judgment appealed from are in accordance with the true demands of justice between the parties, and, finding no material error in the record, the judgment of the court below is affirmed.

(32 Fla. 242)

# ANDERSON v. STATE.

(Supreme Court of Florida. July 29, 1893.)

## INTOXICATING LIQUORS—SELLING WITHOUT LICENSE—EVIDENCE.

1. On a trial of the charge of carrying on the business of selling liquors without a license, where the proof shows only that the defendant, at the request of another, took the latter's

money, and with it went off and procured for the latter some whisky, without showing where or from whom the whisky was obtained, and without showing that the defendant was the owner of, or in any way interested in, such whisky before its delivery to the party for whom it was obtained, or that he was interested in any way in the money given him with which it was procured, such evidence is wholly insufficient to establish the charge.

2. The statute prohibits the selling of liquors without a license, but there is no law making the purchase of liquor, either for one's self or for another, a criminal offense.

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

Harry Anderson was convicted of selling intoxicating liquors unlawfully, and brings error. Reversed.

A. J. Henry, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, upon an information filed by the state attorney, was tried and convicted at the spring term, 1893, of the circuit court for Columbia county, for engaging in the business of liquor selling without a license. Upon the refusal of his motion for a new trial he comes here on writ of error. The reliance here for a reversal is that the evidence was not sufficient to sustain conviction. The only evidence for the prosecution was the testimony of one James Smith, as follows: "I know the defendant. During the month of February, 1893, I was working in the wood yard of J. A. Bethea, in Lake City, Columbia county, Florida. I asked the defendant if he knew where I could get some whisky. He said, 'Yes,' that he could get me some. I gave him the money, 25 cents, and he went off somewhere and got the whisky,—one-half pint,—and gave it to me. I do not know where he got the whisky. This occurred more than once. I do not know whether twice or a dozen or twenty times. I asked him where I could get whisky, because I knew him better than any of the other boys. I came here from Atlanta, Ga., in December, 1892. It is true that I told Mr. Eaton, in Lake City, to-day, that I did not know anything about the defendant selling whisky. I do not know whether he sold it or not. I only know that I gave him the money, and told him I wanted some whisky, and when he came back he brought it to me." The defendant admitted on the trial that he had no license to sell liquors. The burden was upon the state to prove every essential element of the offense charged beyond a reasonable doubt. The leading feature of the charge was the sale of liquor by the defendant, and it was necessary that this fact should have been proved by competent evidence beyond a reasonable doubt. The evidence establishes the fact that the defendant, as the friend or agent of the witness, took the latter's money, and at his request went off and procured some whisky for him. Where or who he got the liquor from is not

shown. Neither is it shown by any word of proof that the defendant was the owner of or interested in the liquor furnished before its delivery by him to the witness, or that he was interested in any way in the money given him by the witness with which the liquor was procured. The proof here shows nothing more than that the defendant acted as the agent, for purchase, of the buyer; and we know of no law that prohibits the purchase of liquor, either for one's self or for another. *Campbell v. State*, 79 Ala. 271; *Morgan v. State*, 81 Ala. 72, 1 South. Rep. 472; *Bryant v. State*, 82 Ala. 51, 2 South. Rep. 670. The evidence being wholly insufficient for conviction, the judgment and sentence of the court below are reversed.

(33 Fla. 52)

**McCLENNY v. STATE.**

(Supreme Court of Florida. July 29, 1893.)

CRIMINAL LAW—APPEAL—REVIEW.

Where there are no errors in the record, and the evidence is sufficient to sustain a conviction found in a criminal case, the judgment will be affirmed.

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

Susey McClenney was convicted of a misdemeanor, and brings error. Affirmed.

A. J. Henry, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

**TAYLOR, J.** The plaintiff in error, upon an information filed by the state attorney, was tried and convicted, under section 2393, Rev. St., of the misdemeanor of concealing the death of her bastard child, and, upon the refusal of her motions for arrest of judgment and for new trial, she brings writ of error here.

The assignments of error relied on here are the refusal of the court to grant the motions in arrest of judgment and for a new trial. The motion in arrest of judgment was founded upon a general allegation that the information did not charge any offense under the statute in such cases. The supposed deficiency in the information is not pointed out either in the motion in arrest below or in the briefs filed here. We are unable to discover any insufficiency in the information upon which the defendant was tried, but, on the contrary, are of the opinion that it contains fully every essential allegation to charge the crime under the statute. The chief ground of the supposed error in the refusal to grant the motion for new trial urged here is that the evidence was not sufficient to support the conviction. Without setting it out in detail, after carefully considering same, we are of the opinion that the evidence was ample to sustain the verdict found. We see nothing in the charge of the court to the jury that was erroneous, or that tended towards any im-

proper influence upon the jury. Finding no errors in the record, the judgment of the court below is affirmed.

(33 Fla. 212)

**SOUTH FLORIDA R. CO. v. WEESE.**

(Supreme Court of Florida. June 19, 1893.)

DEFECTIVE SERVICE OF PROCESS—HOW CURED—INJURIES TO EMPLOYE—ACTION FOR—VENUE—ASSUMPTION OF RISK.

1. Defective service of summons ad respondentum is cured by the personal appearance and pleading to the merits of the cause by the defendant.

2. Actions for injuries to the person, caused by a railroad company, are transitory in their nature, and may be brought in any county through which such road runs.

3. It is not necessary, in order to bring a case within the rule that an employer is not responsible to those in his employ for injuries caused by the negligence or misconduct of a fellow servant, that the servant who causes and the one who suffers the injury should be at the time working together in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose.

4. It is error for the court to submit a case to the jury on the theory that the relation of vice principal existed between the defendant company and the servant whose negligence produced a personal injury to the plaintiff, when there is no testimony tending to show that such relation existed, or that the negligent servant was at the time performing any duties devolving upon the principal. Whether or not the rule in relation to vice principals exists in this state is not decided.

5. The rule is well settled that among the positive duties resting upon the master to the servant is the obligation to exercise such reasonable care as prudence and the exigencies of the situation require in providing the servant with safe machinery and suitable instrumentalities, and a reasonably safe place in which to work. The negligence of the master in this respect is not one of the perils or risks assumed by the employee in his contract of employment, and he has the right to insist that the master shall strictly comply with his obligations in this respect. But, while this rule is clearly established, it is also well settled that it is a complete answer to the claim for damages resulting from a failure to furnish suitable instrumentalities and a safe place to work that the injured servant has full knowledge of the situation, and voluntarily engaged in the employment or continued therein with such knowledge without objection or protest, and without any assurance on the part of the employer to provide better.

(Syllabus by the Court.)

Error to circuit court, Orange county; John D. Broome, Judge.

Action for personal injuries by Edward D. Weese against the South Florida Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

The other facts fully appear in the following statement by MABRY, J.:

Weese, the defendant in error, sued the plaintiff in error for personal injuries received by him while in the employment of the company. The essential averments in the declaration as to the cause of action are as follows: That on the 5th day of October, A. D. 1896, the defendant company, plaintiff



in error here, was a corporation owning and running a railroad from Sanford, in Orange county, to Tampa, in Hillsborough county, and that plaintiff, Weese, was employed by said corporation as a laborer on said road to wipe and clean the engines that were brought into the town of Tampa at night from service on said road, his term of service being 10 hours each night when there were engines requiring the same, at the compensation of \$40 per month. That on the night of the 4th day of October, A. D. 1886, an engine of said corporation was placed on the main track of its road in the town of Tampa, by the order of Thomas Landrum, the then acting yard master in the said town of Tampa; and plaintiff, Weese, being an employe of said corporation, under duty to clean said engine, and being instructed by William Coleman, an engineer, and an agent of said corporation in this department, to wipe off and clean the same, proceeded to do so as instructed. That no pit was prepared in which to stand in the process of cleaning said engine, and no signal lamp was furnished said plaintiff to hang upon said engine as notice and warning to others employed on said road while said engine was being cleaned. That, in order to clean said engine, plaintiff was compelled to get under it, and in order to get under it, it was necessary to go between the wheels, and when under it there was no way of escape except between the wheels; and that while under said engine no damage could ensue unless from gross neglect on the part of said corporation or its agents.

It is also alleged that said plaintiff went under said engine to clean it about 9 o'clock on the night of the 4th day of October, A. D. 1886, with a lightwood torch, which gave abundant light and notice of his locality and employment, and that he remained at work cleaning said engine until about 4 o'clock on the morning of the 5th day of said month, when William Coleman, the engineer aforesaid, who had placed said engine upon said track, and instructed plaintiff to clean it, carelessly and negligently ran a train of cars belonging to said corporation back against said engine, and by great force and violence drove it out of its place; and plaintiff, being forced to escape from under said engine or be crushed by it, was caught while trying to escape therefrom by the wheel of said engine, and the muscles of the calf of his left leg were entirely crushed off from the bone; and that said injury was inflicted without any negligence on the part of plaintiff.

The declaration then alleges that said plaintiff suffered great pain and sickness from said injury, and has been wholly disabled bodily and mentally from performing labor and attending to business since the same was received, and also that by reason of said injury said plaintiff has been permanently disabled physically and mentally. Other sources of damages resulting from said injury are stated, but it does not become nec-

essary to set them out here. The total damage alleged is \$20,000.

To this declaration the defendant company demurred on the grounds that it sets up no sufficient cause of action; that the relation of fellow servant existed between plaintiff and those in charge of defendant's engine which it is alleged caused the injury; that, as shown by the declaration, it was plaintiff's own negligence that caused said injury, and not that of defendant or its agents; and for other causes apparent upon the face of the declaration. This demurrer was overruled, and the defendant company filed four pleas. The first one was the general issue, not guilty. The second plea alleged, in substance, that plaintiff's injury was caused by his own negligence, and not by the fault of defendant, or of its servants or agents. The third, that, if the plaintiff was injured as he has alleged in his declaration, said injury was caused by the negligence and lack of care on part of plaintiff contributing thereto. And, fourth, that if plaintiff was injured by the negligence or lack of care of any of the agents or employes of defendant, as he has alleged in his declaration, said negligence was that of the fellow servant or fellow servants of the plaintiff.

Some two months and a half after issue had been joined upon defendant's pleas, its counsel asked leave to file a plea to the jurisdiction of the court to the following effect, viz.: That plaintiff's cause of action, if any he has, occurred in the county of Hillsborough, in the sixth judicial circuit of Florida, and that no sufficient service has been had upon defendant to give this court jurisdiction of this cause; said service, according to the return of the officer who undertook to make the same, having been made on one Rudolf, who was not the president, secretary, general manager, general solicitor, superintendent, or resident business agent where the cause of action occurred. This application was refused, and the cause tried upon the issues presented, resulting in a verdict for plaintiff in the sum of \$5,000. A motion in arrest of this judgment was made by defendant below on the grounds that no such service was had in said cause upon defendant as to give the court jurisdiction thereof, and the court had no jurisdiction to try and determine said cause, and the same should have been tried, if at all, in the county of Hillsborough, sixth judicial circuit of the state of Florida. This motion was overruled. Upon a motion for a new trial, made by defendant, plaintiff remitted the sum of \$2,000, and thereupon the court overruled this motion for a new trial, and awarded judgment in favor of plaintiff for \$3,000 and costs of suit, and from this judgment the defendant has brought the case here by writ of error.

On the point of the company's liability, including the plaintiff's relation to the company and its employes operating at the rail-

road yard in Tampa, and the cause of the injury to the plaintiff, the effect of the testimony is as follows: Weese, the plaintiff, was employed by the defendant company some time about the 28th of July, 1886, to wipe and clean engines that went into Tampa, and to fire them up before leaving time on out-going trips. During his employment this service was performed at night, between 6 o'clock in the evening and 6 o'clock in the morning, as the engines went into Tampa in the early part of the night, and left early next morning. When Weese was first employed the railroad was narrow gauge, and he worked on the engines in wiping and cleaning them while standing over pits on side tracks, where they were placed for this purpose. A pit is a dug-out place between the tracks deep enough for a man to remain in and escape injury should the engine pass over it. About the middle of September, 1886, the rails of the company's road on the main line were widened to a standard gauge, and from the change up to the time of the injury, which was on the morning of the 5th of October, 1886, only one side track of the company's road at Tampa had been widened to the standard gauge, and no pit had been constructed at that point under either the main line or the side track of the changed gauge. From the time the gauge was widened, engines, after coming into the yard, were constantly placed on the main line and the widened side track, and the plaintiff there performed his work of cleaning and wiping them. In order to perform this service it was necessary for him to go under the engines, and the only way this could be done was by passing between the wheels of the engine; and this space was narrow, not exceeding three feet near the rails, and got much less where the wheels approached each other nearest. The space under the engine was about six feet long, the width of the gauge, and high enough for a man to remain on his knees with his body erect. In the yard at Tampa much shifting or making up of trains was done at night. At least two trains—one passenger and the other freight—were made up each night, preparatory to leaving next morning. The plaintiff knew these facts, as it was his duty not only to wipe the engines during the night, but to put fire in them at least two hours next morning before leaving time. He continued in his employment of wiping engines after the gauge was changed, and made no objection to his work on account of the absence of pits, or that the engines were placed on the main line and side track for him to work on them. On the night of October 4, 1886, two engines were in the railroad yard at Tampa for plaintiff to clean,—one a passenger engine and the other called the freight engine. Plaintiff cleaned the passenger engine, and was at work on the freight engine, some time about 4 o'clock in the morn-

ing, when he received the injuries for which he sues. This freight engine had been placed on the main line a short distance south of the passenger depot by William Coleman, yard engineer, with box cars in front and behind it. There is a conflict in the evidence as to whether or not the engine was fronting north or south. The plaintiff says it was fronting south, and in this he is corroborated by other testimony; but the defendant's testimony is to the effect that the engine was fronting north, the direction it was to go on its outward trip. The main track terminated with an abutment not far south of where this engine was placed, and the space between the engine and the abutment contained box cars. On the south end the engine was coupled on to a freight box by the draw bar, and on the north end it was either coupled to cars, or they were standing close to it. The plaintiff was not certain whether or not the engine was coupled on to a car north, but, if not, cars were standing near it; and the effect of other testimony in the record tends to show that the engine was coupled to the cars north. About 8 o'clock in the morning of the 5th of October, 1886, Coleman, the yard engineer, was engaged in making up the passenger train preparatory for leaving next morning. Weese, it seems, had put fire in the engine used by Coleman, and knew that he was in the yard shifting cars. This he was in the habit of doing every morning. On the morning in question the yard engineer backed the passenger engine to the fish wharf, and brought up a car, and in coupling it on to the passenger coaches standing in front of the engine under which Weese was at work moved it, and, in attempting to escape between the wheels as the engine was moving, Weese got caught, and his left leg was injured. Weese and another witness who was on the engine at the time testify that the engine was moved about 12 or 15 feet. Weese says that he was at work on the eccentric bars, immediately under the engine, when it was struck, and that it moved back moderately fast,—as fast as a man can walk or faster,—and that he crawled along under the engine to keep from being crushed by it. His only way of escape was through the wheels, and he jumped between them, because he thought it was his safest course.

The testimony of other employees in the yard at Tampa is to the effect that the engine came back carefully, and that the coupling on the fish car only took the slack out of the cars, moving the engine not over six inches. Their testimony also tends to show that Weese was not directly under the engine, and his leg was across the rail, but Weese testifies that he was directly under the engine, and his leg was caught in his effort to escape between the wheels while the engine was in motion. This engine had the brakes set on it tightly, and it was not

"chocked." Weese put the brakes on, and, it seems, he had been told that the engines should be "chocked," or the brakes put on, to prevent them from rolling, and he had been shown how to chock the engine by putting wood on the track in front and behind the wheels. This instruction as to "chocking" the engines was given before the gauge was changed. It also appears that no signal lantern was hung out on the engine, and Weese did not make any request to be furnished with any, and the company did not offer to furnish any. There were lights hanging along the depot shed not very far from where the engine was stationed, and Weese had a torchlight with him under it. The torchlight consisted of a can with a tube in it to burn oil.

The yard engineer testified that he supposed it was customary for railroad companies to furnish signal lanterns if the engine wipers demanded them.

No signal lanterns had been hung on the engines at any time when Weese worked on them, as he testifies, although one witness introduced by him says he thinks a signal lamp was on the engine at the time of the injury.

The engineer, Coleman, who backed the engine against the cars that moved the engine under which Weese was injured, was under the control of one Landrum, yard master at Tampa, whose duties, it seems, were to take charge of all trains upon their arrival, make them up ready to go out, do all necessary shifting, take charge of the cleaning of cars, and turn trains over to conductors ready to go out. Coleman was the engineer who managed the engines in doing the shifting, and he was under the direction of the yard master.

Weese testified that he was employed to work for the company by the master mechanic at Tampa, whose duty it was to repair engines, and whose name was McLane, but that Instrom was master mechanic at the time of the injury; that Instrom had been absent from Tampa some eight or ten days or two weeks when plaintiff got hurt, and, in the absence of the master mechanic, Coleman occupied his place, so far as plaintiff was concerned; and by this he explains that Coleman oversaw his work, and instructed him in reference to the same. When Instrom was present he superintended and instructed plaintiff, and in his absence Coleman took Instrom's place. Plaintiff was asked who put Coleman over him, and he said he supposed Instrom did. He never heard any one say that Coleman was to look after him, and all he knew about it was when Instrom left he told plaintiff to go to Coleman for any instructions that he might need in his business. He also stated that Coleman told him in Instrom's absence that he, Weese, would have to continue to wipe engines on the main line and side track, and said that plaintiff would have to clean engines there until the pits were broadened out, and that he continued

to clean the engines there until he got hurt. No special instructions were given Weese in reference to wiping the engine on the occasion he got hurt. When first employed he was told to wipe the engines when they came in and were ready, and, after learning his duties, he continued to wipe the engines without further special instructions. After the gauge was changed he continued to wipe the engines without pits, and Coleman told him he would have to do this until pits were constructed. It does not appear that Weese ever went to Coleman for any instructions in reference to wiping engines, and in performing this service he was acting in the line of his employment by the company.

The superintendent of the company testified that McLane, a machinist in the Sanford shops, was transferred from Sanford to Tampa to take charge of the inspection of engines, and to do any necessary under-repairing on them; and witness considered it McLane's duty to see that the engines were properly cared for in detail. He could not say what particular power McLane had at the time of the injury over the engine wiper, but the rules governing in his position did not give the power to discharge or appoint a man except by consent of the master mechanic; and he, the inspector, is held responsible for carelessness in cleaning engines intrusted to his care. If any engines were found in a filthy condition, the master mechanic, instead of going to the wiper, would go to the inspector; or, in other words, would not go over the head of a superior to his inferior. Instrom, who occupied the same position at Sanford that McLane did at Tampa, was sent to Tampa when McLane left. That engine wipers were supposed to know what they needed in performing their duties, and that it was customary to furnish signal lanterns to them upon request. This request should be made to the master mechanic, and he furnished such lanterns upon proper requisitions.

The testimony on other branches of the case need not be referred to in this connection.

S. M. Sparkman and E. K. Foster, for plaintiff in error. Hammond & Jackson, for defendant in error.

MABRY, J., (after stating the facts.) The overruling of the demurrer to the declaration is assigned as error here, but counsel for plaintiff in error have not discussed this point in their brief, and we will consider it as abandoned.

The refusal of the court to permit counsel for defendant to file a plea to the jurisdiction of the court before the trial is another assignment of error. The court also refused to charge the jury, at the instance of the defendant, that if the injury occurred in Hillsborough county, and not in Orange county, the verdict should be for the defendant.

The suit was instituted in Orange county, and it is alleged in the declaration that the injury to the plaintiff for which he sues occurred in Hillsborough county. The defendant is a railroad company owning and operating a railroad from Sanford, in Orange county, to Tanapa, in Hillsborough county. The return of the sheriff on the summons shows that it was served by "delivering a true copy to Rudolph, a person over the age of sixteen, at the same time showing her the original, at the superintendent's office of the South Florida Railroad." The defendant appeared by attorney, and also filed a demurrer and the pleas mentioned in the statement accompanying this opinion. The defect in the service of the summons, if any existed, was obviated by the appearance and pleading on the part of the defendant, and hence there was no ground to be allowed to plead to the jurisdiction of the court on account of the service of the summons. The action here is for personal injuries to the plaintiff, and is transitory in its nature, and not local, either at common law or by any statute in force in this state at the time, further than to confine the action to some county through which the road ran. Section 33, c. 1989, Laws 1874, provides that all actions against any railroad corporation created by the laws, or operating a railroad, in this state, shall be brought in some county through which such road runs. The action being transitory, the court had jurisdiction to entertain the suit in any county through which the defendant's road ran, and the defendant was brought properly before the court. The appearance of the defendant and pleading to the merits of the action in the Orange circuit court gave that court jurisdiction, and we think no error was committed in refusing the application of defendant to file the plea to the jurisdiction of the court. *Railroad Co. v. Swearingen*, 83 Ill. 289; *Northern Cent. Co. v. Scholl*, 16 Md. 331; *Speer v. Railway Co.*, 23 Kan. 571; *Glen v. Hodges*, 9 Johns. 67. It is the duty of the court at any time before verdict to allow all necessary amendments in the pleadings, in order that the merits of the case may be presented, (*Robinson v. Hartridge*, 13 Fla. 501; *Livingston v. Anderson*, 30 Fla. 117, 11 South. Rep. 270.) but in the present case the plea desired to be filed would not have availed defendant if it had been filed in time.

On the subject of fellow servants the court instructed the jury as follows, viz.: "Whether Coleman, the engineer, whose act is said to have caused the injury to Weese, the plaintiff, was a fellow servant with the plaintiff, is a question of fact for you to determine under the law as I shall give it to you in charge. \* \* \* It is a general rule of law that one fellow servant cannot recover from a common master for injuries done to him by the negligence or carelessness of another fellow servant, when the

master himself is not at fault; but all the employes of a common master are not fellow servants, for the law defines fellow servants to be those who are engaged in working together or in the same line of employment. Hence it is not every employe of a common master who is forbidden to recover for injuries caused by the carelessness of another employe. \* \* \* Those who are working together in the same line of employment under a common master are fellow servants, but the relation does not extend to all the employes of a common master. \* \* \* The alter ego of a corporation is one who stands in the place of the corporation itself; and, although an employe of the company is not a fellow servant with those whom he controls or directs, his act, in contemplation of law, is the act of the company, and they cannot avoid responsibility for it, on the ground of fellow service, where injury occurs. It is for you to determine from the evidence whether Coleman stood in the relation of the alter ego of the company towards Weese at the time of the accident. \* \* \* One who is placed by the master in control of a coemploye, and said employe is made subject to his orders, stands in the place of the master, and is not a fellow servant with those under his orders. \* \* \* If the jury believe from the evidence that the relation of fellow servant existed between plaintiff and the engineer, and the common master was not itself guilty of negligence, they will find for the defendant."

The court refused to give the following instructions requested by the defendant, on the subject of fellow servants, viz.: "It is the duty of the court to determine who are fellow servants in any given case involving the question as to who are fellow servants." "The engine wiper employed to wipe engines and fire up the same in the yard where shifting and making up of trains were done is a fellow servant with the engineer operating the engine in doing such shifting, and cannot recover for any injury which he may have received through the negligence of such engineer whilst both were engaged in the line of their respective duties." "If the jury believe from the evidence that the plaintiff at the time of his alleged injury, if any he received, was in the employment of the defendant as an engine wiper in the yard of the defendant at Tampa, and that the negligence of the yard master or the engineer working under said yard master at Tampa in shifting and making up the trains or doing other similar work caused said injury, then the relation of fellow servant existed between the plaintiff and such yard master and the engineer, and the plaintiff cannot recover for such injury."

The giving of the charges above, and the refusal to give those requested by defendant, are assigned as error here.

In *Parrish v. Railroad Co.*, 28 Fla. 251,

9 South. Rep. 696, we held that a master was not liable to one servant for the negligence of a fellow servant when engaged in a common work, or in the same general undertaking; and that an engineer and fireman in charge of an engine drawing cars used in getting gravel to repair the roadbed were fellow servants with shovelers of gravel on the cars, while the latter were under the control and direction of a separate boss, and not subject to the control of the employes in charge of the engine. The charge given to the jury in the Parrish Case announced that a fellow servant is one engaged with another under a common master in the same common employment, so that they are brought in contact with each other, notwithstanding they are subject to the orders and under the exclusive control of separate bosses, and in different work in the same service. This charge, as applied to the facts of that case, was held to be correct. In view of the growth and development of business enterprises necessitating their division into separate departments, some courts have established what is called the "separate department distinction," and maintain that it is not enough to constitute fellow servants that they were performing parts of a common undertaking not bringing them together, but it is essential either that they were actually co-operating, at the time of the injury, in the particular business in hand, or that their usual duties should bring them into habitual association, so that they can exercise an influence one upon the other for their mutual protection. The Illinois court seems to take this view, and also those of Kentucky, Georgia, and Virginia, and probably a few others. *Railroad Co. v. Cavens*, 9 Bush, 559; *Railroad Co. v. Carroll*, 6 Heisk. 347; *Railroad Co. v. Jones*, 9 Heisk. 27; *Cooper v. Mullins*, 30 Ga. 146.

The rule that seems to be sustained by the weight of authority is that it is not necessary, in order to bring a case within the rule that an employer is not responsible to those in his employ for injuries caused by the negligence or misconduct of a fellow servant, that the servant who causes and the one who suffers the injury should be at the time engaged together in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties tending to accomplish the same general purpose. *Wright v. Railroad Co.*, 25 N. Y. 562; *Railway Co. v. Harrington*, 62 Tex. 597; *Holden v. Railroad Co.*, 129 Mass. 268; *Kirk v. Railway Co.*, 94 N. C. 625; *Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. Rep. 240; *Foster v. Railway Co.*, 14 Minn. 360, (Gil. 277); *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. Rep. 50; *Slattery's Adm'r v. Railway Co.*, 23 Ind. 81; *Brodeur v. Valley Falls Co.*, 16 B. L. 448, 17 Atl. Rep. 54; *Gormley v. Rail-*

*way Co.*, 72 Ind. 31; *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. Rep. 338; *Wood, Mast. & S.* § 425; *McKin. Fel. Serv.* § 9.

The facts in the Parrish Case showed that the negligent and injured servants were brought together in the common work of moving the gravel, and hence the charge of the court, as applied to such a state of facts, was not error. If we eliminate the view that Coleman, the negligent engineer in the case before us, was the vice principal of the defendant as to Weese, the plaintiff, it is evident that the relation of fellow servants existed between them at the time of the injury, according to the rule announced by us in the Parrish Case. They were employed by a common master in a common employment, and were associated with each other in the performance of their respective duties. It was Coleman's duty, under the direction of the yard master, to manipulate the engines in the yard in doing the necessary shifting and making up of trains preparatory to leaving. It was the duty of Weese to wipe the engines in the same yard, and fire them up before leaving time. They were under different bosses, but still they were engaged in a common work, or in the same general undertaking. They would be regarded as fellow servants under the decisions of some of the courts holding to the separate department limitation. This will be illustrated by two cases decided in Illinois. In the case of *Railroad Co. v. Murphy*, 53 Ill. 336, the injured servant was one of several workmen under the charge of a foreman whose duty it was to examine trains on their arrival at the station, and make all needed repairs. The injured servant had been engaged in repairing a car in a freight train, and, having finished this work, started to the workshop, where they kept tools, when, in passing down between the rails of the main track, he was struck by a switch engine, and so injured that he subsequently died. The switch engine was constantly engaged on the station grounds, and, although under the immediate control of a yard master, it was used for whatever purpose it might be required, among others, for switching such cars as were undergoing repairs. The engineer in charge of this engine and the men engaged in repairing the cars were held to be strictly fellow servants, and the common master not liable for the negligent acts of each other. But in *Railroad Co. v. Moranda*, 93 Ill. 302, where the injured servant was under duty to repair and keep in order a section of railroad track, and while in the performance of this duty an express train passed by at great speed, and, having stepped aside to avoid the train, said servant was struck by a large lump of coal carelessly cast from the tender by the fireman on the passing train, it was held that the fireman on the express train and the servant whose duty

it was to repair the track were not fellow servants. It was held in the case of Railroad Co. v. Norment, 84 Va. 167, 4 S. E. Rep. 211, that a yard master or conductor was not a fellow servant with an overhauler (car repairer) in the same yard, though the latter was not under the control of the former. They were regarded as employed in different departments of service. The Virginia court holds to the doctrine of the separate department limitation to which we have above referred. McKin. Fel. Serv. § 72, and notes. Leaving out of view the question of vice principal, Weese and Coleman were, as shown by the evidence before us, under the rule in the Parish Case, fellow servants employed by a common master, and engaged in the same general undertaking. But the court instructed the jury that "one who is placed by the master in control of a coemployee, and said coemployee is made subject to his orders, stands in place of the master, and is not a fellow servant with those under his orders;" and that the jury must determine from the evidence whether or not Coleman occupied the relation of vice principal of the company as to Weese. The defendant's liability, it is evident, was submitted to the jury upon the hypothesis, if sustained by the evidence, that Coleman was the alter ego of the company so far as Weese's employment was concerned. This court has never decided whether or not the rule established by many courts in reference to vice principals prevails in this state. There are many decisions of the highest authority adhering to such a rule, but it must be admitted that there is grave conflict of authority on this point. Id. § 43 et seq. This rule, as stated by Beach on Contributory Negligence, (section 352,) is as follows, viz.: "Where the negligent servant is in his grade of employment superior to the injured servant, or where one servant is placed by the employer in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his alter ego or vice principal, when such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable in damages for the injury." The supreme court of the United States has given the weight of its authority to this view. Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

The testimony before us did not, in our judgment, authorize the submission of the case to the jury on the theory that the company was liable for the negligence of the engineer, Coleman, as its vice principal, even if such a rule obtains in this state. Weese testified that he was over 21 years old when employed to wipe engines and fire them up

in the Tampa yard, and it is entirely clear that he was engaged in this business when he received the injury for which he sues. It is true he testified that the master mechanic at Tampa, whose name was Instrom, told him to go to Coleman for instructions in his (Instrom's) absence, and that in his absence Coleman oversaw his work, and took Instrom's place; also that Coleman showed him (Weese) when he was first employed how to "chock" the engine, and, after the gauge was changed, and in the absence of Instrom, informed him (Weese) that he would have to continue to wipe engines on the main line and side track without pits until they were prepared. But Weese says himself (and this is all the testimony there is on the subject) that all he knew about Coleman's being placed over him was what Instrom said about going to Coleman for instructions. Conceding that it is shown that Weese, in the performance of his duties, was under the directions of the master mechanic at Tampa, or, according to the testimony of the superintendent, which is not inconsistent with that of Weese, under the immediate control of the inspector at Tampa, who was himself under the master mechanic, it does not appear that he was engaged at the time in any service by the direction of either the inspector or Coleman outside of his regular employment, or that he ever went to Coleman for any instructions in reference to his duties at the time of the injury. But, whatever may be the effect of the direction of Instrom to Weese to go to Coleman for instructions in the performance of his duties, it is made to appear beyond question that Coleman's act that resulted in Weese's injury was performed as servant in the line of his regular employment, and he was not therein performing any duties devolving upon the principal. The negligent act of Coleman complained of related solely to his duty as co-laborer with Weese, and there is an absence of connection between the supposed grant of authority to Coleman over Weese and the injury that happened to the latter. McKin. Fel. Serv. § 42; Railroad Co. v. May, 108 Ill. 288. There is no complaint that Coleman was not a competent man for his place, and that the company was negligent in employing him as engineer in the yard at Tampa. The theory that the defendant company placed Coleman over Weese as its vice principal in respect to the performance of their duties at the time is without foundation in the evidence. It has for its support only the instruction, given by the inspector at Tampa, who was Weese's boss, to go to Coleman, the yard engineer under the direction of the yard master, for instructions when the yard master was absent. It is entirely clear from the evidence that there was nothing in the employment of Weese and Coleman by the company to subject the former to the control and subordination of the latter; and, as before stated, at the time of the in-

jury they were performing duties strictly within the line of their respective employments. Coleman not being in any sense the vice principal of the company as to Weese in the duties he was performing at the time of the injury, it follows from what has already been said that they were fellow servants under a common master, engaged in a common undertaking. The court, then, was in error in submitting the case to the jury on the theory that Coleman was the alter ego of the company, because there was no testimony to authorize a finding on this ground. From this standpoint it becomes unnecessary for us to say whether or not the rule above referred to obtains in this state, and, if so, whether or not the charges given by the court to the jury correctly stated the rule on this subject. The court should not have given any charges at all on this subject upon the state of facts as shown to us, and what was said, we think, was calculated to mislead the jury.

The second and third instructions requested by defendant on the subject of fellow servants, and set out in a former part of this opinion, contained correct propositions of law as applied to the facts of the case, and should have been given. For these errors a reversal of the judgment must follow, but a ruling on the other branch of the case makes it proper for us to say something in reference to other grounds upon which a recovery is sought to be had.

The declaration alleges that no pit was prepared in which the plaintiff could stand while wiping engines, and no signal lamp was furnished him to hang out as notice and warning to other employes while engines were being cleaned. It is implied in the contract of employment between the employer and employe that the latter assumes the risks and perils ordinarily attending or incident to the business in which he voluntarily engages for hire, and this includes the risk of injuries resulting from the carelessness or misconduct of fellow servants engaged in a common work or general undertaking. But the law is well settled that a master must not expose his servant, when acting in the line of employment, to dangers and hazards against which he may be protected by reasonable care and diligence on the part of the master. Among the positive duties resting upon the master to the servant is the obligation to exercise such reasonable care as prudence and the exigencies of the situation require in providing the servant with safe machinery and suitable instrumentalities, and a reasonably safe place in which to work. The negligence of the master in this respect is not one of the perils or risks assumed by the employe in his contract of employment, and he has the right to insist that the master shall strictly comply with his obligation in this respect. The authorities are not inharmonious on this point. *Hough v. Railway Co.*, 100 U. S. 213; *Davis*

*v. Railroad Co.*, 55 Vt. 84; *McKin. Fel. Serv.* §§ 24, 25, and authorities cited in notes.

But while the rule just announced is clearly established, it is also well settled that it is a complete answer to the claim for damages resulting from a failure to furnish suitable instrumentalities and a safe place to work that the injured servant had full knowledge of the situation, and engaged in the employment, or continued therein, without objection or protest, and without any promise or assurance on the part of the employer to provide better. There is some conflict of authority on this point, but we think it can safely be stated that the prevailing judicial view is that, where a servant voluntarily engages in a service for another, and has full knowledge that the instrumentalities he is to use and the situation in which the service is to be performed are dangerous, and the danger therefrom is apparent, and he makes no protest, and his employer does not mislead him in any way as to these matters, he assumes the risks ordinarily incident to that employment, and cannot recover for injuries resulting therefrom. The exception to the rule was not established to relieve an employer from the duty due to his employe to furnish him safe and suitable instrumentalities with which to work, but its justness is found in the consideration that, where an employer does not furnish safe implements, and does not pretend to do so, and this fact is fully known to the employe, he waives this duty on the part of the employer, and should not be permitted to recover for injuries received while engaging in such service without such instrumentalities. *Railroad Co. v. Watson*, 114 Ind. 20, 14 N. E. Rep. 721, and 15 N. E. Rep. 824; *Hough v. Railroad Co.*, supra; *Railway Co. v. Lempe*, 59 Tex. 19; *Umbach v. Railway Co.*, 83 Ind. 191; *De Forest v. Jewett*, 88 N. Y. 264; *Campbell v. Railroad Co.*, (Pa. Sup.) 2 Atl. Rep. 489; *Linch v. Manufacturing Co.*, 143 Mass. 206, 9 N. E. Rep. 728; *Buzzell v. Manufacturing Co.*, 48 Me. 113, 77 Amer. Dec. 212, and notes; *Railway Co. v. Drew*, 59 Tex. 10; *Kroy v. Railroad Co.*, 32 Iowa, 357; *Muldowney v. Railroad Co.*, 39 Iowa, 615; *Wood, Mast. & S.* §§ 326, 327; *McKin. Fel. Serv.* § 30.

The court instructed the jury that the rule of law which exempts a master from responsibility to the servant for injuries received from the negligence of his fellow servant does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required, and that it was the duty of railroads to provide all necessary and usual means for the protection of their employes against injury by accident while engaged in their duties. The defendant excepted to this charge, and it is assigned as error. The point of objection is not that the charge does not contain within itself a correct statement of a legal proposi-

tion, but that it was erroneous, as applied to the facts of the present case, as Weese fully knew the dangerous position which he was occupying, and with full knowledge of this situation he continued to wipe engines in the Tampa yard, although no pits were prepared. If the court had refused to instruct the jury, upon being requested to do so, that Weese was not entitled to recover if the testimony showed that he was within the exception to the rule, it would have been error. But the court also instructed the jury that when a servant enters into the employment of another he is presumed to have contracted with reference to all hazards and risks ordinarily incident to the employment, and cannot recover for injuries resulting to him therefrom. Also a servant is bound to see patent and obvious defects in the instrumentalities of the business in which he is engaged, and when he comes into the service of a person, or continues in such service, knowing that the instrumentalities employed have obvious and patent defects, or has equal opportunity with the master of knowing that such instrumentalities are unsafe and dangerous, he takes the risk of their use upon himself, and he cannot hold the master responsible for injuries resulting therefrom. The two last-mentioned charges were given by the court at the instance of the defendant, and no assignments of error are based upon them. When the three charges are considered together it leaves no room for objection on the ground that the first had the effect to mislead the jury; for, although they were told that the defendant's exemption from liability to one servant on account of the negligence of a fellow servant did not excuse it from furnishing suitable instrumentalities with which to work, still they were told that if the plaintiff, with full knowledge of the dangerous situation, engaged in the service, he could not recover for injuries resulting therefrom. The court was also requested to give the following charge, the refusal to give which is assigned as error, viz.: "If the jury believe from the evidence that the plaintiff, Weese, was injured while engaged in the regular line of his duties, by an engine under which he was working being moved whilst he was underneath the same, and should further believe that there was no pit where said engine was placed in which he, the said Weese, could stand whilst performing such duties for which he was employed, but that he knew this at the time he went under the engine; and should believe further that the said Weese had been accustomed for several days or two weeks prior to receiving the injury, if any he received, to perform said duties, not having a pit to stand in at the time he was so engaged in the performance of said duties, and knew or should have known that the place in which he was so engaged in performance of said duties was dangerous,—then he cannot recover for any injuries so received, and the jury must find for the defendant."

This charge is nothing more than the application of the principle of law already given to the jury by the court to the facts of the case under consideration, and we think it should have been given. The court had stated to the jury—and it was a correct proposition—that a servant is bound to see patent and obvious defects in the instrumentalities with which he works, and when he goes into the service of a person, or continues therein, with full knowledge that the instrumentalities employed have obvious and patent defects, he takes the risk of their use upon himself, and cannot hold the master responsible for injuries resulting therefrom. Under the testimony, the defendant had the right to have this charge given to the jury.

The court charged the jury on the law applicable to contributory negligence, but nothing need be said in reference to these charges. What has been said covers the merits of the controversy presented here, and is enough to dispose of the case. It is to be noted that this case arose prior to the passage of chapter 3744, Laws 1887.

For the reasons given the judgment must be reversed. It is therefore ordered that the judgment be reversed, and a new trial awarded.

(32 Fla. 28)

#### ORANGE BELT RY. CO. v. CRAVER.

(Supreme Court of Florida. July 15, 1893.)

CONDEMNATION PROCEEDINGS—CONDUCT OF JURY  
—MANNER OF ARRIVING AT VERDICT—MEASURE  
OF DAMAGES—WITNESSES.

1. In proceedings to condemn land for right of way of a railroad or canal company, all parties thereto are entitled to have the intelligent judgment of the entire jury upon the assessment of damages to be allowed; and should it appear that the jury reached a verdict by an agreement, in advance, that each one should set down the sum to which he considered the landowner entitled; that the aggregate of these sums should be divided by the number of the jury, and the quotient thus obtained should be the amount of the verdict,—it will be set aside. But where it appears that the average of the estimates of the jurors was obtained by adding up the amounts, and dividing the result by the number of the jury, and afterwards the average thus obtained was objected to by some of the jury, and upon further consideration another sum was agreed upon as a verdict, the verdict will not be set aside.

2. It is proper for the jury, in fixing the amount of compensation to be allowed the landowner in condemnation proceedings, to estimate, not only the value of the land actually taken for right of way, but also the damage done to the remaining portion of the tract, resulting from the construction of the road.

3. The inquiry before the circuit court on a protest against the report of a jury in condemnation proceedings is not in the nature of an original proceeding to fix the amount of compensation to be allowed the landowner, but is an investigation into the validity and regularity of the proceedings by the jury in fixing the compensation to be awarded; and upon such a hearing the party objecting to the report has the right to produce evidence tending to show good grounds for setting aside the report, and if the court should deny this right it would be error.

4. Should the trial court improperly ex-



clude a question propounded to a witness, and it appears that subsequently, during the same examination, the witness answers the question excluded, and he is examined in reference to the matter which the question excluded tended to elicit, error cannot be predicated upon the ruling of the court excluding the question.

5. Witnesses who reside near the land in question, and are familiar with its value, as well as the value of other lands in the neighborhood, can testify as to the value of the land taken for right of way. Such knowledge is sufficient to authorize them to give their estimates as to the value of the land taken.

6. Good cause must be shown before a report of a jury in condemnation proceedings will be set aside, and in the absence of such showing the presumption is in favor of the report, and that the jury discharged their duty. The jury, in such proceedings, exercise, however, important functions, and pass upon valuable rights of property; and upon proper showing their award may be impeached for misconduct on their part, or where they have acted upon a wrong basis, or for partiality, bias, prejudice, or inattention, or unfaithfulness in the discharge of their duties, or for error of such character as to furnish a just inference of the existence of such influences.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. Hanson, Judge.

Petition by the Orange Belt Railway Company against James C. Craver for condemnation of land. From a judgment on the award of damages reported, petitioner appeals. Affirmed.

Thomas E. Wilson, for appellant. Barron Phillips, for appellee.

MABRY, J. A petition was filed on the 9th day of January, A. D. 1888, in the office of the clerk of the circuit court for Hillsborough county, by the appellant, a railway company, for the condemnation of a certain parcel of land, situated in said county, for a right of way for said company. No question is presented as to the sufficiency of this petition. It alleges the facts required by the statute in such proceedings, and contains a description of the land proposed to be condemned, over which the company had located its road, accompanied with a map showing where the road would run over the land, when constructed, and the quantity of land to be taken. After the filing of the petition the circuit judge made an order, directed to the sheriff of Hillsborough county, Fla., commanding him to summon 12 disinterested freeholders, registered voters of said county, as a jury, to meet at a place designated in said order, near the land to be condemned, on a day mentioned, and to take steps, after being sworn, to appraise and value the lands described in the petition, and to fix the amount of compensation to be made to the owner. The sheriff obeyed this order by summoning 12 disinterested freeholders, registered voters of said county, who, after being sworn, met at the time and place mentioned in the order, and made an award, which was filed in the clerk's office. The report recites that the jury viewed the premises described in the

petition, heard the allegations of the parties, and appraised and determined the value of each parcel of land proposed to be taken, with the value of the improvements thereon, and each separate estate therein, and the damages to which the owner was entitled. The conclusion of the report is: "We determine the value of the parcel of land described in said petition to be five hundred (\$500) dollars; that the value of the improvements thereon is nothing; that there is no estate in the said land, other than that of the defendant; that the damages that will be sustained by the owner by reason of the taking of the land are five hundred (\$500) dollars, included in the above estimate; and that we fix the amount of the compensation to be made to the said owner at five hundred (\$500) dollars."

On the day the report was filed in the clerk's office the company, by its attorney, filed a protest against the confirmation thereof, on the grounds that the amount awarded by the jury is excessive; that the valuation of the land taken, as shown by the report, is excessive, and not justified by any item of damage; and that the method adopted by the jury to arrive at the valuation made in their report was incorrect.

Three days after filing the foregoing protest, additional grounds of protest were filed, as follows: That neither the report nor the petition shows the amount of land taken; that there was inattention, of such extraordinary character and grossness, as to furnish a just inference of the existence of partiality and prejudice on the part of one of the jurors.

Upon a hearing and consideration of the protest, the court decided that no sufficient cause had been shown why said report should not be confirmed, and the same was in all things affirmed. From this decision the company has appealed to this court.

We will dispose of the assignments of error insisted on here, and two of these are that the principle upon which the award was made by the jury, and the method by which they arrived at the amount of the award, were erroneous, and sufficient to cause the same to be set aside. The act of 1885, c. 3595, as amended by the act of 1887, c. 3712, on the subject of the condemnation of land for the right of way for any railroad or canal company, provides that, in order to acquire such right of way, the companies named shall file a petition in the office of the clerk of the circuit court of the county in which the land is situated, and shall therein allege certain matters specified in the statute. Upon the presentation of the petition the judge of the circuit court shall make an order, directed to the sheriff, to summon 12 disinterested freeholders, registered voters of the county, as a jury to meet at a time and place to be named in such order, to appraise and value the land on oath, and to fix the amount of compensation to be made to the owners thereof. The jury so selected, at their first

meeting, shall cause notice to be given to the owner or owners of the lands of the time when, and place where, they will meet to consider the amount of compensation to which the owner or owners of such lands shall be entitled. The statute prescribes the notice to be given, and the evidence of it to be stated in the report of the jury. It also prescribes that "the jury shall view the land described in the petition, hear the allegations of the parties, and shall appraise, ascertain, and determine the value of each tract or parcel of land proposed to be taken, with the value of the improvements thereon, and they shall fix the amount of the compensation to be made to each of the owners thereof." It further provides that a majority of the jury may determine all matters before them, and shall, within 10 days after viewing the land mentioned in the petition, file in the office of the clerk of the circuit court of the county a report of their proceedings concerning such lands, setting forth their verdict as to the amount of compensation awarded by them to the owner of each tract or parcel of land. Provision is then made for filing a protest by either party against the confirmation of said report. The party protesting must, "within ten days after the date of the filing of such report, file with the clerk of said court his or their written protest against the confirmation of such report, setting forth the reasons why the same should not be confirmed, and it shall be the duty of the said judge to hear the parties and their witnesses, and determine the matter at as early a day as practicable. Should the protesting party on such hearing show good cause why such report should not be confirmed, the judge shall refuse to confirm the same, and he shall order and cause to be taken such further proceedings in the matter, not inconsistent with this act, as, in his judgment, right and justice demand. Should said judge on such hearing determine that no sufficient cause has been shown why said report should not be confirmed, or should no protest be filed as hereinbefore provided, within ten days from the date of the filing of such report, the said judge shall make an order confirming said report," etc. Counsel for the company, on the hearing of the protest, called one of the jury of appraisement, and proposed to prove by him the method employed by the jury in arriving at their award, but the court ruled that the juror could not be allowed to impeach his verdict. A party who was present when the assessment was made was, however, permitted to testify to a conversation between the juror proposed to be examined and the counsel for the company, immediately after the award was agreed upon, in which conversation, it is testified, the juror stated each one put down the amount that he thought would be a fair value for the land, added them up, divided the result by 12, and gave the quotient as the result; also, that the

juror stated he tried to get the jury to lower their verdict, and that he wanted to put it at \$200, or \$250. The juror was then recalled by counsel for the company, and examined, without objection, so far as the record shows. He testified that each juror put down the amount he thought the owner was entitled to. These amounts were then added up, and the result divided by 12, to get the average, which would, as it came out, have been \$620. He also testified that he thought the amount was a little too much, and came out on one side, seven other jurors following him. Some of them objected to the amount, but they could not help themselves, and then agreed to it. The juror objecting then proposed that the amount be reduced, and fixed at \$500, and seven jurors, being a majority, agreeing to this, ruled, and this was the way the amount of the award was reached. The report of the jury, awarding the sum of \$500, is signed by all of the jurors, and there is no contention that they did not all finally agree to this amount as their verdict. The objection urged here is that the principle by which the jury arrived at the sum of \$500 was wrong. We entertain no doubt as to the right of all parties to condemnation proceedings to have the intelligent judgment of the jury upon the assessment of damages to be allowed, and any agreement between them, in advance, which will leave the amount to be allowed as the result of chance, will not be sustained. In *Railroad Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. Rep. 788, it is said: "There is no doubt, having regard to the constitution of different individuals' minds, that an agreement upon the amount is nearly always the result of compromise of opinion; and, where there is no previous agreement to be bound by the result, there can be no objection to a subsequent adoption of such amount, if, in view of all the evidence, the commissioners become convinced that the amount thus determined is just and right. An agreement to be bound in advance is not the result of compromise or conviction, and affords designing persons on the commission the opportunity to mark an extravagantly high or low amount, so that the average will not yield a just average of the unbiased judgment of the persons composing the commission." The three commissioners in that case stated the respective amounts that they considered the owner entitled to, and then they agreed to add them up, and divide the result by three, and take the quotient as the award. It was said that there was nothing objectionable in this. The courts have generally set aside, as improper, a verdict, where it appeared that the jury agreed in advance that each should set down the sum to which he considered the plaintiff entitled; that the aggregate of these sums should be divided by the number of the jury, and the quotient thus obtained should, without alteration, stand as the ver-

dict. But if, without any such agreement to abide by the result, the jury obtain, in the way indicated, the average of their opinions, and after deliberation adopt it as their verdict, it will not be set aside. *Smith v. Cheetham*, 3 Caines, 57; *Manix v. Malony*, 7 Iowa, 81; *Denton v. Lewis*, 15 Iowa, 301; *St. Martin v. St. Desnoyer*, 1 Minn. 153, (Gil. 131); *Dorr v. Fenno*, 12 Pick. 521; *Forbes v. Howard*, 4 R. I. 364; *Thomp. & M. Juries*, §§ 409, 410. Taking the statement of the juror himself as evidence of the method by which the jury reached the result in the case before us, there is enough to indicate that some of them had agreed to find a verdict by adding up the amount estimated by each one for the landowner, and dividing the result by 12, but it is made to appear clearly that the amount reached by this method was not adopted by the jury as their verdict. Objection was made to this amount, when ascertained, and a lesser sum was finally adopted. The average of all the amounts set down by each juror was \$620, but after objection to this amount, as being too much, by a juror, upon further deliberation, the sum of \$500 was agreed upon, and this sum was returned as the final award. Tested by the rule on this subject, the testimony does not, in our judgment, show such misconduct on the part of the jury, in this respect, as to render the ruling of the circuit judge thereon erroneous. *Birchard v. Booth*, 4 Wis. 67. This result is based upon a concession that the evidence introduced on this point is admissible, and we have so considered it because no objection to it seems to have been insisted on at the time it was offered. The settled rule, at the common law, excluded a juror as a witness to impeach his verdict, though there is a departure from the rule in some decisions. *Vide authorities supra*. There are other decisions holding that a jury of appraisement, or commissioners to assess damages in condemnation proceedings, are not governed by the common-law rule, and that they are competent witnesses to testify to what transpired before them in making up their award. *Canal Bank v. Mayor, etc., of Albany*, 9 Wend. 244; *Railroad Co. v. Probate Judge*, *supra*.

It is further contended that the method employed by the jury in arriving at their award was wrong, in this: that they not only took into consideration the value of the land taken for right of way, but also the damage done to the other portion of the tract by reason of the taking thereof; the point of contention here being that as the track through which the right of way passes was wild land, and no improvements were upon it, the only element of compensation was the value of the land actually taken. The constitution provides that the compensation to be made to the owner of the land proposed to be taken for right of way shall be ascertained by a jury of 12 men, in a

court of competent jurisdiction, as shall be prescribed by law, and which compensation shall be allowed, irrespective of any benefits from any improvements proposed by the corporation. Const. 1885, art. 16, § 29. The statute under which the proceedings in the present case were had, provides that "the jury shall view the land described in the petition, hear the allegations of the parties, and shall appraise, ascertain, and determine the value of each tract or parcel of land proposed to be taken, with the value of the improvements thereon, and each separate estate therein, and the damage that will be sustained by the owner or owners by reason of the taking thereof, and they shall fix the amount of the compensation to be made to each of the owners thereof." Act 1887, c. 3712, § 3. The right of way sought to be acquired by the proceedings in the present case extends across two 40's of land owned by appellee; and, at the hearing on the protest before the judge, testimony was introduced tending to show that some of the jurors, in estimating the compensation to be allowed the owner, took into consideration the damage to the remainder of the land, deemed by them to result from the construction of the road over the same. There is a conflict in the evidence on the protest as to the damage, if any, to the remaining portion of the land. The construction of the road necessitated a considerable cut over one portion of the land, and an embankment over the other, and these were considered by some of the witnesses as sources of damage to the land not taken. The jury determined the tract of land described in the petition to be worth \$500, and the testimony indicates that this land was the part taken for right of way. The report states that "the damages that will be sustained by the owner by reason of the taking of the land are five hundred (\$500) dollars," but this amount was included in the above estimate of \$500, which was fixed as the amount of compensation to be paid to the owner. It is not at all certain that the jury estimated damages to the remaining portion of the land in making their award; but, conceding that they did, there would be no error in doing so, if damage was sustained by the owner by reason of the taking of the right of way. By the very language of the statute, it is not only proper, but the duty of the jury, in fixing the amount of compensation, to estimate the damage that will be sustained by the owner by reason of the taking of the right of way, as well as the value of the land actually taken. This, of course, will include the damage to the remaining tract of the land from which the right of way is taken, resulting from the construction of the road. The result is that there is no merit in the contention that the only element of compensation was the value of the land actually taken.

It is further assigned as error that the court erred in admitting the testimony of witnesses who were not experts, and had no knowledge of the matters upon which they were allowed to express an opinion. This objection relates to the competency of certain members of the jury, introduced as witnesses by appellee, on the hearing of the protest, to testify to the value of the land taken for a right of way. These wit-

testified that they resided near the land and were familiar with its value, value of the land in the neighborhood in which it was located. It is concluded in order to make such evidence effective witnesses must be shown to have special knowledge of the facts. No other objection is made to the testimony. The exception tends only to the testimony of the witnesses as to the value of the land in which the right of eminent domain is perfectly clear that the witnesses testify as to this. The witnesses were familiar with the land as well as the neighborhood. The witnesses are authorities on the facts. See § 435, and

error that the court set aside the award, and the jury, and in "following the testimony of the defendant's witnesses, all of whom were members of the jury that made the award, and none of whom were real-estate men, instead of following the testimony of complainant's witnesses, neither of whom was on the jury, and both of whom were real-estate men," and in not "directing the jury to file a remittitur as to a portion of the award, and in not decreasing the award to a reasonable sum, under the evidence." The foregoing includes the assignment of error involving the sufficiency of the evidence before the court to set aside the report of the jury, and will be considered together. On the protest the company examined two witnesses, both of whom lived near the land in question, had been engaged in the real-estate business, and stated that they were familiar with the value of the land in question. These witnesses say that in their opinion the appellee was not damaged by reason of the construction of the road over his land, beyond the value of the land taken for right of way. One fixes the value of the land taken for right of way, at the highest figure, \$105, and the other at \$120. Appellee testified for himself, and introduced three other witnesses who were on the jury of appraisement, but who lived near the land, and were familiar with its value. Objection was made to these witnesses testifying as to the value of the land, on the ground that they were not experts. This objection we have already considered. No other objection was made to the admissibility of their testimony. One of these witnesses places the value of the land taken at \$250, and the damage done to the remainder of the tract by reason of the construction of the road at \$150, making the total of his estimate at \$400. Another witness places the value of the land taken at \$100 per acre, and the damage at \$1,000, and the third one estimates the good land

taken at \$100 per acre, and the damage to the tract at \$1,000. Appellee testified that the land taken was worth \$100 per acre, and the damage to the remainder was \$500. The quantity of the land sought to be condemned, as shown by the petition, is about six acres. Upon substantially such a showing, did the circuit court err in refusing to sustain the protest, and in confirming the report of the jury? We do not think so. It is not to be forgotten that jurors in condemnation proceedings exercise important functions, and pass upon valuable rights of property. Their award, embodied in a report, is subject to review, and may be impeached, where misconduct in the jury is shown, or where they have acted upon a wrong basis, or, as stated by Mills on Eminent Domain, section 234, "for partiality, bias, prejudice, or inattention, or unfaithfulness in discharge of their trust, or for error of such extraordinary character or grossness as should furnish a just inference of the existence of such influences." The jury are required to view the land desired to be condemned, "hear the allegations of the parties, and shall appraise, ascertain, and determine the value of each tract or parcel of land proposed to be taken, with the value of the improvements thereon, and each separate estate therein, and the damage that will be sustained by the owner or owners by reason of the taking thereof, and they shall fix the amount of the compensation to be made to each of the owners thereof." In Missouri, under a statute similar to ours, except 3 commissioners assessed the damages, instead of a jury of 12 men, as in ours, it was said, in the case of Railroad Co. v. Richardson, 45 Mo. 466: "They [the commissioners] may arrive at their conclusions upon the proofs and allegations of the parties; and, in addition thereto, they are required to view the premises, and have the advantage of actual personal inspection. They are generally selected on account of their capacity and fitness, and are required to be disinterested; and, unless the court is clearly satisfied that they have erred in the principle upon which they have made appraisal, there is nothing for review, and their report should not be disturbed." In a later case—Railroad Co. v. Campbell, 62 Mo. 585—it was held that "ordinarily, where opinions as to the value of the land might well be variant, the reports of commissioners appointed to assess the land condemned for a railroad will not be closely scrutinized; but the court will interfere where the damages assessed are flagrantly excessive; where there are manifest indications of an entire lack of appreciation of the duties and responsibilities of their position, and an utter obliviousness of the rudimentary principles of fairness and impartiality." Under our statute, good cause must be shown before the report will be set aside, and in the ab-

sence of such showing the presumption is in favor of the report, and that the jury have properly discharged their duty. Railroad Co. v. Walker, 17 Neb. 432, 23 N. W. Rep. 348; Railroad Co. v. Hopkins, 90 Ill. 316; Railway Co. v. Barnum, 107 Ill. 160; Railroad Co. v. Jacobs, 110 Ill. 414. On the testimony in the record, we cannot hold that the circuit judge erred in refusing to set aside the report. The entire proceeding, we remark, in conclusion, has been conducted by both sides on the idea that the jury was properly organized, and no question as to the constitutionality of the statute has been presented. The judgment appealed from must be affirmed, and it is ordered accordingly.

(32 Fla. 238)

### STRINGER v. STATE.

(Supreme Court of Florida. July 15, 1893.)

INTOXICATING LIQUORS—SALES WITHOUT LICENSE  
—CRIMINAL PROSECUTION — SUFFICIENCY OF  
PLEA.

To an information charging the accused with carrying on and engaging in the business of dealer in spirituous, vinous, and malt liquors in Hernando county, Fla., without a license, he interposed a plea to the effect that prior to the time when the offense is alleged to have been committed, and before the filing of the information, an election had been properly held in said county, under the provisions of chapter 3700, Laws Fla., to determine whether or not the sale of such liquors should be prohibited in said county, and at said election a majority of the votes legally cast were in favor of prohibiting the sale of such liquors. On motion of the state the court struck from the files this plea on the ground that it was no defense to the charge. *Held* to be error. If the plea be true, there was no law in force in the county at the time upon which an information could be predicated for selling such liquors without a license.

(Syllabus by the Court.)

Error to circuit court, Hernando county; George B. Sparkman, Judge.

Sheldon Stringer was convicted of selling intoxicating liquors unlawfully, and brings error. Reversed.

J. B. Wall and John P. Wall, Jr., for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MABRY, J. An information was filed against plaintiff in error in the Hernando circuit court on the 30th day of September, A. D. 1892, for engaging in and carrying on the business of dealer in spirituous, vinous, and malt liquors, and for selling certain of said liquors, to wit, alcohol, brandy, whisky, gin, rum, wine, lager beer, and rice beer, without first having obtained a state license to engage in carrying on and conducting the same. The information, after first reciting that it is filed by the proper law officer, gave the court to be informed that "Sheldon Stringer, late of the county of Hernando, aforesaid, in the circuit and state aforesaid, on the 1st day of October, in the year of our Lord one thousand eight hundred and

ninety-one, with force and arms, at and in the county of Hernando, aforesaid, unlawfully did engage in carrying on and conducting the business" as above stated, against the form of the statute in such cases made and provided, and against the peace and dignity of the state of Florida. To this information the accused filed a plea to the effect that the state ought not to prosecute or maintain the said information against him, because on the 1st day of June, A. D. 1891, an election was ordered by the board of county commissioners of the county of Hernando upon the application of more than one-fourth of the registered voters of said county, under and by virtue of the provisions of chapter 3700, Laws Fla., to determine whether or not the sale of intoxicating liquors, wines, and beer should be prohibited in said county; that said election was duly held on the 16th day of July, 1891, in accordance with said order, after having been duly advertised according to law, and at said election a majority of the votes legally cast were in favor of prohibiting the sale of intoxicating liquors, wines, and beer in said county, as will fully appear by reference to minutes of the board of county commissioners, copies of which were attached and made a part of the plea. The copies of the minutes referred to show an order of the board calling, upon a petition of more than one-fourth of the registered voters of Hernando county, an election under chapter 3700, Laws Fla., and also a canvass in July, 1891, of the vote at this election, and a declaration of a majority of 180 votes found against the right to sell in said county. On motion of the state attorney that said plea constitutes no defense to the charge in the information, and for other sufficient grounds appearing upon its face, the court struck it from the files, and the accused filed the plea of the general issue. Upon a trial he was convicted, and adjudged to pay a fine of \$100 and costs, and from this judgment a writ of error has been sued out.

After verdict the defendant moved in arrest of judgment, because the court erred in striking out the special plea of the defendant to the information, and this motion was overruled. Exception to this ruling was taken at the time, and an assignment of error is based upon it here. The information charges the defendant with conducting the business of dealer in spirituous, vinous, and malt liquors, and selling the same without obtaining a license for this purpose, which was clearly a violation of the revenue act of 1891, (chapter 4010.) The plea sets up that in July, 1891, an election was held in Hernando county, as provided by the act of the legislature (chapter 3700) providing for an election under the local-option article of the constitution of 1885, and that the majority vote at this election was against the right to sell spirituous, vinous, and malt liquors in said county. If the election was held

and resulted as alleged in the plea, the revenue act, to the extent of authorizing the sale upon the procurement of a license, was suspended, and not in operation at the time of filing the information, and when the offense is alleged therein to have been committed. If the plea be true, there was no statute then in operation in that county to sustain the information. This point is so fully considered in the case of *Butler v. State*, 25 Fla. 347, 6 South. Rep. 67, as to render any further discussion of it here unnecessary. The plea, if true, was a complete defense to the charge contained in the information, and the court committed an error in sustaining the motion to strike it out.

Nothing need be said in reference to the other assignments of error.

For the error in striking out the plea the judgment is reversed, with directions that such further proceedings be had on the plea as are conformable to law.

(23 Fla. 12)

### HAYS v. ERNST et al.

(Supreme Court of Florida. July 11, 1893.)

WILLS—VALIDITY—CONTEST—WITNESSES—COMPETENCY.

1. A will executed in this state in the year 1885, purporting to devise both real and personal estate within this jurisdiction, but signed by only two subscribing witnesses, is valid as to the personality, if valid in other respects, though inoperative as to the real estate. The statute did not undertake to prescribe the mode of executing wills in reference to the disposition of personal property, further than to regulate the revocation of such wills when written, and the establishment of nuncupative wills. In other respects, the common-law rule controlled the execution of wills concerning personal property, and, according to this rule, such wills, when written, required no witnesses to their execution.

2. The statutory regulation (McClell. Dig. p. 987, § 9) that "no will shall be admitted to probate upon the oath of any person appointed executor or executrix thereto, when it shall appear by said will or otherwise that said person so appointed is interested in the estate therein bequeathed, or any part thereof," has reference to the admission of wills to probate in common form, and without reference to testimony over the contests of wills.

3. Under section 1. c. 1963, Laws 1874, an executor named in a will, who is also a legatee therein, is a competent witness on an issue of devisavit vel non, as this issue does not involve a transaction or communication between the testator and such legatee. Heirs at law, next of kin, and devisees are all competent witnesses as to the execution of the will.

4. Where competent testimony has been excluded, and the appellate court cannot say what would have been the result had such testimony been admitted and considered, the judgment will be reversed.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

To the petition of Daniel Hays that an instrument purporting to be the will of Johann C. Lehmann, deceased, be admitted to probate as such, A. W. Owens, in behalf of the state, filed a petition in contest. From

a decree rejecting the will, proponent appeals. Reversed.

M. C. Jordan and A. W. Cockrell & Son, for appellant. J. R. Parrott, for appellees.

MABRY, J. On the 9th day of October, A. D. 1885, Hays, the appellant, presented to the county judge of Duval county a writing purporting to be the last will and testament of Johann Christian Lehmann, accompanied with a petition setting up the fact that said writing was executed by Lehmann as his last will and testament, and praying that the same be probated as such. The writing claimed to be Lehmann's will, and presented to the county judge, purports to devise to the proponent, Hays, real estate situated in Duval county, Fla., and in Franklin county, Ohio, and also all the bank account of Lehmann with the Florida Savings Bank & Real Estate Exchange, in the city of Jacksonville. This writing is signed by Johann Christian Lehmann, and attested by John H. Brown and George W. Wetmore, and the attestation is that said "instrument was at the date thereof signed, sealed, and published and declared by the said Johann Christian Lehmann as and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses." Brown and Wetmore made oath before the county judge that Lehmann, on the 18th day of September, 1885, in their presence, subscribed said instrument as his last will and testament, and that affiants, at the request of Lehmann, and in his presence, and in the presence of each other, subscribed their names as witnesses; also that, at the time of subscribing his name to said instrument, Lehmann was over 21 years old, and was of sound mind. Lehmann died on the 19th day of September, 1885, in the city of Jacksonville, where he had resided for some time before his death.

After the presentation of the alleged will to the county judge for probate, and without any action thereon by him, A. W. Owens presented a petition in the county court of Duval county, addressed to the judge thereof, and therein alleged that Lehmann died in Duval county, Fla., on the 19th day of September, A. D. 1885, and, as petitioner was informed and believes, without leaving any heirs at law. The proceedings on the part of Hays in presenting to the county judge the instrument of writing as the will of Lehmann, with the request that it be probated, are set out in the petition; and, further, that, to the best of petitioner's knowledge, information, and belief, said Lehmann, at the time of the making of said instrument, was non compos mentis, and also that said instrument purporting to be his last will and testament was not signed by him, but by some one else, without his

request or consent. It is also alleged that, if said instrument for any reason be invalid, the property of Lehmann, both real and personal, will escheat to the state of Florida, and that petitioner is the attorney and representative of the state in the county of Duval.

The prayer of the petition is that the court will inquire into the premises, as provided by law, and will declare said instrument null and void, and appoint an administrator to take charge of and administer the goods and chattels of said Lehmann, deceased.

This petition was presented on the 16th day of October, A. D. 1885, and on the 18th of March, 1886, an order was made by the county judge, as it is recited by agreement of counsel, that the contest in the matter of the will of Johann Christian Lehmann be heard on a subsequent day in that month.

The record discloses the testimony of several witnesses taken before the county judge in reference to the execution of the alleged will by Lehmann, and also the decision of said judge that the said instrument was not the last will and testament of said decedent, and should not be allowed to probate in said court. An appeal was taken from this decision to the circuit court of Duval county, and, upon argument there, the circuit judge decided that there was no error in the record of the county court, and its judgment was affirmed. The record is now before us on appeal from the decision of the circuit court.

It is testified that four persons, Hays, the sole beneficiary in the will, Brown and Wetmore, the subscribing witnesses, and Clem Johnson, were present when it was executed, and that Lehmann asked Johnson to sign also as a witness, but he was told that two would do. The judge refers in his opinion to the fact that the will was signed by only two witnesses. At the time of the execution of the instrument in question, wills devising real estate were required by statute to be attested and subscribed by three or more witnesses, or else they were void and of no effect. *McClell. Dig. p. 985, § 1.* This means they were void and of no effect as devises of real estate. The statute did not undertake to prescribe the mode of executing wills in reference to the disposition of personal property, further than to regulate the revocation of such wills when written, and the establishment of nuncupative wills. In other respects the common-law rule controlled the execution of wills concerning personal property, and, according to this, such wills, when written, required no witness to their execution. *Meyer v. Fogg, 7 Fla. 292; Schouler, Wills, § 318.* The instrument offered for probate in the case before us purports to devise both real and personal property, and, so far as being a will of the realty, it must fail in this jurisdiction, because it has only two attesting and subscribing witnesses. *Croly v. Clark, 20 Fla. 849.* The

county judge would for this reason have been justified in refusing to probate the instrument as a bequest of real estate, but the absence of subscribing witnesses would not be enough to sustain its rejection as a will of the personalty, provided it had the requisites of a valid will for this purpose in other respects. While the county judge refers in the opinion rendered by him to the fact that the alleged will has but two subscribing witnesses, it is clear that he based his decision rejecting the proposed will in toto also upon testimony before him, and regarded as competent. The decision, in effect, on the testimony, was that Lehmann did not execute the instrument offered as his will, and hence it was not entitled to be probated for any purpose. The proponent (appellant here) insists that the county judge committed an error in his ruling on the testimony, and that the judgment should be reversed on this account. This will necessitate a brief reference to the testimony and the rulings of the court thereon.

Hays, Brown, Wetmore, and Johnson testified for proponent that they were present when the instrument was executed, and saw Lehmann sign the same as his will in their presence, and that Brown and Wetmore, at his request, in his presence, and in the presence of each other, signed it as witnesses. Hays is named as executor of the will, and is sole beneficiary therein. At the time of Lehmann's death he was occupying a room in Hays' house, and died there. Hays says he let Lehmann have a room after he had failed to get one anywhere else, and he expressed great appreciation for this kindness, and said that he had been sick for many years. While staying in Hays' house, Lehmann bought real estate in Jacksonville, and consulted Hays about the purchase, and seemed to place great confidence in him. Hays testified to attentions shown by him to Lehmann during his last illness, and about his wanting to make a will, and asking Hays to get some one to write it for him. He then testified to the writing of the will and its execution as above stated, and also of Lehmann's death, the day following. Two other witnesses testified for proponent that they were familiar with Lehmann's handwriting, and gave it as their opinion that his name signed to the alleged will was genuine. In opposition to this showing for the proponent, caveator introduced four witnesses, two of whom, as experts, in comparing the signature to the alleged will and the signature to a note and mortgage introduced in evidence, and shown to have been signed by Lehmann, say that, in their opinion, the signatures were not made by the same person, and that the signature to the will was not genuine. Two other witnesses, who were familiar with Lehmann's handwriting, and who were employees in banks where he did his business, say that they would not have paid checks for Leh-



mann with the same signature on them that is on the will. The will and also the signature of Lehmann, shown to be genuine, signed to a note and mortgage, were before the county judge when he made his decision. In considering the case, the county judge ruled out and refused to consider the testimony of Hays, on the ground that he was an interested party. Was this ruling correct on the issue then before the county judge? The statute provides that "no will shall be admitted to probate upon the oath of any person appointed executor or executrix thereto, when it shall appear by said will or otherwise that said person so appointed is interested in the estate therein bequeathed, or any part thereof." *McClell. Dig. p. 987, § 9.* This statute was passed as an amendment to the one passed the year before, authorizing wills to be admitted to probate upon the oath of any person appointed executor or executrix thereto. *Id. p. 986.* These provisions had reference to the admission of wills to probate in common form, and without reference to testimony over the contests of wills. They provided that wills might be admitted to probate upon the oath of the executor or executrix when not interested in the estate devised, or, where there was no executor or executrix, upon the oath of any credible person having no interest under the will, that he or she verily believed the writing exhibited as the last will and testament to be the true last will and testament of the deceased. When a will, with all the essential requisites as to its execution, and apparently genuine, is exhibited to the county judge for probate, he would be authorized, under the provisions of the statute and on the oath of the party mentioned, to admit it to probate. The oath of the disinterested executor or other credible person is the formal proof required by the statute to admit the will to probate in such cases, but it has no reference to the competency of persons to testify to material matters on a contest of the will. Section 1, c. 1983, Laws 1874, provides that "no person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto;" and the proviso to this section, excluding certain interested persons from testifying in regard to any transaction or communication between such persons and a party at the time of examination deceased, does not, in our judgment, exclude Hays from testifying as a witness to the probate of the will which was the subject-matter of consideration before the court. A proceeding to establish or invalidate a will rests upon different grounds from ordinary causes of action, and is in the nature of a proceeding in rem. The heirs at law and next of kin and devisees are usually nominal parties, but the proceeding is between living parties. The cause of action

does not exist until after the death of the testator, and he is in no sense then a party to the proceeding. On a contest of a will, the subject-matter of investigation is the act of the testator in executing the will, and the proceeding is directed to this matter. The execution of a will is not a transaction or communication between the testator and a legatee, and the heirs at law, next of kin, and devisees are competent witnesses as to the factum of the execution of the will. *Garvin's Adm'r v. Williams*, 50 Mo. 206; *Shaller v. Bumstead*, 99 Mass. 112; *Lawyer v. Smith*, 8 Mich. 411; *Snider v. Burks*, 84 Ala. 53, 4 South. Rep. 225; *Kumpe v. Coons*, 63 Ala. 448; *Milton v. Hunter*, 13 Bush, 163. The county judge committed an error, then, in excluding from his consideration the testimony of Hays on the ground of interest. What would have been the result had Hays' testimony been cast into the judicial scale we cannot say. The decision was against the validity of the will, and, as it cannot be said that there was no conflict of evidence on this point, the exclusion of competent evidence was error. *Simmons v. Spratt*, 26 Fla. 449, 8 South. Rep. 123; *Dickey v. Malechi*, 6 Mo. 177.

So far we have considered the case, as it seems by the record to have been presented in the county court, as a contest of the proposed will on the caveat filed by the state attorney, alleging a failure of heirs on the part of Lehmann, the alleged testator. In the opinion rendered by the county judge, rejecting the will for probate, it is stated: "It is a well-established principle of law that no one but an heir of the realty, or entitled to distribution, has a right to contest the probate of a will or a devise of the realty; and it is contended by counsel for petitioner that A. W. Owens, Esq., representing the state of Florida, has no right to appear in opposition to the application for probate of the alleged will; but there is evidence before this court that said Lehmann left heirs surviving him, and A. W. Owens, Esq., is now recognized by the court as counsel and proctor for and in behalf of the heirs and legal representatives of said Lehmann." In the bond filed by the appellant in the appeal from the county court to the circuit court, Frederick Ernst and several others are named as obligees, and it is therein recited that they contested the probate of said will; and in the bond filed on appeal to this court the same parties are mentioned as obligees, and it is also recited that they were contestants of said will. There is nothing in the record, except what is recited in the opinion of the county judge above and the recitals in the appeal bonds, to show that Lehmann left any heirs, or that any contest of the will was made in their behalf in the county court. Upon the filing of the caveat on the part of the state attorney, the record recites that, upon

agreement of counsel, the contest of the will of Lehmann was fixed for hearing on a certain day. Testimony was taken, and, in rendering judgment thereon, reference is made for the first time to the heirs, and their representation by the caveator, who had commenced the contest by filing the petition against the probate of the will.

It is said in *Meyer v. Fogg*, 7 Fla. 292, that the only persons competent to contest the will then under consideration were the heirs of the realty or distributees entitled to the personalty, and there should be allegation and proof of such fact. The contestants of the will in that case, failing to show such a status, were not entitled to a standing in court. The testator left heirs in that case. The county judge had jurisdiction of the contests over the probate of wills, and the only statutory regulation as to the practice before him in such matters at the time of the decision in the case before us is that in chapter 1627, Acts 1868. *Lavey v. Doig*, 25 Fla. 611, 6 South. Rep. 259. Chapter 3886, Acts 1889, makes special provision for the contests of the probate of wills, and this act is declared to be applicable to wills of persons who had died prior to its passage, and which had not been admitted to probate, as well as to wills of persons who should die after its passage; but the decision in this case was made before this act went into effect.

The act of 1868, *supra*, provides that the pleadings in the county court, sitting as a court of probate, shall be in writing, and shall be (1) the complaint by petition, and (2) the answer or demurrer; and that, upon filing the answer, the cause shall be at issue. Considering an issue by agreement of parties to have been made upon the petition of Hays to have the will probated and the caveat of the state attorney, the case presented in the county court was between them, and, confined strictly to the record, there is nothing to show that the heirs of Lehmann, if he left any, were before the court as contestants of the will. One of the assignments of error in the circuit court (and the same is renewed here) was that the alleged heirs of Lehmann were not parties to said cause by any appropriate or legal proceeding, and were not, in fact, contestants of said will. As we have above stated, the issue strictly presented on the record in the county court was on the caveat filed by the state attorney, on the theory that there were no heirs of Lehmann; and, considering it from this standpoint, the county judge committed an error in excluding the testimony of the proponent, Hays, if for no other reason. The same result would follow if we were to recognize A. W. Owens as representing the heirs of Lehmann. Inasmuch as the case must be reversed, it is deemed proper to direct that, upon the return of the mandate of this

court, an issue be properly made on the petition of the heirs of Lehmann, if he left any, and they desire to contest the said will, and that due proceedings be had thereon as provided by law.

(33 Fla. 1)

**LEDWITH v. CITY OF JACKSONVILLE**  
et al.

(Supreme Court of Florida. June 14, 1893.)

**EQUITY PLEADINGS—SUPPLEMENTAL BILL—NEW MATTER.**

1. A cross bill is one brought by a defendant in a suit against the complainant in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill, and is considered as an auxiliary suit, or as a dependency upon the original bill, and can be sustained only on matter growing out of the original bill. Such cross bill may set up new matter arising subsequently, but still it must constitute part of the same defense, or relate to the same subject-matter in such a way as to be a defense to the original suit.

2. A supplemental bill is considered merely as an addition to the original bill, and, while it is often permissible and proper to introduce matter that has occurred after the institution of the suit, and of such a nature as cannot be properly the subject of an amendment, yet such new matter must not be such as to change the rights and interests of the parties before the court.

3. The matter brought forward in the supplemental cross bill in the case at bar *held* to be no defense to the original bill filed against the city of Jacksonville, appellee here.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; W. B. Young, Judge.

Bill by William M. Ledwith against the city of Jacksonville and others for an injunction. Supplemental bill by defendants against complainant to dissolve the writ granted on complainant's bill, and for other relief. From a decree dissolving the injunction, complainant appeals. Reversed.

Cooper & Cooper, for appellant. Stephen E. Foster, for appellees.

**MABRY, J.** In September, A. D. 1889, the appellant, William M. Ledwith, filed a bill in the circuit court for Duval county against the city of Jacksonville, the city council and the board of health of said city, to enjoin them from preventing him and his tenants from selling fresh meats and dressed poultry in a building situated on the east half of water lot No. 10 in said city. The building is alleged to be the property of appellant, and was constructed with the approval and sanction of said city, and had for some eight or nine years before the filing of the bill been used as a public market for the sale of fresh meats and dressed poultry for the city of Jacksonville under contracts with said city, and the said building was at the time of filing the bill in every respect suitable for a public market, and in perfect sanitary condition. The bill speci-

fied the various particulars in which said building was suitable as a public market place, including adequate and necessary refrigerator accommodations, but it does not become necessary for the purposes of this decision to set them out here.

It is alleged that the city of Jacksonville and her said officers, acting under certain pretended ordinances attempted to be passed by said city, were daily arresting the tenants of appellant doing business at his said building, and had declared their purpose to drive them away, and break up the vending of fresh meats thereat. The ordinances are alleged to be invalid for various reasons, both on account of defects on their face and on account of certain mentioned illegal objects and purposes designed to be accomplished by them. The court granted, on the prayer of the bill, an injunction restraining the city and her officers, and all persons acting or claiming to act by, through, or under any of the defendants in the bill, from preventing the complainant therein, William M. Ledwith, his tenants, lessees, or any person authorized by him, to sell fresh meat in said building; and from entering upon said building, and preventing the use of the same for the sale of fresh meat; or from denying to complainant the right of renting and leasing space and stalls therein, or any portion thereof, for the sale of such meats; and from threatening, molesting, disturbing, or annoying complainant's tenants, lessees, or any person or persons authorized by him, in the sale of fresh meats in said building; and from publicly proclaiming or declaring in the name of said city that complainant's said building, or any part thereof, should not be used for the sale of fresh meats,—until the further order of the court.

The respondents answered the bill, and therein relied upon the ordinances mentioned in the bill as authorizing and justifying their action in attempting to prevent the sale of fresh meat and dressed poultry in the said market building of complainant. The ordinances in question sought to establish a public market for the city at a building on water lot 24, new number, in said city, and to prevent the sale of fresh meat, dressed poultry, and fish at any other point, except in such one-stall markets as might be established with the permission of the city council. The answer contained many allegations not necessary to be referred to, but it is only sufficient to say that the entire defense sought to be interposed rested upon the validity of the said city ordinances.

After replication filed to the answer, the court, on the 5th day of November, 1889, refused to dissolve the injunction granted, upon motion made for that purpose, and the city appealed from that decision to this court.

The affirmance here of the court's ruling in refusing to dissolve the injunction will be found in the case of *City of Jacksonville v.*

*Ledwith*, 26 Fla. 163, 7 South. Rep. 885. The ordinances upon which the city's defense rested were held to be void, and a very full and exhaustive discussion of the grounds for so holding will be found in the opinion filed in that case.

Subsequent to the decision here, the city of Jacksonville, on the 5th day of August, 1890, passed another ordinance, which was approved the 9th day of that month, to regulate the vending of fresh meats, dressed poultry, and fish, and to establish and regulate markets. The second section of this ordinance was amended in September, 1890, the amendatory ordinance receiving the approval of the mayor on the 19th day of that month. It is only necessary to refer to the leading features of this ordinance as amended to understand its purport and objects. By it the building on water lot 24, new number, fronting on Market street, is declared to be a public market for the city of Jacksonville, and not elsewhere; and every day in the year, except Sundays, is declared to be a market day. All persons are prohibited from selling or offering for sale any fresh meats, dressed poultry, or fish at any place within the territory bounded by Duval street on the north, Catherine street on the east, the city limits on the south, and Julia street on the west, except at the said public market; and no person shall sell or offer for sale any fresh meats, dressed poultry, or fish outside of said territory, unless such person shall have a license to sell the same, procured under the provisions of the ordinance, and then only in buildings constructed, maintained, and furnished in accordance with the requirements thereof, and which buildings are thereby designated as private markets. Any person may obtain a license to sell fresh meats, dressed poultry, and fish for the period of one month by payment to the city treasurer of five dollars in advance, the license to be issued by the treasurer on receipt of the money. Such licenses shall end on the 1st of the month, and may issue for fractional portions of the month upon payment of the proper proportion of the fee, and all such licenses shall authorize the selling of fresh meats, dressed poultry, and fish only within buildings constructed and maintained in accordance with the requirements of the ordinance outside the limits prescribed in the establishment of the public market, and the other requirements of the ordinance. The ordinance contains certain general regulations in reference to the conduct of all markets in the city, such as prohibiting the bringing to or offering for sale in any market or elsewhere in the city of unwholesome meat, or any live poultry not in a healthy condition, or the flesh of any animal which was sick when butchered, or which died a natural death, or was killed by accident, or otherwise than in the usual manner of slaughtering animals for food;

the prevention of the obstruction to the passageway to and through any market house, or the deposit of decayed vegetable or animal matter in or about any market house, and the smoking of cigars, pipes, and cigarettes in a market place during market hours; the regulation of the transportation of fresh meats through the streets of the city; the establishment of scales and measures conforming to the standard of weights and measures of the state of Florida; and the creation of the office of market inspector, and prescribing his duties; and the regulation of the days and hours for keeping open the markets in said city.

The ordinance also provides that the private markets shall have water-tight floors of yellow pine heart plank or Portland cement, or both, at least one inch in thickness, placed on solid foundation. The floor surface, with reference to drainage, in said markets is regulated, and the entire construction of such markets is required to be under the supervision and approval of the city engineer, and subject to daily inspection of the city inspector. The ordinance also provides that each private market shall have but one stall, which shall be three feet wide, and six feet in length, and galvanized iron hooks shall be provided upon the stalls where meats and dressed poultry are exposed. Refrigerators must be provided for in the private markets for the storage of meats, fish, and dressed poultry, and the refrigerators shall be approved by the market inspector. The fee of five dollars required to operate a private market is declared to be a license fee for the payment of the cost of police regulation and inspection of markets, and this money, together with all other moneys collected as license fees under this ordinance, is required to be kept separate as a fund to be used exclusively for the payment of the expenses actually incurred by the city for the inspection and regulation of markets and the vending of fresh meats, dressed poultry, and fish.

The twenty-third section of the ordinance provides that the stalls in the public market shall be set apart for the sale of meats, fish, vegetables, and other provisions, as the board of public works shall from time to time direct. A sufficient number of stalls shall be provided by the board of public works to meet all demands therefor. The twenty-fourth section enacts that the stalls in the public market shall be numbered, and then rented by the board of public works to the highest bidder at public auction in the market house at 12 o'clock M. on the first Monday in November annually, provided that until November next the board may make such arrangements for the renting of stalls as they may deem proper. Any stall or stalls which may thereafter at any time be unrented or unoccupied shall be rented by the board of public works un-

til the first Monday in November to the highest bidder at public auction in the market house, after such notice as the board of public works may deem reasonable, such notice to be posted on a bulletin board at one of the entrances to the public market; but no stall shall be rented for a longer period than one year, and the terms of payment shall be monthly, in advance, with security in double the amount of the rent which will accrue by the first Monday in November next ensuing, which security shall be approved by the board of public works. The board of public works shall mark out in the public market building such space or spaces as they may deem necessary to be used for refrigerators, and shall advertise and sell to the highest bidders such spaces at public auction, giving such notice thereof as they may deem necessary. The space so advertised may be sold for such length of time, and with such privileges of renewals, as the board of public works may deem advisable.

The punishment provided for a violation of any of the provisions of the ordinance is a fine not exceeding \$500, or by imprisonment for a term not longer than three months for the same offense.

On the 5th day of September, 1890, and after the return of the mandate of this court to the circuit court, the respondents in the bill of complaint made a motion to dissolve the injunction before granted, on the ground that since the granting of the same the ordinance above referred to had been passed, approved, and published by the proper authorities of the city of Jacksonville, the provisions of which were being daily violated in complainant's building, and that by the terms of said injunction said city is restrained from enforcing said ordinance. This motion was refused on the ground that the court could not act upon the matter in the present condition of the record.

In January, 1891, respondents, by their solicitor, filed a petition to be allowed to file a bill in the nature of a supplemental bill, and therein set forth the proceedings in the cause up to and including the decision of this court on appeal; and also that since the affirmance of the decision of the lower court new matter had transpired and arisen, important and material in the cause, and which new and material matter is alleged to be the passage of the ordinance of August, 1890, with its amendment in the following September; that under this ordinance the board of public works of said city has numbered the stalls in the public market, and at 12 o'clock M. on the first Monday in November, 1890, offered them for rent at public auction to the highest bidder, as provided in said ordinance. Further, that a large number of persons, tenants of complainant, Ledwith, are daily engaged in selling fresh meats in his said building in viola-

tion of said ordinance, which is reasonable and just, and under it suitable accommodations have been and will continue to be furnished, and that, as said city and its officers are advised, the injunction heretofore granted is still in force, and any attempt on their part to enforce said ordinance against the tenants of said complainant will render them liable to punishment for contempt of court, and that said city and its officers are by said injunction deterred and prevented from carrying out and enforcing said ordinance.

It is also stated in this petition that the passage of the said ordinance with its amendment in August and September, 1890, annihilated all right of said complainant to the relief prayed for in his bill, but under the circumstances respondents were not able to put in issue the said ordinance, or plead the same in bar of his said suit. The petition prays that the order dated the 5th day of November, 1890, overruling the motion to dissolve the injunction, be vacated and set aside, and that respondents be granted leave to file an original bill in the nature of a supplemental bill against said complainant, Ledwith, with apt words to set forth the said new matter above mentioned, and that the cause be reheard at such time as a hearing may be had upon the supplemental bill.

Upon consideration of this petition the court granted leave to file the bill prayed for, and on the same day (21st of January, 1891) respondents filed a bill in the nature of a supplemental bill.

The allegations in Ledwith's bill against the city and its officers, their answer thereto, and the former proceedings in the cause up to and including the decision of this court on the appeal from the order refusing to dissolve the injunction, are referred to in and made a part of this supplemental bill.

It is further alleged that since the said proceedings the city of Jacksonville in legal form has passed the ordinance of August, 1890, with the amendment, to which reference has been made, and that under its provisions the board of public works of said city has numbered the stalls in the public market mentioned in said ordinance, and at 12 o'clock M. on the first Monday in November, 1890, offered said stalls for rent at public auction to the highest bidder. That a large number of persons, tenants of said William M. Ledwith, are daily engaged in selling fresh meats and dressed poultry in the said Ledwith building on water lot 10, within the territory bounded by Duval street on the north, Catherine street on the east, the city limits on the south, and Julia street on the west, and not at the public market established by the city in and by the said ordinance. That the city of Jacksonville and its officers are prepared to furnish ample accommodations in the building established as and for a public market for all persons desiring to engage in the business

of selling fresh meats, dressed poultry, and fish within the said prohibited territory, and that said accommodations are offered and will be furnished at a fair and moderate rental on reasonable terms of payment, and which rental is less than Ledwith charges his tenants. Further, that the said ordinance is reasonable and just, and the enforcement of its provisions is expedient and necessary for the promotion of the welfare and prosperity of the citizens of said city, and the protection of the health of the same, and that said ordinance is valid and legal, and that the selling of fresh meats, dressed poultry, and fish by the tenants of the said Ledwith in his said building is in violation of said ordinance; but complainants in the supplemental bill are advised that the injunction heretofore granted is still in force, and any attempt on the part of the said city or its officers to enforce the provisions of said ordinance as against the said Ledwith and his tenants will render them liable to punishment for contempt, and that said city is deterred by said injunction from carrying out and enforcing said ordinance against the said Ledwith and his tenants. That by the passage of said ordinance all right of the said Ledwith to the relief prayed in his bill has become annihilated, but, under the circumstances, complainants in the supplemental bill are unable to put in issue said ordinance, or plead the same in bar, in the suit of Ledwith against him.

The special prayer of this bill is that said ordinance be declared a sufficient bar to any further proceedings by said William M. Ledwith in his said suit, and that his said bill may be dismissed.

Ledwith, through his counsel, made a motion to strike from the files the bill in the nature of a supplemental bill, on the ground that it does not state a proper case for such a bill. This motion was denied, but it was ordered by the court that said bill stand as a supplemental cross bill. Ledwith answered this bill, and, upon replication filed, proof was taken, and final decree rendered in favor of the complainants in the supplemental cross bill, and the injunction formerly granted in the cause was modified so as not to interfere with or in any manner hinder the enforcement of the provisions of the said ordinance by the city, and that said injunction be dissolved, and said ordinance as amended be a sufficient bar to any further proceedings by said Ledwith in his said suit. Ledwith has appealed from this decision.

In view of the conclusions reached on this record it becomes unnecessary to refer specially to the allegations of Ledwith's answer to the supplemental cross bill. It is sufficient to say that his answer attacks the subsequent ordinance of 1890 as amended, both upon matters apparent upon its face and on account of the objects, purposes, and motives of its passage.

It is clearly manifest from the record that

the acts and doings of the city of Jacksonville and her officers, about which Ledwith complained in his bill, and against which he sought and obtained an injunction, occurred long prior to the passage of the ordinance of August, 1890, and which is set up in the cross bill filed by the respondents to the original suit. Ledwith's bill was filed in September, 1889, for the purpose of restraining the city of Jacksonville and her officers from arresting his tenants and molesting him in the conduct of a market business at a certain building situated in the city, by virtue of certain pretended ordinances attempted to be passed by said city in that year. The city relied upon said ordinances as a justification for her acts and doings in preventing complainant from carrying on the market business for the sale of fresh meats at his said building. The ordinances then in question were void, and have been so declared. *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. Rep. 885. Some 12 months after the filing of Ledwith's bill, and after the ordinances brought in question by that bill had been declared void, the city of Jacksonville ordained another ordinance on the subject of vending fresh meats, dressed poultry, and fish, and this ordinance is brought forward in what is called a "supplemental cross bill" to modify and vacate the former injunction granted in the case. The question is, to what extent can this be done? Judge Story, in his book on Equity Pleading, (section 389), says: "A cross bill *ex vi terminorum* implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill." He also says that such bill is usually brought either to obtain necessary discovery of facts in aid of a defense to the original bill, or to obtain full relief to all parties touching the matters of the original bill. The subject-matter of the cross bill must be the same, or, as expressed by the author just quoted, must touch the matters of the original bill. A cross bill is considered as an auxiliary suit, or as a dependency upon the original bill, and can be sustained only on matter growing out of the original bill. While the cross bill may set up new matter arising subsequently, still the new matter must constitute part of the same defense, or relate to the same subject-matter. Without such restriction, new matter might be introduced into litigation by cross bills without end. As a complete defense to the original suit, a cross bill may become proper and necessary, but it cannot be converted into a separate and distinct suit relative to other and different matters, or become the foundation of a decree concerning matters not embraced in the original suit. *Slason v. Wright*, 14 Vt. 208; *Town of Rutland v. Paige*, 24 Vt. 181; *May v. Armstrong*, 3 J. J. Marsh. 280; *Daniel v. Morrison's Ex'r*, 6 Dana, 182; *Galatian v. Erwin*, 1 Hopk. Ch.

58; *Field v. Schieffelin*, 7 Johns. Ch. 250; *Pindall v. Trevor*, 30 Ark. 249; *Cross v. De Valle*, 1 Wall. 5; *Canant v. Mappin*, 20 Ga. 730; *Griffin v. Fries*, 23 Fla. 173, 2 South. Rep. 266. In *Rubber Co. v. Goodyear*, 9 Wall. 807, the rule stated by the supreme court of the United States is as follows, viz.: "A cross bill is brought to obtain a discovery in aid of a defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross bill, though it may have a connection with the same general subject." In *Pindall v. Trevor*, supra, it was ruled that where the allegations of a cross bill are foreign to the subject-matter of the original bill, it should not be allowed to be filed, or, if filed, should be stricken out. It is said that a cross bill may be filed to answer the purpose of a *plea puis darrein continuance* at the common law, —as where, pending a suit, and after replication and issue joined, the defendant obtains a release. The release not being in issue, he will not be permitted to prove it, and hence the necessity of making such an issue in the pleadings. *Mitt. Pl.* 124. But, while this is true, it is essential that the new matter brought forward in the cross bill be so related to the subject-matter of the original suit as to be in defense of it. This is the rule sustained by the authorities.

The introduction of the new matter in this case by what is designated a "supplemental cross bill" does not change the rule as to the nature of the matter to be brought into controversy in the case. A supplemental bill is considered merely as an addition to the original bill, and while it is often permissible and proper to introduce matter that has occurred after the institution of the suit, and of such a nature as cannot be properly the subject of an amendment, yet such new matter must not be such as to change the rights and interests of the parties before the court. *Story, Eq. Pl.* §§ 332, 336; *Honor v. Hanks*, 22 Ark. 572. Calling the pleading here a "supplemental cross bill" does not alter the case.

How can the passage of the subsequent ordinance in 1890 in any way validate or sustain the action of the city authorities in attempting to enforce the void ordinances passed in the year 1889? We are unable to see that it can be invoked for any such purpose. Ledwith's bill was directed against the acts of the city in 1889, under void ordinances, and it has been adjudicated that such acts were illegal, and without proper municipal authority. The city of Jacksonville has not undertaken to validate, if it had such authority, the void ordinances, but has passed a new ordinance on the same subject,—that of vending fresh meats. Conceding that such new ordinance is valid, it is

entirely prospective, and can afford no protection for anything done before it went into effect. A prospective law does not affect the rights of parties accruing before its passage. This being the case, the passage of the city ordinance in 1890 is not so related to the subject-matter of the original suit between Ledwith and the city as to be the proper subject of litigation in it. *Draper v. Gordon*, 4 Sandf. Ch. 210. The ground upon which such new matter is sought to be introduced is, we think, entirely without support. The injunction originally granted on Ledwith's bill was based upon allegations therein, and cannot be held to prohibit the city, by legal ordinances, from regulating in a legal manner the sale of fresh meats, dressed poultry, and fish in the city. The object of Ledwith's bill was not to prevent the city of Jacksonville from passing ordinances on the subject of vending fresh meats, or of enforcing them. The language of the injunctive order cannot be so construed. When it was ordered that the city and her officers be restrained from arresting Ledwith's tenants, from molesting him and his agents in the sale of fresh meats at the building mentioned, or from publicly proclaiming and declaring in the name of the city that said building cannot be used for the sale of fresh meats, it had reference to the rights of the parties as then existing and disclosed by the averment in the bill. Considering the case made by the original bill, and the injunction granted thereon, we think it entirely clear that the city was placed thereby under no legal restraint as to future action in regulating by ordinance market houses, although it might affect the market house of Ledwith. If such was the case, the city was in contempt in passing the subsequent ordinance of 1890, as it was therein declared that a certain building other than that of Ledwith should be the public market within certain territory in said city, and it prohibited the sale of fresh meats at any other public market. We think the court was in error in permitting the supplemental cross bill to stand, and in making any decree upon the matters therein contained affecting in any way the former decision of the court.

The entire trial in the circuit court was upon the issues involving the validity of this ordinance presented by the cross bill and answer thereto, and the argument of counsel here is confined to these issues. These issues, as we have seen, were not proper to be introduced into the original suit of Ledwith, and the only way they can come into consideration is by treating the cross bill as an original bill, and presenting an entirely new suit. If we were to do this, we fail to discover any equitable grounds upon which the city can stand. So far as we know, all that she has done is to pass the ordinance sought to be brought in question, and has not undertaken to enforce it in any way. No one is complaining, so far as we know,

of anything done under the ordinance, and no question has arisen on account of any acts by virtue thereof. The cross suit, as an independent action, must have an equity to support it. *Griffin v. Fries*, supra. If the ordinance be valid, the city is invested with legal power to enforce it, and if it be invalid it will be the privilege of any one affected by its attempted enforcement to call it in question.

On the record before us we do not see that we are called upon to say anything as to the validity of the ordinance passed in 1890.

The decree of the court appealed from must for the reasons given be reversed, and judgment will be entered here accordingly.

(51 Fla. 541)

### HOEY et al. v. JACKSON.

(Supreme Court of Florida. May 17, 1893.)

#### CANCELING JUDGMENTS AT LAW—NEGLIGENCE OF PLAINTIFF.

1. Fraud, accident, and mistake are the principal grounds upon which courts of equity act in granting relief against legal proceedings, and in relieving parties against judgments at law; but the party asking relief in such cases must show that he could not avail himself of such defense at law, or, if such defense could have been made there, he was deprived of an opportunity of presenting the same, without fault on his part, by the fraud or circumvention of the opposite party.

2. Where a party has been regularly served with process in a cause, and neglects to appear and defend the suit, but suffers judgment to be taken by default, and he has not been prevented from making a defense by fraud or accident, unmixed with negligence on his part, a court of equity will not afford him any relief against the judgment.

(Syllabus by the Court.)

Appeal from circuit court, Alachua county; Jesse J. Finley, Judge.

Bill by Cordelia Hoey and another against Thomas E. Jackson, executor, to cancel a judgment in ejectment, and for other relief. From a decree dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by MABRY, J.:

Cordelia Hoey, in her own right, and as administratrix of Cason Cooper, deceased, and Charles Hoey, who joined in the right of his wife, Cordelia, filed a bill in 1884, in the circuit court for Hillsborough county, against John Jackson. The essential features of this bill are, in substance, as follows:

That in 1866 Cordelia Hoey (then Cordelia Cooper) purchased lot 6 of block 62, according to the survey and map of the town of Tampa, for the sum of \$250, of her own separate property, and the party from whom the purchase was made conveyed to her husband, Cason Cooper, lot 4 of block 62 of said town, instead of said lot 6 of block 62, as was intended. That at

the time of the purchase said Cordella and her husband, Cason Cooper, were placed in possession of said lot 6 by the vendor, and that they occupied said lot as a home for many years. In 1872 the mistake in the description of said lot was discovered, and the vendor undertook to correct it by describing lot 6, block 62; but a further mistake was made, in referring to the map as made in 1854, which was not correct, the map being made in 1853. That Cason Cooper had died before the correction was made in 1872.

That the sheriff and ex officio tax collector of Hillsborough county sold on the 2d day of March, 1868, the east half of said lot 6, block 62, and one W. E. Sweat became the purchaser, but that the sale was void for the following reasons: First, the assessment against Cason Cooper was illegal, in this: that he was assessed upon two promissory notes for \$5,000 at their full face value, when said notes were worthless; second, the personal property of said Cooper was not first sold, before resorting to the sale of the land; third, the tax sale was not advertised the length of time required by law, nor did the advertisement contain the proper description of said lot, nor did the assessment contain a correct description of the premises; fourth, said sale was not conducted in accordance with law, and that respondent is charged, in law, with knowledge of all the foregoing facts. That in March, 1868, said sheriff and ex officio tax collector executed and delivered to said respondent a deed attempting to convey to him the title to the said east half of lot 6, block 62, but that said deed is null and void in law, because the sale of the lot of land sold was illegal and void, and the deed, upon its face, fails to show a compliance with the law. That, having heard that Sweat had sold his interest in the lot under the tax sale to respondent, said Cordella went to Tampa for the purpose of redeeming the lot from tax sale, and, seeing respondent, informed him that she had heard he intended to buy Sweat's interest as purchaser at the said tax sale, and he replied that he intended to buy it, and hold onto the land, if he could. That she then warned him not to buy the said lot, as it would certainly be redeemed; and this was a short time, as she is informed, before he bought said tax claim from Sweat. A short time after hearing that respondent had purchased Sweat's tax claim, said Cordella and her husband, Cason Cooper, obtained the necessary funds with which to redeem said lot from said tax sale; and, Cason being feeble in body, Cordella took the money to the storehouse of respondent, and, upon entering the store, saw him, but, seeing her, he went into the back room of the store, and failed and refused to return into the store, in order to avoid seeing her. But she

charges that she went to respondent's store with the necessary money to redeem the lot of land, and with the purpose of redeeming it, or making a tender of the money, but that respondent, knowing her purpose, avoided seeing her, because he did not want her to redeem said lot, so that he could, by his fraud and deceit, obtain title to the same, against conscience and the law of the land.

That within two or three days after she went to the store of respondent to redeem said land, and within the time limited by law for the redemption of lands sold for taxes, her husband, Cason Cooper, went to said respondent, and tendered to him the amount, in lawful currency of the United States, sufficient to redeem said lot of land, but respondent refused to accept the same, and the only reason given by him for his refusal was that he had gotten hold of the land, and intended to keep it; and so complainants charge that respondent refused said tender for the purpose of defrauding said Cason Cooper and his wife, Cordella, of their said lot of land.

Further, that the said Cason Cooper informed his wife, Cordella, of what he had done, and upon this information it is charged that after the foregoing tender was made and refused the said Cason Cooper sought legal advice from his attorney, and again saw said respondent, and counted out to him, in the presence of two witnesses, an amount of money, of lawful currency of the United States of America, sufficient to redeem said lot of land from said tax sale, and demanded of him a cancellation and delivery up of said deed to said lot of land, executed by the said tax collector, and said respondent, without making any objection to the sufficiency of the money, or quality of the same, refused to accept said tender unless the said Cooper would also then pay to respondent a store account then claimed to be due. That said Cooper then stated he would pay his store account as soon as he could, but that he wanted them to redeem his lot from taxes, and said respondent again refused to accept the same; and complainants charge that said respondent, desiring to use the forms of law in furtherance of his unlawful purpose to defraud them of said lot of land, refused to deliver up, and have canceled, said deed, and held the same, and still holds the same, to the injury of said oratrix.

That Cason Cooper departed this life in January, 1871, intestate, leaving the said Cordella his sole heir at law, and letters of administration were granted to her in 1871 on the estate of said decedent. That all the debts of said estate that have been presented to her have been paid, and there remains nothing to be done by her, as administratrix of said estate, except to obtain a final discharge.

That in furtherance of his design to defraud the said Cordella of said lot of land, and to cast a cloud upon the title to the



same, respondent, in May, 1871, caused the said tax deed obtained from the said tax collector to be recorded upon the records of deeds of said county, but he well knew that he had no right to said deed, and that the same was no evidence of title, as between him and the said Cordella. That said deed was recorded for the purpose of casting a cloud upon the title of Cordella to said lot of land, and of defrauding her of said property. That in furtherance of his design to defraud complainant Cordella Hoey of said land, respondent employed an attorney in reference to this matter, and the attorney so employed spoke to complainant Charles Hoey in 1872, and told him that his wife, Cordella, formerly Cordella Cooper, owed respondent, and he would sue her, and that said complainant, not knowing anything in reference to said indebtedness, and having the utmost confidence in the said attorney, and not wishing to have his wife sued, paid to the said attorney of respondent the sum of \$25, and for which said attorney executed a receipt acknowledging the payment of said sum of money from said Charles Hoey on account of tax on house and lot, the said receipt bearing date May 2, 1872. That said house and lot mentioned in the receipt are the same referred to in this bill, and which are the subject of this suit, and the tax mentioned is the same that was tendered to the said respondent, as hereinbefore alleged, and that said Cordella never owned any other house and lot, and never owed any tax on any other house and lot to respondent; and it is charged that he, for the purpose of defrauding complainants, had the said tax deed to said lot recorded, and at the same time setting up, through his said attorney, the inconsistent claim of the tax due on the said house and lot.

That, for the purpose of defrauding the said Cordella of her said lot, respondent waited until the death of her husband, Cason Cooper, before resorting to the plan of defrauding her of her said property, because respondent well knew that the said Cooper would defeat any attempt on his part to obtain possession of said lot. That after being deprived, by death, of the advice and knowledge possessed by her said husband, respondent had his said tax deed recorded, and in August, 1873, instituted a suit of ejectment against the said Cordella in her own right, and as administratrix of Cason Cooper, deceased, and her then husband, Charles Hoey, and their tenant, to dispossess them of said lot of land. That summons in said suit was served on the said defendants therein in August, 1873, but respondent well knew he had no right to said lot, and resorted to the forms of law for the purpose of carrying out his scheme to defraud complainants of said lot of land.

Fearing that respondent would institute suit to get possession of said lot, the said Cordella sought the advice of an attorney learned in the law, residing at Tampa, and,

upon expressing her fears to him in reference to said contemplated suit, he advised her to go home, and rest contented, as he knew all the facts of her case, and that respondent could never get possession of her lot, and that he would attend to the matter, and give attention to any suit that respondent might institute against her. That, relying upon said assurances, she returned to her home, and, being ignorant of the law and the procedure in the courts, thought she had done all that was necessary for her to do, and when she was served with the summons in said suit she sent the copy to her said attorney, and rested contented, and thought that if her said attorney needed her presence he would inform her, but did not deem it necessary to go to court until advised to do so by her attorney. That nothing was done in said suit, except filing the praecipe and issuing summons, until in July, 1874, when the declaration was filed. That in October, 1874, a motion was made by attorney for respondent for judgment by default against the defendants therein, and although there was no appearance entered, and no plea filed therein, no judgment was entered on said motion. That on the 13th day of October, 1875, respondent, by imposing upon the court, in its ignorance of the truth of the case, and knowing that he had no right to the same, obtained a judgment by default against the defendants therein for the possession of said lot, and, imposing upon the court, respondent caused a jury to be impaneled, and, as complainants are informed, introduced before said jury, as evidence of his right to possession of said lot, the said void tax deed, and that this was all the evidence before the jury, and that they, not knowing all the facts of said case, and not knowing that said deed was void, did render a verdict in favor of respondent for the possession of said lot of land, and \$129.66 for damages, and judgment of court was entered in favor of respondent on said verdict, for said lot and damages.

That in furtherance of his design to defraud the said Cordella of her lot of land, and imposing upon the officers of the court, respondent, in December, 1875, caused a writ of possession to be issued, and placed in the hands of the sheriff of Hillsborough county, and said sheriff executed said writ on the 4th day of December, 1875, by ousting said Cordella and her tenant, and putting said respondent into the possession of said lot.

It is then alleged that respondent, from the inception to the termination of the suit, and the execution of the writ of possession, fraudulently used the forms of law, and imposed upon the officers of the court, for the purpose of injuring and defrauding said Cordella of her said property, and that all the proceedings in said suit are absolutely void.

That the said Cordelia, not hearing anything from her said attorney after the service of said summons on her, presumed that respondent had abandoned his suit, and that it was several months after the execution of the writ of possession that she learned respondent had obtained judgment in said suit. That when said suit of ejectment was instituted, and when the judgment therein was rendered, complainants' residence in Hillsborough county was very remote and inaccessible to Tampa, the county site, and that at said time, and until a very short time ago, the means of communication and transportation to and from Tampa were very poor, and complainants were in destitute circumstances, financially. That complainant Charles Hoey was delicate, and could not work long at a time, and that both were compelled to work in the field for an existence, and were without any means with which to buy a horse or conveyance to go to Tampa, and had to rely entirely upon the kindness of friends and neighbors—who, on account of the sparsely-settled condition of the country, were few—to get to Tampa, and that it was some three or four months after hearing of the said judgment before an opportunity presented itself for them to go to town. That upon going to town they were astonished to learn that their said attorney had several months before permanently removed from Tampa to Tallahassee, Fla., and there were no lawyers residing at Tampa then, except the counsel of respondent, upon whom they felt they could rely, and upon an investigation they discovered that no appearance had been entered, and no plea filed, for defendants, in said suit. That said Cordelia sought the advice of such friends as she could rely upon, and was told by them that she could do nothing, as the judgment had already been entered against her; and, not having the advice of an attorney skilled in the law, and being too poor to remain in Tampa, she returned home.

That as soon as she could make a little money she again went to Tampa, but could not get the advice of lawyers skilled in the law, except those who were attorneys for respondent, and the attorney who had represented him in said suit had at this time been appointed circuit judge; and her friends upon whom she relied for advice told her that she could then do nothing, and said judge could not hear the case, on account of having been respondent's counsel, and relying upon this advice, and not being able to employ counsel away from home, she again returned home, discouraged.

That when her husband Cason Cooper died, he left her a small amount of household furniture, besides the lot of land in controversy, and two promissory notes for \$5,000, but the party who executed the notes became insolvent, and she lost the entire amount of the notes, and, when deprived

of the lot of land by the fraud of respondent, she and her husband were left without any means of support. That a friend of said Cordelia induced counsel to examine into her case, and, being advised that it was best for her to consult with counsel, she went to Tampa, and conferred with her present counsel, and, being advised that she might and ought to recover her said property, employed them to institute suit for this purpose, and that she would long since have commenced such proceedings, had it not been for her poverty, caused by the fraud of said respondent.

That respondent is a shrewd land speculator, drives a hard bargain, and devoid of conscience, and, although he knew that he had no right to said lot of land, yet he persisted in his efforts to defraud said Cordelia of the same, and, step by step, took advantage of her defenseless position, weakness, and ignorance, and defrauded her of her said property.

That respondent could command a large sum of money, and was litigious, and said Cordelia knew that she could not cope with him, in her crippled condition; and, as he had defeated her in every attempt to hold her property, she felt a great fear to go to law with such a man, without some means to pay the expenses of litigation.

Further, that respondent has been in possession of said lot of land since December, 1875, and is still in possession of the same, collecting the rents, issues, and profits from the same. That the rental value of the same is \$25 per month, and that respondent is justly indebted to said Cordelia for said rental, and she prays that she may have judgment for the same. And, wishing to do equity, she now offers to pay whatever amount of taxes that was tendered and refused by respondent, less the \$25 that has been paid as herein alleged, and any sum that respondent may be entitled to in equity, after a true and correct balance is struck between them, under the directions of the court.

The bill contains nine interrogatories addressed to the respondent, seeking, by answers to specific questions, information covering the allegations of the bill. The prayer is that upon final hearing the judgment rendered in the said ejectment suit be set aside, on account of the fraud practiced upon the court by respondent, and that the court hear and determine the respective equities alleged in the bill, and respondent be required to deliver up for cancellation the said tax deed executed to him by the said sheriff and ex officio tax collector of Hillsborough county to said lot of land, and that all cloud upon the title of complainants to the same on account of said tax deed be removed, and the pretended title of respondent be held for naught; also, that a reference be had to a master to ascertain what amount respondent

ent owes complainants on the rental for said lot, and for general relief and process.

This bill was demurred to on the grounds that it did not make such a case as entitles complainants to the relief prayed; that, as appears by said bill, the respective rights of complainants and respondent under said tax deed, as well as the rights of respondent to the land, as against complainants, are "res adjudicata," and complainants are estopped from setting up any claim to the said lot of land; that said Cordelia Hoey is a married woman, and does not sue by her next friend, as required by law; and that it does not appear that complainants, or either of them, have any legal title to said lot of land.

The case was transferred to the fifth judicial circuit on account of the disqualification of the judge of the sixth circuit, and upon a hearing of the foregoing demurrer the same was sustained, and the bill dismissed. From this decree an appeal has been taken.

Subsequent to the appeal the appellee, John Jackson, died, and the suit has been revived here in the same name of Thomas E. Jackson, executor of said decedent.

Barron Phillips, for appellants. Sparkman & Sparkman, for appellee.

MABRY, J., (after stating the facts.) Fraud, accident, and mistake are the principal grounds upon which courts of equity act, in granting relief against legal proceedings, and in relieving parties against judgments at law. The party asking relief in a court of equity, in such cases, must show that he could not avail himself of such defense at law, or, if such defense could have been made there, he was deprived of an opportunity of presenting the same, without fault on his part, by the fraud or circumvention of the opposite party. Chief Justice Marshall formulates the rules as follows: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Insurance Co. v. Hodgson*, 7 Cranch, 332. This is the general rule, and it is essential for the complaining party, in equity, where he relies upon matters of which he could have availed himself at law, to show the court that he has not been guilty of laches, and that he has been deprived of an opportunity of asserting his rights or making his defense at law through some accident, fraud, or mistake not attributable to himself, as he has no right to ask a court of equity to relieve him from his own culpable negligence. *Owens v. Ran-*

*stead*, 22 Ill. 161; *Railroad Co. v. Holbrook*, 92 Ill. 297; *Barber v. Rukeyser*, 39 Wis. 590; *Railroad Co. v. Titus*, 27 N. J. Eq. 102; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Shepard v. Akers*, 3 Tenn. Ch. 215; *Dibble v. Truluck*, 12 Fla. 185; *Budd v. Long*, 13 Fla. 288; *Finegan v. Mayor*, 18 Fla. 127; *Thornton v. Campbell's Ex'r*, 6 Fla. 546. An application of this rule to the allegations of the bill before us, the essential features of which are set out in the foregoing statement, will suffice to dispose of this case. The facts alleged in the bill, if true, and had they been relied upon, under proper plea, in the ejectment suit, would have availed the defendants therein as a complete defense. As appears from the bill, an opportunity was given to make this defense, as a summons in said suit was regularly issued, and properly served upon the defendants. In *Railroad Co. v. Holbrook*, supra, it was held that "where a party has been regularly served with process, and neglects to appear and defend, and suffers judgment to be taken by default, and has not been prevented from making a defense by fraud or accident, unmixed with negligence on his part, a court of equity will not afford him any relief against the judgment, though it may be unjust."

Although it is repeatedly alleged in the bill that the respondent, John Jackson, with a fraudulent design, and in furtherance of a fraudulent scheme on his part to deprive complainant Cordelia Hoey of her lot of land, purchased a tax title to the same, and resorted to the legal proceeding of ejectment to get possession thereof, yet there is nothing alleged to show that Jackson or his agents fraudulently prevented her, or her husband and tenant, from making any and all proper defenses to the suit, when instituted. In order to maintain a standing in a court of equity, she must have been prevented from making her defense by fraud, accident, or mistake, unmixed with negligence on her part. It does not appear that Jackson did anything to prevent her from going to court, or undertook in any way to mislead or deceive her in reference to making her defense.

The allegations in reference to the failure of the attorney to appear for defendants in the ejectment suit are insufficient. In the first place, such a failure is in no way attributable to Jackson, and, at most, would be the neglect of their own agent. *Shepard v. Akers*, supra. But it does not appear that any attorney was consulted after suit was instituted, and the mere fact that copy of summons was sent to the attorney who had previously been consulted does not show sufficient diligence. It is not even alleged that the attorney received the copy of summons, or knew that the suit had been instituted.

The allegations of the bill fail to show, we think, any sufficient reason, in law, why complainants did not make their defense at law; and for this reason, without examining the

other objections made to the bill, we think the court was correct in dismissing the same. The decree of the circuit court is therefore affirmed, and it is so ordered.

(32 Fla. 64)

**DUMAS v. GARNETT.**

(Supreme Court of Florida. July 13, 1893.)

**BOUNDARIES—EVIDENCE—RIPARIAN RIGHTS.**

1. The riparian act of December 27, 1856, (sections 454, 455, Rev. St.,) does not include riparian or littoral proprietorships on all navigable waters, but only those on a navigable stream, bay of the sea, or harbor.

2. Whether land which does not extend down to the bank of a navigable stream, whose banks are the subject of overflow by the ordinary tides, but is reached by such overflowing waters, is riparian to such stream, within the meaning of the riparian act, not decided.

3. Where it is not shown that land claimed to be riparian to a navigable stream was such at the passage of the riparian act of December 27, 1856, (sections 454, 455, Rev. St.,) or has become so since, (assuming that such change of condition would bring it within the statute,) a verdict adverse to the owner of such land, asserting, through it, a right to the benefits of such act, must be sustained.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county; James M. Baker, Judge.

Action in ejectment by Stella Dumas against Reuben B. Garnett. Defendant had judgment, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by RANEY, C. J.:

In 1805, on the 9th of January, Enrique White, the Spanish political and military governor of St. Augustine, Fla., and its province, for H. M., granted to Gaspar Papy 5½ acres of land, bounded by the south with the Bartola Suarez lands, by the east with the "zacatel," by the north with the road that goes from the city to the new fair, and by the west with Juan Bosquet's lands. The shape of the tract, according to the accompanying plan of the survey, is a quadrilateral, the eastern and western sides of which are parallel, whereas the northern and southern sides verge a little towards each other from east to west; the western side being about five-sevenths the length of the eastern side, and about one-third the length of the northern. It is also spoken of in the title as 5½ acres of land on the New Fair road; and in the original survey made by John Travers, the words "towards the new ferry," are used instead of "to the new fair." On November 14, 1835, Francis Gue and Joseph S. Sanchez, executors of Anna Pona Papy, the widow of Gaspar Papy, conveyed to William Eldridge a parcel of land containing "five and a half acres, more or less, as will appear by a survey of the same made by John Travers, \* \* \* bounded \* \* \* on the south by the land of Mary Cooper, on the east by marshes of Bridge creek, on the north by the street which leads to Avices ferry,

and on the west and south by land of — Lewis," which said land is situated in St. Augustine, Fla.; and Eldridge conveyed it, by the same description, to Theodore Flotard, May 14, 1838. On April 2, 1838, Flotard and Smith Woodhull, trustee of William Woodhull and John W. Woolsey, conveyed to Peter Sken Smith the land, referring to the survey, and also describing it as "bounded on the north by a street leading to what was formerly known and called 'Avices Ferry,' on the south by land lately the property of Mary Cooper, or of her children; on the east by the marshes of Bridge creek, sometimes called 'Maria Sanchez Creek,' and on the west, and partly on the south, by property lately sold by the \* \* \* said Theodore Flotard to said Smith, and formerly known as the 'Mitchell Grove,' \* \* \* and is the same that was originally granted to Gaspar Papy," etc. On May 15, 1838, Smith mortgaged the property to Smith Woodhull, as trustee for William Woodhull and John Woolsey, and on July 30, 1846, Woodhull, trustee, assigned the mortgage and unpaid indebtedness secured thereby to Amelia Dumas; and on June 25, 1847, a decree of foreclosure and sale was rendered thereon in the superior court of East Florida, in favor of Amelia Dumas, against said P. S. Smith, Christopher Andrews, Thomas Crosby, and Orloff M. Dorman, in which decree the property is described the same as in the mortgage; the only variance between such description and that in the deed to Smith being the use of the words, "the marshes or Bridge creek," for "the marshes of Bridge creek." On September 6, 1847, Joseph S. Sanchez, sheriff of St. Johns county, under a sale made pursuant to such decree, conveyed to Amelia Dumas the land, describing it as in the stated mortgage. It should be stated, in connection with the variance of description mentioned, that in the mortgage and subsequent instruments referred to the land is specially mentioned as being the same granted to Gaspar Papy, and afterwards sold by the executors of his widow to Eldridge, and by him to Flotard.

Amelia Dumas died, unmarried and without issue, in the year 1861, leaving, surviving her, her father, Peter B. Dumas, as her heir; and he died in 1869, intestate, leaving his wife, Rose B. Dumas, and a son, Henry B. Dumas, and a daughter, Stella Dumas, the plaintiff, as his heirs. On October 24, 1871, Henry Dumas conveyed all his interest in the estate of his father to said Rose B. and Stella Dumas; and in 1873 Rose B. Dumas died, having made her last will and testament, by which she gave all her property, real and personal, to the Rev. Augustine Verot, the Roman Catholic bishop of St. Augustine, and his successors in office; the said will having, it would seem, been admitted to probate in St. Johns county in

August of the year last stated. On July 13, 1874, Bishop Verot and plaintiff agreed, by writing under seal, attested by two witnesses, to a division of the property of said Peter B. and Rose B. Dumas, by which agreement it was provided, *inter alia*, that the said "Stella Dumas will own and possess and retain in fee simple the tract of land called the 'Grove,' which is bounded north by Bridge street, east by Maria Sanchez creek, west by the Sebastian river, and south by what is known as the 'Hernandez,' now claimed by George Atwood, and 'Wheadman' tracts of land." This instrument was also executed by Henry B. Dumas as a quitclaim to the property described in it. On August 3, 1877, Bishop Moore, the successor of Bishop Verot, executed to Stella Dumas a deed, whereby he "remised, released, and quitclaimed" to her the last-described land, such deed purporting to be an execution of the preceding agreement.

Henry B. Dumas, testifying in behalf of the plaintiff, stated that at the execution of the deed by Bishop Moore the plaintiff was in possession of the land described in it; that since 1869 he had been her agent, for the transaction of all her business, and had had charge of these lands, and control of all her deeds and other papers; that Peter B. Dumas was, in his lifetime, the agent of Amella Dumas, for the transaction of all her business, and had the control of her lands, and custody of her papers.

Francis Gonzales testified that he had heard the word "zacatel" used in Mexico. That it is a Spanish provincial word, and means the place where the grass grows. "Zacate" is the grass. The cattle will eat it. It is applied to a dry place where the grass grows. That he was not familiar with its use in Florida, and could not tell whether it means here lands covered with water or not. That, in Spanish, "shore" is "orilla."

Venancio Sanchez testified that he had lived in St. Augustine a great many years, and knew the meaning of the provincial word "zacatel" in Florida. "Zacatel" means occasionally covered with water, where salt marsh grass grows. "Cienque" means low lands on high ground. "Zacate" means salt grass. "Zacatel" is the place where "zacate" grows. It would not be "zacatel" where the tide ebbs and flows, unless there was grass growing under the sea.

Francis P. Sanchez testified that he had lived many years in St. Augustine. "Zacate" means marsh grass. "Zacatel" means the place where there is a large body of marsh grass.

Henry B. Dumas, recalled, stated that Amella Dumas, upon getting her deed from Sanchez, sheriff, took possession of the lands described in it. "I can't say exactly how she did so. The lands, the most of them, cultivated and inclosed in a fence. My father lived in the vicinity, on his home-

stead. He had control of Amella's lands, as her agent, and inclosed the Papy grant in the same lot as his homestead. Same fence around both. House on homestead was built year after Amella bought Papy grant. I went away to Savannah in 1849, when I was 20 years old, and did not return to stay till 1869. Was back home occasionally, and saw the premises. The road to the ferry on Avice's and Vail's ferry is now known as 'Bridge Street.' The Suarez grant, afterwards the Cooper lands, bound the Papy grant on the south. The Bosquet grant is on the west. At the time of the deed to Amella Dumas there was a trail running along the western edge of the marshes of Maria Sanchez creek. The marshes were all flooded by the tide at high, and were left dry at low tide." The trail was covered by ordinary high tide, but at low tide it was left bare. That as agent for Stella Dumas he had, since his return from Savannah, resided on these lands. On cross-examination, he stated that his father, P. B. Dumas, built his house on the grant to the east of the Papy grant. One fence inclosed both grants. The fence extended east to the west side or the trail. Witness does not recollect a ditch being there,—not on the east side. There was a fence on the west side of the trail. Cannot give the distance. Thinks it was 10 to 20 feet west of the trail. There were tenants on the tract on the west side of the trail. They were on high land. Did not see any posts put down for fence. Never saw any change in position of fence. It had been there since he could remember. Is still there. Is the fence now on the west side of Washington street. Has made sales of land on Papy grant since father's death. All sales he made were to the west of the trail. Did not exercise acts of ownership to lands east of trail. Has been aware of buildings put upon the land occupied by Garnett. Redirect: When witness' sister Amella got deed to Papy grant, there were tenants on it, and they became her tenants. The houses so occupied were not on the lands for which this action is brought. Knows where the lands described in the declaration, and occupied by defendant, are. "They are on what is known as the 'Marsh,' directly east of Washington street, opposite the land of the Papy grant, now occupied, heretofore sold by Stella Dumas, and between them and the channel of Maria Sanchez creek."

Alexander Bryant, for plaintiff, deposed that he knew the Papy grant, south of Bridge street. Lived near there before there was any filling of the land below the water east of Washington street. East of the trail, the land below ordinary high tide was bare. "It was some distance to the grass, (as far as the length of this room,) but cannot give the distance. It was sand and mud and marsh, all mixed together."

Toney Huertas, for plaintiff, testified that

he had lived in St. Augustine 78 years, and known the Papy grant ever since he was a child. Peter S. Smith at one time owned and occupied it. It was fenced after Smith bought it. He laid it out into lots, and set out trees. He owned the Mosquet grant and the Crosby lot. At the time Smith owned these premises, there was a trail across them to the Segul plantation. The trail was covered by water run upon the land to the west of it at high tide till a ditch was dug to keep it out. East of the trail, the ground was marsh and land. The trail was on the east side of the ditch. From the trail to the edge of the marsh grass was about 30 feet. The trail was not flooded at ordinary tide, but the marsh grass was flooded. The marsh grass and field grass ran in spots. Cross-examination: The marshy ground did not extend to the trail. No grass grew where people walked. Gaspar Papy put up a fence. Witness did not assist in doing it. Afterwards, Smith rebuilt it. Witness never had any conversation with Papy or Dumas as to the east line of this tract. Smith rebuilt fence in same place. When he sold to Crosby, he sold an extreme end of the grant. "We worked inside of the ditch. The ditch was outside of the fence, and about four feet west of the trail. Carriages went along the trail." Redirect: "Carriages were not driven along the trail. We used to go down to the point to cut grass for the horses. The trail was not fenced on the east side. It was an open prairie, like, to the east."

Rude & Dewhurst, for appellant. Geo. W. Lount, for appellee.

RANEY, C. J., (after stating the facts.) This is an action of ejectment instituted by appellant against the appellee to recover a certain piece of land in the city of St. Augustine, in St. Johns county, described in the declaration as situated at the corner of Bridge and Washington streets, beginning at the southeast corner of such streets, running thence southerly, along Washington street, 168 feet, more or less, to the north line of lands occupied by James B. Thomas; thence easterly, along the north line of the lands occupied by said Thomas, 145 feet, more or less, to the lands of H. M. Flagler; thence northerly, along the line of the lands of H. M. Flagler, 168 feet, more or less, to Bridge street; thence westerly, along the "north" side of Bridge street, 145 feet, more or less, to the point of beginning,—excepting therefrom several premises along the north side of said lot, occupied, respectively, by Hannah B. Davis, James D. Snowden, Mary A. Hartwig, and Jacob A. Spencer, and the premises in the southwest corner of said lot occupied by Charles Stewart,—containing about 18,000 square feet of land. Mesne profits are claimed from January 26, 1883, at the yearly value of \$200.

As is evident from the preceding statement, the land sued for is not within the calls of the Spanish grant to Gaspar Papy, nor within those of any of the subsequent title papers down to the agreement of July 13, 1874, between the plaintiff and Bishop Verot. The description in this paper, and that in the quitclaim deed from Bishop Moore to plaintiff, may be said to include it; but neither of these instruments was intended, or had the effect, to create, of itself, an interest in any land, as to which the parties thereto were not jointly interested before. Assuming, for the purposes of the case, that the extreme western line of the "zacatal," which was the eastern boundary of the Papy grant, may have been below the line of high tide, it is still indisputable that such eastern boundary extended no further eastward, and is not shown to have reached the creek. It is also clear that neither the plaintiff, nor any of her predecessors in title, has ever exercised any actual dominion, or *pedis possessionem*, over the land east of this eastern boundary of the Papy grant. The width of Washington street is not shown, and if we concede that the western boundary of the "zacatal" may have been 20, or even 30, feet east of the tract, or of the west line of the street, there is still nothing to show that the west boundary of the land sued for is not still further east, or that it is within the calls of the Papy grant, or any title paper antedating the agreement with Bishop Verot. Under these facts, the sole basis of any claim upon the part of the plaintiff to title to the land in controversy is the riparian act of December 27, 1856, (sections 454, 455, Rev. St.,) and the riparian ownership of the kind contemplated by it. The ownership or title to which the act adds the title of "submerged lands" is that of "any tract of land \* \* \* lying upon any navigable stream, or any bay of the sea, or harbor," and it is "into streams or waters of the bay or harbor" that structures may be built, or the filling up from "the shore, bank or beach" be done, and it is to such "riparian proprietors" that previous improvements are confirmed. It is palpable that it was not the intention or effect of the act to include within its beneficial purposes all riparian or littoral proprietorships. On the contrary, all riparian or littoral lands not on a stream, or on a bay of the sea, or on a harbor, are beyond the terms and spirit of the law, however navigable the waters washing their shores may be. There are authorities to the effect, to say nothing more, that in this country all tidal streams are *prima facie* navigable. *Buck v. Cone*, 25 Fla. 1, 6 South. Rep. 160; *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. Rep. 716; *Walker v. Allen*, 72 Ala. 456; *Gould, Waters*, § 43. The plaintiff here has been content to rest on this rule, and we shall, without pursuing the investigation of the subject any further, accord to her the full benefit of its presumption that the Maria Sanchez creek is a "nav-

igable stream," within the meaning of this expression, as used in the statute referred to. Presuming, then, from its tidal character, that the named stream is navigable, however contrary might be found the fact upon due inquiry, (*State v. Black River Phosphate Co.*, 27 Fla. 276, 9 South. Rep. 205; *State v. Pacific Guano Co.*, 22 S. C. 50, and authorities supra,) the question for solution is whether or not the Gaspar Papy land was, at the passage of the riparian act, land "lying upon," or riparian to, Maria Sanchez creek, or has since become so, if it be such subsequent change of condition would bring it within the benefits of the statute. The cases of *Alden v. Pinney*, 12 Fla. 348, and *Sullivan v. Moreno*, 19 Fla. 200, relating to lands on Pensacola bay, go to the extent of holding that there must be a water boundary, or, in other words, there must not be any land intervening between that of the claimant of the benefits of the act, and the water. Of course, there is no pretense or claim here to any land riparian to any bay of the sea or harbor. If this was the case, the record would tell us something about the shore of the bay or harbor, and then the question would be whether the land to which it was claimed that the benefits of the act had attached extended down to high-water mark or low-water mark, as the requirements of the act may be. There is nothing in the record on the subject of the shore. There is hardly more as to Maria Sanchez creek, its exact locality as to the Papy grant, or the character of its banks, or its immediate surroundings. From Toney Huertas, who had lived in St. Augustine since 1809, and knew the Papy grant since he was a child, we learn that Smith, who appears to have bought in 1838, and held till 1847, laid it out in lots, and set out trees, and that there was then a trail across the premises, and that "east of the trail the ground was marsh and land;" that marsh grass was flooded at ordinary tide, and the trail at high tide, and that the marsh grass and field grass ran in spots; that it was like an open prairie to the east of the trail. This testimony relates to a period anterior to Amelia Dumas' purchase of the Papy grant, which was in September, 1847. Henry B. Dumas informs us that this trail, along the western edges of the marshes of Maria Sanchez creek, was there when Amelia Dumas purchased, and that the marshes were all flooded by the tide, when high, and were left dry at low tide; that he has been aware of buildings put upon the land occupied by Garnett, and sued for, and that these lands are on what is known as the "Marsh," directly east of Washington street, opposite the land of the Papy grant, now occupied and heretofore sold, by Stella Dumas, and between such latter lands and the channel of the stated creek. Alexander Bryant informs us that, before there was any filling in, the land below the water east of Washington street was bare; that it was

some distance to the grass, and it was sand and mud and marsh all mixed together. We understand the last clause to be descriptive of the space east of the trail, or of the west line of the "zacatél." It is, in our judgment, impossible for us to hold, upon this record, that the water, even at high tide, reached the eastern line of the Papy grant on the 27th day of December, 1856,—the date of the approval of the riparian act. It is clear that a street had been established, and that lands east of this street had been filled in, and it is not shown that this had not been done prior to the date last mentioned. It is mere assumption to say that at that time Amelia Dumas' eastern boundary extended even to high-water mark, or was reached by the ordinary high tides. It is impossible to locate, from the evidence before us, the line of high tide at any time subsequent to September, 1847,—the date of conveyance to Amelia Dumas. Changes of the character indicated having taken place since then, it devolved upon the plaintiff to show either that those changes had not taken place before the riparian act, or that she had made them, and they were confirmed to her by the last clause of the first section of the statute. The proof is, however, that she had never exercised any dominion over the locus in quo, or any part of the territory east of the grant. We are unable to see how the jury could have come to any other conclusion than they did, under the testimony, and for the reasons stated we must affirm the judgment. If the verdict had been for the plaintiff, we should have to set it aside for the same reasons. Before dismissing the subject, we must say that we are not to be understood as deciding that lands which are situated off from, and do not extend down to, the bank of a stream whose banks are the subject of overflow by the ordinary tides, are riparian, as to such stream, and within the statute of 1856, but we leave the question undecided until there shall be a case necessarily presenting the question. It may also be observed that, of course, the testimony is too scant to enable us to pass upon the effect, under the riparian act, of the laying out of Washington street, as between the municipality and the plaintiff. *Geiger v. Filor*, 8 Fla. 325.

For the reasons stated the judgment must be affirmed, and it will be ordered accordingly.

(45 La. Ann. 1006)

LESTER v. CORLEY. (No. 1,268.)

(Supreme Court of Louisiana. June 14, 1898.)

SLANDER—DEFAMING CHARACTER OF PLAINTIFF'S DAUGHTER—JUSTIFICATION—EVIDENCE—MALICE.

1. The proof disclosing that plaintiff's daughter had eloped with a young man, at night, on foot, and alone, and that they passed the latter half of the night at a stranger's house, together, the defendant was justified in stating to a party of friends, who had been called together in consultation in regard to the matter, the nature and character of certain

rumors that were in circulation in the neighborhood in reference to her improper intimacy with the person with whom she had eloped as a reason that induced him to believe that they should immediately get married in case of their capture by the parties in pursuit of them at the time.

2. Such a statement is utterly wanting in malice, the essential ingredient of defamation and slander.

(Syllabus by the Court.)

Appeal from district court, parish of West Carroll.

Action by Albert J. Lester against Ed. Corley for slander of plaintiff's daughter. Defendant had judgment, and plaintiff appeals. Affirmed.

Robert Whetstone, for appellant. Wells & Gray, for appellee.

WATKINS, J. This is an action in damages for defamation and slander of the plaintiff's daughter, and the plaintiff is appellant from an adverse judgment, predicated upon the verdict of a jury rejecting his demands. The charge of the petitioner is that defendant did willfully, maliciously, and libelously slander and defame the character of his 14 year old daughter, by asserting in a public place, and in the presence and hearing of a number of persons, that she had been seduced by one John Boling, who had kept her as his mistress, and was thus keeping her at the time; that said false and slanderous statements had exposed his daughter to hatred, contempt, and ridicule, and caused her to be shunned by her acquaintances; and that her only means of redress is in a court of justice. As an aggravation of the slander and defamation charged, the plaintiff further avers that "said false and slanderous assertion of the defendant has not only injured her, but has injured him personally, and every member of his family," and "that same has exposed him and every member of his family to hatred, contempt, ridicule, and obloquy, and has caused them to be shunned, and has injured them in the community in which they live." Upon the foregoing averments plaintiff declares that his daughter personally, he himself, and his family have been damaged in the sum of \$10,000, and he prays judgment for that sum in his own favor, other members of the family not being joined in the suit as parties plaintiff or defendant.

First pleading an exception of no cause of action, defendant subsequently excepted that the petition was vague, and too indefinite to admit of explicit answer, and that it was further defective in that it alleges that \$10,000 damages was due to himself, his daughter, and the members of his family generally, without apportioning the share or portion of each; in consequence of which he demands that the suit be dismissed. These exceptions having been overruled, the defendant filed an answer, the

purport of which is that, at the time of said alleged slanderous utterances being made, plaintiff's daughter, Susie, had just eloped with John Boling, without the authority or consent of her parents, and was at the time absent, and that the relations and friends of the plaintiff were then engaged in making search for the couple; that, being at the residence of a neighbor, several other neighbors being present, the question was being discussed between them and the defendant as to what was the best thing to be done with the runaway couple in case they were apprehended; and the latter admits that he did say that "they should marry, because, from all the information he could get, they had been as good as married for nearly two years." But defendant avows that this remark was made without malice on his part, it being only a suggestion as to the best thing that could be done under the circumstances; that it was but the repetition of a common rumor in the neighborhood at the time, and that said report was true; but he affirms that he never repeated or circulated this rumor, and denies that it had any injurious effect on the plaintiff, or any member of his family, his daughter having married another man during the pendency of this suit, with her father's permission, and at his residence. In the course of his argument, defendant's counsel invited attention to his exceptions, and insisted that they were good, and should have been sustained by the district judge. It seems clear that his exception of no cause of action was not well taken, if it was not formally abandoned; but we think it was abandoned, at least in effect, and his dilatory exception is untenable, the averment complained of having been manifestly intended to show an aggravation of the defamation and slander as a means of enlarging the quantum of damages.

On the merits the proof is brief, but pertinent, and, in the main, harmonious. In respect to the truth of the report affecting the chastity of the plaintiff's daughter there is some doubt, she denying and he affirming its correctness; but as to the existence of such a rumor in the vicinity in which plaintiff lived there is, in our minds, no doubt; and it is equally clear that defendant had heard the rumor for some time previous to the time of the occurrence of the alleged slander, though disbelieving it until the elopement took place and brought the circumstances to his mind again. The testimony of the defendant is in keeping with the averments of his answer and the testimony of several of plaintiff's witnesses. All the evidence shows him to be a man of character and first respectability in the neighborhood in which he lives. The fact of plaintiff's daughter having eloped with the young man in question, under very peculiar and significant circumstances, super-inducing pursuit by father and friends, was



the immediate cause of his neighbors collecting together for purposes of consultation. The very object in view was assistance and comfort to the plaintiff in his hour of tribulation and distress, not annoyance and vexation. At this consultation the defendant took the position that, in case the erring couple were apprehended and brought back to the paternal roof, they should marry, announcing his opinion on the faith of what he had heard currently reported in the neighborhood. There is no question of the fact that his advice was correct, for the proof shows that the girl was married soon after this suit was filed, albeit to a different man. One of the plaintiff's principal witnesses, in speaking of what transpired at the consultation, says: "I remarked, after Mr. Wm. Corley had made some remarks, that I would kill the girl before she should marry Boling, and then Mr. Ed. Corley made the remarks which I have related," thus characterizing the circumstances that led up to the defendant's statement, and evidencing the absence of malice or ill will towards the plaintiff. The circumstances of the elopement of the plaintiff's daughter with Boling are thus detailed by themselves, as witnesses: Boling's statement is as follows, to wit: "I lived last year—1891—the first part of the year, up to about July—at Mr. Lester's. I worked in the field. Members of his family worked in the field with me. I knew Susie Lester. She worked in the field with me a little. Susie and I left there some time in June. We started about 8 o'clock at night. We left on foot. We came down the big road towards Floyd. Went down to about one mile this side of Goshen. We traveled all night. We were brought back by Lee Virgel and James Lester." The statement of Susie Lester, daughter of the plaintiff, and now the wife of Lewis, is as follows, to wit: "It is a fact that I left my father's house and went with John Boling. It was about 8 o'clock at night when we left. We went on foot. We went down nearly to the parish line on the road to Delhi. We did not walk all night. \* \* \* We rested from 12 o'clock until daylight. We stopped at Mrs. Sweet's. We left there just at sunrise." The foregoing are very suggestive circumstances indeed. Recapitulation or comment would not strengthen them, or render them any more cogent or convincing. We do not feel willing to announce it as our opinion that the charges preferred against the plaintiff's daughter were proved beyond the peradventure of a doubt, but it is our deliberate conviction that the defendant had sufficient ground to make the statement he did, under the circumstances detailed; that he did not maliciously and causelessly utter and publish a libelous slander to the world, with the purpose or expectation of inflicting injury upon the plaintiff or any member of his

family. Having heard of rumors to the prejudice of the young girl, her sudden flight with young Boling, on foot, at night, and alone, was quite sufficient to confirm his previous suspicions; and when the plaintiff's friends and neighbors were summoned together—he among them—for the purpose of consultation, what more reasonable or natural than that he should give the facts within his knowledge and information, and state his conclusions; particularly as the girl's own course of conduct had not only invited, but rendered same necessary? We are clearly satisfied that the finding of the jury was perfectly correct, and is in consonance with equity and justice. The case of *Savole v. Scanlan*, 43 La. Ann. 967, 9 South. Rep. 916, is not a parallel case. Judgment affirmed.

### VICKSBURG, S. & P. RY. CO. v. STOCKING.

(Supreme Court of Mississippi. April 9, 1892.)

CARRIERS—INJURIES TO LIVE-STOCK SHIPMENTS—CONNECTING LINES—EVIDENCE.

1. Where, in an action against a railroad company for damages to horses shipped over the T. road from A. to S., and thence by defendant's road to V., the complaint alleges that the horses were in good condition on their arrival at S., evidence is competent of a memorandum made by defendant's agent at S., in the presence of plaintiff, as to their poor and weak condition on such arrival.

2. In an action against a railroad company for damages to horses shipped over the T. road from A. to S., and thence by defendant's road to V., defendant's expert may testify for the purpose of showing that the transportation was under a contract of shipment made at A., with a limitation of liability; as to the regular freight rate from A. to V., and the special rate given when common-law liabilities are removed.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

Action by E. L. Stocking against the Vicksburg, Shreveport & Pacific Railway Company for damages to horses shipped over defendant's road. From a judgment for plaintiff, defendant appeals. Reversed.

Appellee, E. L. Stocking, shipped a car load of horses from San Antonio, Tex., to Vicksburg, Miss., over the Texas & Pacific Railroad, to Shreveport, La., thence over the Vicksburg, Shreveport & Pacific Railroad to Vicksburg. The declaration alleges that the stock were delivered to the defendant at Shreveport in good condition, and that, through the defendant's negligence and carelessness, they became diseased, lessened in value, and many of them died; and claims damages in the sum of \$1,000. Defendant pleaded: (1) Not guilty. (2) A special contract of transportation from San Antonio to Shreveport, and thence on its road to Vicksburg, at one freight, as agreed upon by the defendant and the connecting carrier, by which contract it was stipulated, in consideration of reduced charges for transporta-

tion, that the liability of the company should be that of a forwarder or private carrier for him, and that the shipper should release the carrier from any and all liability for and on account of any delay in shipping the stock after delivery to its agent; that the appellee, at his own risk and expense, agreed to take care of, water, and feed the stock while in the stock yards of the company, or elsewhere, awaiting shipment, and while they were being unloaded and reloaded, and to unload and reload the same, and hold the carrier harmless while the stock was in his possession; and that the shipper would hold the carrier harmless on account of the acts of its laborers, furnished to him at his request; and that the carrier was not to be liable unless its negligence is proven by the shipper. After rectifying the bad condition of the stock, the plea averred that by the terms of the contract no claim could be made against the appellant, and that the damages suffered were caused by the negligence of appellee. (3) The failure of the appellee to bring his suit within 40 days from the time the damages were suffered, as required by the contract. (4) The appellee was required by the contract to give notice, in writing, of any claim for damages, before the stock was mingled with other stock, within one day after delivery of the stock, and he failed to give such notice, but gave a clear receipt for his stock, without indicating any claim for damages. The replication to the second plea states that the alleged contract was made solely for transportation to Shreveport; that the stock were delivered to appellant, at Shreveport, in good condition, and were negligently fed and watered, and exposed to great delays, as alleged in the declaration. Replication, in short, was filed to the third plea. The replication to the fourth plea is that the stock were transported from Shreveport to Vicksburg on a new and separate contract, and not under the original. The defendant offered in evidence a paper headed "A Memorandum of Freight Transferred and Delivered to the V., S. & P. Ry. by the T. & P. Ry. 14th of Nov., 1880," which had the following entries made in pencil by Hearn, the agent of the Vicksburg, Shreveport & Pacific at Shreveport: "The stock poor and weak. 1 horse died at Shreveport. 1 horse lame at Shreveport. 1 horse lame in Shreveport. 1 horse died at Palestine." Defendant proposed to show by Hearn that he, as the agent of the Vicksburg, Shreveport & Pacific Railway Company, made these entries, when he made them, and in whose presence he made them. The court ruled that the paper was only evidence of the fact that the stock were received by the Vicksburg, Shreveport & Pacific from the Texas & Pacific Railway Company. Hardy was introduced by the defendant, and testified as to the nature of the bill of lading, and the liability of connecting railway companies on receiving such bills of lading from other con-

necting railroads, and as to the duty of such roads to forward freight so received, and as to the regular rate of freight charges from San Antonio to Vicksburg, and as to the special rates given when common-law liabilities were removed. To all this he testified as an expert. After the testimony was all in, this evidence was excluded, on motion of plaintiff. There was a verdict for the plaintiff for \$300. Defendant appealed.

Nugent & McWille, for appellant. Henry & Thompson and L. W. MaGruder, for appellee.

CAMPBELL, C. J. Without going further, in dealing with the several questions raised by the assignment of errors, we announce that the evidence of the witness Hardy should not have been excluded, nor should the entries made on the waybill or transfer sheet, or whatever it is called, at Shreveport, by Hearn, the agent, have been excluded. The testimony of Hardy was competent to show, in connection with other evidence, that the carriage by the defendant was under the contract of shipment made at San Antonio, and the evidence of Hearn as to the entries on the paper is that they were made by him as part of the *res gestae*, and in the presence of the plaintiff.

Reversed and remanded for a new trial.

(70 Miss. 392)

#### WILKINSON v. SEARLS.

(Supreme Court of Mississippi. Nov. 28, 1892.)

#### SET-OFF—WHEN ALLOWABLE.

Under Code 1880, § 1551, providing that "defendant may plead and set off against the demand of the plaintiff any debt or demand which he may have against the plaintiff," defendant, in assumpsit for goods sold, may set off an amount due him from plaintiff arising out of a previous transaction, in which he had paid plaintiff for more and different goods than he had actually received.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Assumpsit by C. J. Searls against D. W. Wilkinson. From a judgment for plaintiff, defendant appeals. Reversed.

On April 2, 1892, C. J. Searls, a broker, doing business in Vicksburg, Miss., sold D. W. Wilkinson, a broker of Jackson, 125 barrels of meal, for \$295. Prior to this it seems there had been various transactions between them, and Wilkinson had bought various bills of corn and other produce from Searls. On the 3d day of May, 1892, Searls sued Wilkinson in assumpsit for \$295, the price of the meal sold on April 3d. Wilkinson admitted liability for this bill, but filed pleas by way of set-off amounting to \$248, and tendered with his pleas a sum sufficient to pay balance due plaintiff, with interest. Plaintiff demurred to these pleas, because the account sought to be set off shows the claim to be for unliquidated damages. The demurrer was sustained. Defendant then filed

additional pleas 4, 5, and 6, and exhibits showing the nature and character of the items on which the defendant claimed an indebtedness by way of set-off. These pleas were in substance as follows: (4) That the defendant avers that, before the commencement of this suit, plaintiff contracted to sell and deliver to him, at Jackson, Miss., 10 car loads of corn, of a certain grade of corn; that the contract was in writing; that defendant paid the plaintiff for this corn according to contract, and before it was known that the plaintiff had not shipped the kind of corn he contracted to sell; that he shipped corn of a lower grade, of less value, and that several cars were short in weight; that the difference in value between the corn purchased and that actually delivered by the plaintiff was the sum of \$246.12, and defendant sought to set off this amount against the claim of plaintiff. The fifth plea sets up substantially the same facts in regard to the 10 car loads of corn; that the corn received was of less value by the sum of \$218.64 than the corn contracted for; that defendant had previously purchased from plaintiff a car load of corn and a car load of oats; that these were short in weight, making a difference in value as to this of \$27.48. The sixth plea sets out that there had been various transactions between the parties, and that there was at and before the commencement of this suit an open and unsettled account current between them, in which plaintiff was indebted to defendant in the sum of \$246.12 of the items above mentioned. Plaintiff demurred to these pleas, because the pleas are an attempt to set off unliquidated damages growing out of prior transactions; that there is no sufficient allegation of any set-off or cross action; and that said pleas are no defense. This demurrer was sustained. Defendant declined to plead further, and judgment was entered in favor of plaintiff, and defendant appealed.

Brame & Alexander, for appellant. Calhoun & Green, for appellee.

CAMPBELL, C. J. The demurrer should have been overruled. The substance of the 4th, 5th, and 6th pleas is that the plaintiff has in his hands, by reason of former transactions, (set forth in the pleas with needless particularity,) money which the defendant is entitled to recover by an action for money had and received; and, whatever may be true elsewhere, under our statute<sup>1</sup> this is a valid set-off. There is nothing in any of the cases from our Reports cited by counsel inconsistent with this view. On

the contrary, they sustain it. Reversed. Demurrer to the 4th, 5th, and 6th pleas overruled, and cause remanded for further proceedings in the circuit court.

(69 Miss. 658)

WESTERN UNION TEL. CO. v. JONES.  
(Supreme Court of Mississippi. April, 1892.)

TELEGRAMS—FAILURE TO DELIVER—PENALTY—EVIDENCE—APPEAL.

1. Where a telegraph operator accepts a message for transmission, the fact that there is no office at the place to which it is to be sent does not relieve the company from its liability for failure to transmit and deliver.

2. There was no error in excluding evidence that the message was sent by telephone, where it was not delivered.

3. The statutory penalty for failure to send and deliver a message is recoverable in every case where an obligation to send and deliver is not fulfilled.

4. The fact that the message was written on an ordinary piece of paper, instead of on a telegraph blank, does not relieve the company of its obligation to transmit.

5. A verdict will, on appeal, be assumed to be right where only rulings of the court were objected to, and there was no error in them.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by Harriet Jones against the Western Union Telegraph Company for failure to deliver a message. Judgment for plaintiff. Defendant appeals. Affirmed.

Harriet Jones, the appellee, sued the Western Union Telegraph Company in the justice's court to recover \$150, this being \$25 statutory penalty, and \$125 special damages, for failure to deliver a telegram sent by her to her daughter at Clinton. The telegram was as follows: "Patsie Greenwood, Clinton. Lee died last night. Send wagon. Have grave dug." The message was written on a plain piece of paper, and taken to the office of the telegraph company at the depot in West Jackson, and handed to a night operator of the defendant, who had been in the defendant's employ only a short time, and who did not know at the time that the defendant had no office at Clinton. The office at Clinton had been closed for two years previous. The Lee referred to in the message was a child of the plaintiff, and Patsie Greenwood was a daughter of the plaintiff also. The child which had died had been living with her sister at Clinton. The child died in Jackson while there on a visit, and had expressed a wish to be buried in Clinton. The message having not been delivered, the child was buried in Jackson, and the expense of the burial was borne by the plaintiff, and amounted to about \$21. On the trial the defendant offered to show by its operator who took the message that, when he discovered that the defendant had no office at Clinton, he immediately sent the message to Clinton by telephone. This evidence was excluded by the court. The defendant objected to the introduction of the

<sup>1</sup>Code 1890, § 1551, provides that, "where a mutual indebtedness shall exist between the plaintiff and defendant, the defendant may plead and set off against the demand of the plaintiff any debt or demand which he may have against the plaintiff."

message in evidence, because, the same being written on an ordinary piece of paper, and not on one of defendant's blanks, the defendant is not to be charged with any obligation for the transmission of any message unless the same be written on one of its blanks provided for the purpose. The court overruled the objection. The contention of the defendant was that, under the circumstances, the plaintiff was only entitled to recover the price paid for the message, and that it was not a case for the infliction of the statutory penalty, and that the special damages were too remote. The court took the view that the price of the message and the statutory penalty were recoverable, but no special damages, but the jury brought in a verdict of \$50.40. The defendant declined to move for a new trial, and brings the case to the supreme court on a special bill of exceptions, assigning for error the action of the court below as set out.

Mayes & Harris, for appellant. M. M. McLeod, for appellee.

CAMPBELL, C. J. There is no error in the rulings of the court on the trial of this case, and as the result reached was not complained of in the circuit court, but was acquiesced in for the purpose of entitling the defendant to appeal to this court, and test the correctness of the rulings of the judge, we will not disturb it. We assume that the verdict is right, since no motion was made to set it aside, and we find no fault with the action of the court specially excepted to. The fact that the message was written on paper other than the blanks usually employed made no difference, since it was received and paid for as a message to be sent; and the fact that the company had no office or agent at Clinton is not an excuse for failure to transmit and deliver the message received by its agent, and paid for as such. It was peculiarly within the apparent scope of the agency of the company's agent at Jackson to know to what places messages could be sent, and, having received the message to be sent to a place where the company had a wire, the company was liable for the failure to transmit and deliver, according to the contract with the sender. If the agent who received the message for transmission, not knowing that Clinton was a place at which the company did no business, had sought the plaintiff, on learning his mistake, and had informed her of it, and returned her the money paid him, a different question would have been presented; but he did not do this, and, recognizing his obligation to send the message, did it by telephone, which was offered to be shown as an excuse for the nondelivery complained of. There was no error in excluding the proposed evidence of the transmission of the message by telephone, as its nondeliv-

ery was the cause of complaint. If it had been promptly delivered to the person to whom it was addressed, all ground of complaint would have been prevented. The penalty prescribed by statute for failure to transmit and deliver messages promptly applies in every case in which there is an obligation to do these things. Affirmed.

(89 Miss. 652)

ALABAMA & V. RY. CO. v. PURNELL.  
(Supreme Court of Mississippi. April, 1892.)

CARRIERS—DELAY IN CARRYING PASSENGERS—  
DAMAGES.

1. Plaintiff was a passenger on a train which was stopped by a wreck on the track. She was notified that she would have to be transferred to a train which would come up on the other side of the wreck, and was twice told by the conductor to get off for that purpose, but, being informed that the train had not yet arrived, she concluded to remain in the car, a claim agent of the road who was in the car so advising her. The conductor was requested to inform her when the train arrived. On being informed of its arrival, she started out at once, but was too late to catch it. She was taken back to her station without charge, and the money for her ticket refunded. *Held*, that liability for failure to carry her on her journey should have been submitted to the jury, with an instruction that there could not be punitive damages, but only compensatory damages.

2. A verdict for \$500 was excessive.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by Irene Purnell against the Alabama & Vicksburg Railway Company for failure to carry plaintiff on her journey. Judgment for plaintiff. Defendant appeals. Reversed.

In November, 1890, the appellee purchased from appellant, at Vicksburg, a ticket over its road and the Alabama Great Southern Railroad to Tuscaloosa. She had with her a child 15 months old. She got on the train, and, after it had proceeded a short distance, she was informed that there had been a wreck on the track near Smith's Station, and that, in consequence, she could hardly make connection at Meridian. She was informed that she would have to make a transfer at the wreck to the train from the east that would there meet the east-bound train, and be turned back. The day was fair, though a little chilly. She occupied a seat in the sleeping coach. The train stopped at Smith's Station, and, on inquiry, she learned that the wreck caused the delay. In a short time the conductor came to her, and told her she would have to get off to make the transfer. A Mr. Stevenson, who was the claim agent of appellant, who was sitting with Mrs. Purnell, asked the conductor if the train had come, and, receiving a negative reply, advised Mrs. Purnell not to get off, and requested the conductor to notify them when the train

arrived. No promise was made. In about 15 minutes the conductor returned, and requested appellee to get off, and make the transfer, saying it was the orders. Stevenson advised appellee to keep her seat, and he would see her transferred. She kept her seat, and about a half an hour afterwards the porter came to the door, and notified her that the train into which she had to transfer had arrived. She left the coach at once, and proceeded with Mr. Stevenson to make the transfer, but, when she had gone beyond the wreck, the train had pulled out. All the other passengers, about 25 in number, were properly transferred. Missing the connection, she returned to Vicksburg, without charge, and her ticket was taken up by the company, and her money returned to her. Mrs. Purnell brought this suit against the railroad to recover \$3,000 damages for its alleged negligence and willful failure to carry her on her journey, whereby she suffered great inconvenience, bodily suffering, etc. The court instructed for the plaintiff that the railroad company was liable for punitive damages if it failed to do its duty, and that this failure arose from a willful and reckless disregard of defendant's duty. The court refused a peremptory instruction to find for the defendant. There were a verdict and judgment for plaintiff for \$500, and costs, from which defendant appealed.

Birchett & Shelton and Nugent & McWille, for appellant. M. Marshall, for appellee.

CAMPBELL, C. J. We disapprove this verdict. The sum given by it is greatly disproportioned to the injury suffered and the wrong done, if any. It is manifest that the failure of the plaintiff to go on her journey resulted from her acceptance of the suggestion of Mr. Stevenson and his promised assistance, instead of the conductor's, and, if she is entitled to recover anything, it is a sum far below that for which the verdict was rendered.

The court rightly refused to instruct the jury to find for the defendant, but should have restricted it to compensatory damages, if it found for the plaintiff at all. Railroad Co. v. Scurr, 59 Miss. 456. The second instruction for the plaintiff should not have been given, for the facts exclude all thought of punishing the defendant, which, under the most unfavorable view of the affair which can be taken, simply failed to do all that might have been done to insure the plaintiff's continuance of her journey. It was for the jury to say if it failed of duty to her, under all the circumstances. The instructions asked by the defendant and refused narrowed the inquiry by the jury too much, and were properly refused.

Reversed and remanded.

(98 Ala. 200)

# ENSLIN et al. v. WHEELER.

(Supreme Court of Alabama. July 27, 1893.)

JUDGMENT AGAINST DECEDENT — LIEN—STATUTES — ACTION TO ENFORCE — EQUITABLE JURISDICTION—PARTIES.

1. Code 1886, § 2280, provides that when a judgment has been rendered against a decedent before his death no execution can issue thereon against his personal representative, except in the case provided in section 2897, and that the judgment can be revived only by suit on the judgment. Section 2897 provides that a writ of fieri facias, issued and received by the sheriff during defendant's life, may be levied after his death, or an alias may be issued and levied, if there has not been the lapse of an entire term, so as to destroy the original lien. Section 2894 provides that such writ is a lien only from the time it is received by such officer, and continues as long as the writ is regularly issued and delivered to him without the lapse of an entire term. Act Feb. 28, 1887, (Code, p. 635,) § 1, provides that a certified abstract of any judgment rendered by a court of record may be filed in the office of the probate judge and registered, and that a judgment so filed shall be a lien on the property of the defendant in such county, which is subject to execution, and such lien shall continue for 10 years from registration, which is notice to all of such lien. Held, that the latter act was not in conflict with the former statutes, but provided merely an additional lien, and both statutes are in force.

2. Where a judgment which was rendered against a decedent before his death is registered in the office of the probate judge, as required by Act Feb. 28, 1887, the lien is not destroyed by the death of the judgment debtor, and his lands descend to his heirs incumbered with such lien, though no execution was issued thereon for more than an entire term before such debtor's death, and none was in the hands of the sheriff at that time.

3. In the absence of any statutory provision for the enforcement of such lien, a court of equity will take jurisdiction, and enforce it by virtue of its general jurisdiction over liens and trusts.

4. Act Feb. 28, 1887, creating such lien, applies to all judgments in force at the time of its adoption, as well as to those subsequently rendered.

5. Act Feb. 5, 1891, (Acts 1890-91, p. 375,) provides that on any judgment or decree which has been or may hereafter be legally registered execution may be issued at any time within 10 years from the date of the judgment, whether execution has been previously issued thereon or not, "provided that the registration must have been made within a year from the time the judgment or decree was rendered." Neither Act Feb. 28, 1887, nor the act amendatory thereof, (Acts 1888-89, p. 60,) specified any time within which judgments should be filed and registered. Held, that the act of 1891 was not intended to declare that, unless the judgment was registered within a year after its rendition, it should not be a lien, but to declare an additional remedy and benefit as to judgments registered within a year.

6. The administrator and heirs of a deceased judgment debtor are proper parties defendant to an action in equity to enforce the lien of a registered judgment created by Act Feb. 28, 1887.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by Adelaide B. Wheeler, administratrix of the estate of Henry L. Wheeler, deceased, against Eugene F. Enslin, admin-

istrator of the estate of James Kendall, deceased, and others, heirs of Kendall, to enforce the lien of a judgment in favor of Henry L. Wheeler and against Kendall on certain land of which Kendall died seised. From a judgment for plaintiff, defendants appeal. Affirmed.

The defendants, in their answer to the bill, among other things, averred that no execution had issued on the Wheeler judgment for more than an entire term before the death of said Kendall; that no execution was in the hands of the sheriff at the time of the death of said Kendall; and prayed that said answer be taken as a cross bill, and that the court would order that said recorded judgment be canceled as a cloud upon the title to the real estate of which said James Kendall died seised. The court sustained a demurrer by plaintiff to the cross bill, and, upon the cause being submitted on pleadings and proof, decreed that plaintiff was entitled to the relief prayed for, and so ordered.

Mountjoy & Tomlinson, for appellants.  
Webb & Tillman, for appellee.

COLEMAN, J. Wheeler, as administratrix, filed this bill in the city court, sitting as a court of equity, to enforce a judgment lien upon certain lands particularly described in the bill, which belonged to the judgment debtor of respondent's intestate. The material facts are agreed upon, and the equity of the bill and complainant's right to relief involve a construction of the act of the legislature adopted February 28, 1887, to be found also at the bottom of page 635 of the Code. We believe the question raised by the bill is before this court for the first time. The complainant's intestate recovered a judgment in a court of law on the 25th day of October, 1884, against one Kendall, the respondent's intestate, which judgment was regularly filed and registered, during the lifetime of said Kendall, in the office of the probate judge, in accordance with the provisions of the act of February 28, 1887. Said Kendall died in September, 1889, and letters of administration were taken out on his estate in January, 1890. The judgment was filed for presentation as a claim against his estate in August, 1890. Executions had issued upon said judgment in the lifetime of Kendall, but they had not been issued regularly, and kept alive, and at the time of the death of Kendall there were no executions in the hands of the sheriff. The motion to dismiss the bill for want of equity and the demurrer thereto raise the questions to be decided.

It is contended that the bill is without equity,—First, because the lien given by the statute is not one of equitable jurisdiction; second, that by the death of Kendall, the judgment debtor, the judgment was abated, and the lien destroyed; and, third, that if

respondent is mistaken in these propositions, then complainant has a plain and adequate remedy at law. The act reads as follows: "Section 1. Be it enacted by the general assembly of Alabama, that the plaintiff or owner of any judgment or decree rendered by any court of record for the payment of money may file in the office of the judge of probate of any county in this state a certificate of the clerk or register of the court by which such judgment or decree was rendered, showing the court which rendered the same, the amount and date thereof, and the amount of costs, the names of the parties, and the name of the plaintiff's attorney, which certificate shall be registered by the judge of probate of such county, in a book to be kept by him for that purpose, which register shall also show the date of filing, and the name of the owner of such judgment or decree; and every judgment or decree so filed and registered shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution, and such lien shall continue for ten years from the date of such registration. The registration of such judgment or decree shall be notice to all persons of the existence of such lien." "Sec. 3. Be it further enacted, that the laws relating to the entry of credits and satisfaction of mortgages shall apply to the entry of credits and satisfaction of the liens created by this act." Unmistakably, the purpose and effect of the act is to declare "that every judgment and decree so filed and registered shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution, and such lien shall continue for ten years from the date of such registration," and the "registration is notice to all persons of the existence of such lien." Neither the original act nor the one amending it (Acts 1888-89, p. 60) provide a remedy for the enforcement of the lien. Section 2280 of the Code of 1886 reads as follows: "When a judgment has been rendered against a decedent before his death, no execution can issue thereon against his personal representative, except in the case provided for in section 2897, (3213;) nor can the judgment be revived against him except by suit on the judgment." Section 2897 reads as follows: "A writ of fieri facias, issued and received by the sheriff during the life of the defendant, may be levied after his death, or an alias issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created." Section 2894 is in the following language: "A writ of fieri facias is a lien, only within the county in which it is received by the officer authorized to execute it, on the lands and personal property of the defendant subject to levy and sale, from the time only that the writ is received by such officer; which lien continues as long as the writ

is regularly issued and delivered to such officer, without the lapse of an entire term." It is under these sections of the Code, and the decisions of this court rendered upon the law as it was prior to the adoption of the Code of 1852, that respondents contend that there is no equity in the bill. These sections of the Code of 1886 were in force, and had been for many years, prior to the adoption of the act of February 28, 1887, and neither of these several sections of the Code are referred to in the act of 1887. Unless the later act is in conflict, these several sections of the Code continue in force.

Section 2280 of the Code, *supra*, has been construed by this court, and it is held that, where a judgment has been recovered against a debtor in his lifetime, after his death the judgment is a mere cause of action against his personal representative, incapable of revivor otherwise than by suit at law in the ordinary manner. *May v. Parham*, 68 Ala. 253; *Brown v. Newman*, 66 Ala. 275; *Powe v. McLeod*, 76 Ala. 418. No execution can be levied after the death of the judgment debtor, except in the case provided for in section 2897, and that exception does not arise in the present case. After death, the lien of an execution provided in section 2894, *supra*, was incapable of enforcement in any court except in the case provided in section 2897, and in the manner therein provided. The lien of an execution, however, is not the lien given by the act of the legislature under consideration. Both liens may exist without interference the one with the other. *Chemical Works v. Moses*, 89 Ala. 538, 7 South. Rep. 637. It is contended that in this state, at a former period, judgments were liens from the date of their rendition, and such liens were incapable of enforcement after the death of the judgment debtor. Prior to the adoption of the Code of 1852 it was held that judgments and decrees of courts of record created liens upon land from the date of their rendition, and it was also held that such judgment liens could not be enforced after the death of the judgment debtor. *Abercrombie v. Hall*, 6 Ala. 658; *Lucas v. Price*, 4 Ala. 679. See *Mansony v. Bank*, Id. 735, 749, where the authorities are collected. From an examination of the authorities and the several statutes upon which they were based, it will be seen that there was no statute declaring in express words that judgments were liens from the date of rendition. By the act of 1807 (*Clay's Dig.* p. 199) the plaintiff enforced his judgment against the lands of a resident debtor by the writ of *elegit*, and by act of 1812 (*Clay's Dig.* p. 205) lands were made subject to the payment of judgments and decrees of courts of record by writ of execution. It was by construction of the remedy given by the writ of *elegit* in the one case, and *ieri facias* in the other, that it was held that judgments were liens from the date of their rendition. Upon the death of the debtor the lands descended

to his heirs. The property vested in them. The heirs were not parties to the suit in which judgment was rendered against their ancestor. They were not bound by it. Having never had their day in court, neither the writ of *elegit* nor *ieri facias* could be executed against their property. The lien of the judgment was that given to it by construction, and grew out of the remedy by the writ of *elegit* or *ieri facias*. The remedy having been destroyed by the death of the judgment debtor, the lien itself was destroyed. *Burk v. Jones*, 18 Ala. 167; *Forrest v. Camp*, 16 Ala. 642; *Hendon v. White*, 52 Ala. 597; *Ray v. Thompson*, 43 Ala. 434; *Fry v. Bank*, 16 Ala. 232. And these principles apply to liens created by the levy of an attachment, unless otherwise provided. *Phillips v. Ash's Heirs*, 63 Ala. 414. By the act of 1828 (*Clay's Dig.* p. 197) it was enacted that judgment creditors might subject the lands of a decedent to the satisfaction of their judgments, under certain conditions, by suing out *scire facias* against the executor and heirs; but this remedy is not now in force.

It is very clear that the authorities and principles of law to which we have adverted and cited have no application to a lien created by the statute, independent of the remedy to enforce the collection of a judgment, and our conclusion is that the lien is not destroyed by the death of the judgment debtor, and that the lands descend to the heirs incumbered with the lien acquired by filing and registering the judgment as provided by the statute of 1887. Courts of law have no original jurisdiction to enforce liens, and, in the absence of statutory provisions conferring the remedy upon a court of law to enforce a lien created by the statute,—and no other mode is provided by statute,—a court of equity, by virtue of its general jurisdiction over liens and trusts, will take jurisdiction, and enforce the lien. *Montandon v. Deas*, 14 Ala. 33; *Wimberly v. Mayberry*, 94 Ala. 240, 10 South. Rep. 157; *Westmoreland v. Foster*, 60 Ala. 448; *Bingham v. Vandegrift*, 93 Ala. 283, 9 South. Rep. 280. The statute of February, 1887, is wholly remedial, and should be liberally construed. We hold that it applies to all judgments in force at the time of its adoption, as well as to those subsequently recovered. *Dally v. Burke*, 28 Ala. 328; *Curry v. Landers*, 35 Ala. 280; *Ex parte Pollard*, and *Ex parte Woods*, 40 Ala. 77; *Ex parte Buckley*, 53 Ala. 42; *Eskridge v. Ditmars*, 51 Ala. 245. By act approved February 5, 1891, (Acts 1890-91, p. 375,) it was further enacted "that on any judgment or decree which has been or may hereafter be legally registered \* \* \* execution may be issued at any time within ten years from the date of the rendition of the judgment or decree; and that, whether execution has been previously issued or not on such judgment or decree: provided, that the registration must have been made within a year from the

time the judgment or decree was rendered." Neither the original act of 1887 (page 99) nor the amendatory act of 1888-89 (page 60) specified any time within which judgments and decrees should be filed and registered, but declared that "every judgment and decree so filed and registered shall be a lien on the property of the defendant, \* \* \* and such lien shall continue for ten years from the date of such registration." We do not construe the last amendment as in any manner declaring that, unless the judgment or decree was registered within a year from the date of its rendition, it should not be a lien. Our construction is that the last amendment was intended to declare an additional benefit and remedy on judgments and decrees filed and registered, provided they were thus registered within a year from the date of rendition. Until the adoption of the last amendatory act (1890-91, *supra*) it was necessary that the writ of *fiel facias* be issued within a year from the date of the rendition of the judgment, (Code, §2882,) and this section of the Code applied to judgments which were filed and registered equally as to judgments not filed and registered. By virtue of the amendment, execution may issue at any time within 10 years, whether previously issued or not, provided the judgment was registered within a year from its rendition. This amendment was not intended to furnish a statutory remedy for the enforcement of the statutory lien created by the act; neither does it destroy the lien of judgments because not registered within a year, and which liens may be enforced in a court of equity. Notwithstanding the broad language of the statute that execution may issue at any time within 10 years, the issue of the execution must be within the lifetime of the judgment debtor, unless it is within the exception provided in section 2597. Section 2280 of the Code, *supra*, is not repealed or modified by the act of 1890-91. Both statutes continue in force, and have their fields of operation, and the lien of execution as provided in section 2894 of the Code, *supra*, remains unaffected. Lands descend to and vest in the heirs upon the death of the ancestor. The statute (1890-91) makes no provision for making the executor or heirs parties. They are entitled to their day in court. The judgment, after the death of the judgment debtor, is a cause of action; and by virtue of the act of 1887 it is a cause of action secured by a lien upon the property of the judgment debtor. As to realty, upon his death, the legal title vests in the heir, and as to personalty in the administrator. As in cases brought to enforce a vendor's lien, after the death of the vendee, the administrator is interested in the payment of the debts of the decedent, and is a proper party to such a bill, and, the legal title being in the heirs, is a necessary party, so in a bill filed to enforce a judgment lien the administrator and heirs of the deceased debtor are proper parties

defendant. It follows from these conclusions that the city court did not err in any of its rulings on the motion to dismiss the bill, or on demurrer to the original or cross bill, nor in the final decree granting relief. Affirmed.

(38 Ala. 251)

BARRON v. ROBINSON et al.

(Supreme Court of Alabama. June 20, 1893.)

NEW TRIAL—SURPRISE—DILIGENCE.

A new trial on the ground of surprise in that defendant supposed that the action had been settled with the exception of costs by a note which he had given, will not be granted, where the papers on the application show that he did not make known to his attorney his grounds of defense, and did not move for continuance, but announced ready, and went to trial.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action by J. R. Robinson and others against J. R. Barron. Judgment for plaintiffs. A petition for new trial was denied, and defendant appeals. Affirmed.

The petitioner, appellant here, presented his petition to the Honorable John P. Hubbard, judge of the second judicial circuit, within four months after a judgment for \$1,000 had been recovered against him in the Pike county circuit court at the suit of J. R. Robinson and others, praying for a rehearing, under section 2872, Code. The grounds for this application as disclosed are that on the trial of the cause in which said judgment was rendered against him the defendant was prevented from making his defense in this: that the plaintiffs in that judgment had another suit against defendant, which stood for trial at the same time as the one in which judgment was rendered; that about three months before the rendition of said judgment defendant gave plaintiffs' attorney his note for \$30, which was taken in full settlement for the damages in both of said suits, and defendant believed no question remained in the case but one of costs; that it was agreed, and it was his understanding and belief, that both suits were settled by the note, and in consequence he had no witnesses summoned for his defense in either case, and he did not inform his attorney, before the trial, what his defense was, and when the case was called and on trial he was surprised when the plaintiffs' attorney swore that said note was not taken in payment of both suits; that he did not know, and was not informed, that he would have to meet that issue, until he had answered ready for trial, and plaintiffs' attorney testified it was not the agreement that said note was given in compromise of both suits. Defendant testified against the plaintiffs' attorney on the trial, and swore that said note was given in settlement and compromise of both of said suits. The petitioner sets up at least two defenses, one of which was that said suit was for cutting



trees on plaintiffs' land, and that they were not cut down by defendant, or by his direction, but were cut by another person, against his consent, and contrary to his directions, and that he had two witnesses, whose names he gave, who could corroborate him in that statement. The plaintiffs in the judgment demurred to the petition for insufficiency on many grounds, which demurrer was sustained, and defendant amended his petition. The plaintiffs then presented their answer to it. The answer stated that one of said suits was for the rent of land for the year 1890, and the other was for the statutory penalty of cutting trees off of plaintiffs' lands. That during the pendency of said suits defendant represented to J. D. Gardner, one of plaintiffs' attorneys, that he had paid to another of plaintiffs' attorneys, Mr. Wiley, \$25 on the rent, and requested said Gardner to allow the balance of the rent—\$30—to be paid in three monthly installments of \$10 each, and to this request said Gardner acceded, and took from defendant a note in writing, the original of which was attached to the answer, and which reads: "For rent of their place last year I hereby agree to pay Robinson, Taylor & Co., or bearer, thirty dollars, in monthly installments of ten dollars each, commencing from the 15th of the month, and I waive all exemptions in favor of the payment of this debt." That at the time said instrument was executed nothing was said about the settlement of the suit for cutting the trees, and the note was only given to settle what defendant said was a balance due on the rent of plaintiffs' lands for the preceding year. That when said suit for cutting the trees was called the defendant went to trial on the plea of not guilty, and made defense that he had made an executory contract for the purchase of the land, and did not set up that he had made settlement for the damages. That he did set up in the suit for rent. That he had paid the full amount agreed to be paid in money and in a note for \$30, which was submitted to a jury, and found against defendant. Defendant in his amended petition reiterates much of what he had stated in his original petition; states that he and Gardner swore adversely to each other touching the settlement of said suit; that defendant did not make known to the court, after said Gardner testified, that he was surprised by his testimony, nor did he make known to his attorney that he had other evidence that he could produce, because he was ignorant of his rights, and believed that, as he had announced ready, he could not afterwards make a motion to continue the cause; that on the trial he testified to said agreement as alleged in his petition, but, being surprised as he was, and confused, he could not make his testimony as full and clear as he might have done if he had had more time for reflection. The judge refused to grant the prayer of the petition. There is

set forth in the transcript what purports to be a minute entry rectifying the action of the judge, as if done by the court, but that is a clerical error. The petition never found its way into the court, and was acted on by the judge.

M. N. Carlisle, for appellant. Gardner & Wiley, for appellees.

HARALSON, J. Our rulings have been uniform and consistent to the effect that, "although the petition may show that the defendant was prevented from making his defense by surprise, accident, mistake, or fraud, yet, if it shows nothing more, and fails to show that he was prevented without fault on his part, it discloses no right to obtain a rehearing under the Code, or under any other law." *Ex parte Wallace*, 60 Ala. 267. A concurrence of injustice committed and freedom from fault on the part of defendant is indispensable to relief. *Waldrom v. Waldrom*, 76 Ala. 289. "In such a proceeding the law is strict in requiring not only a clear statement of a meritorious defense, but also allegation of the facts and circumstances which are relied on to show that the party complaining acted with due diligence, and is chargeable with no fault or neglect in not having had the matter of his defense completely presented at the trial." *Ex parte Wallace*, supra; *Martin v. Hudson*, 52 Ala. 279. Our books abound with cases of apparent hardship with which the court has refused to interfere because the parties complaining had not brought themselves strictly within the rules above announced. 3 Brick. Dig. 677; 2 Brick. Dig. 280, 281. The facts averred in the petition and answer are sufficient to show that the defendant was not diligent in preparing his case for trial. He did not even inform his attorney before or at the time of entering on the trial of the defensive matters he now brings forward. He did not apply for a continuance, but announced ready, and went to trial. It does not appear he made a motion for a new trial at the term of the court at which judgment was obtained against him. He does not make known any newly-discovered evidence, or other defensive matter, not known to him on the trial. The note he says he gave in compromise of both suits against him is attached to plaintiffs' answer to the petition, and shows that defendant was mistaken in saying it was in compromise of the suit in which this judgment was obtained. It shows on its face it was for another and different consideration,—that of the rent of lands for the previous year. He now says he was surprised, confused, and ignorant of the proper course to pursue, and that he did not make his testimony as full and clear as he might have done if he had had more time for reflection. Doubtless every litigant who loses his case sees where he might have done better, and would like

to try it over again. Lord Thurlow once said, "Questions are not to be brought before the court in this way, merely to try which way the stick will fall," and take the chances for another hearing. There must be stability in the judgments of courts. If misfortune has overtaken the defendant, he makes no case for relief. The circuit judge committed no error in denying the petition.

**Affirmed.**

(101 Ala. 289)

**TURNER COAL CO. v. GLOVER, (two cases. Nos. 296, 322.)**

(Supreme Court of Alabama. April 26, 1893.)

**PLEADING—DEMURRER—PLEA—NEW TRIAL—ACTION TO RECOVER PENALTY FOR DESTROYING TIMBER.**

**On the Merits.**

1. On demurrer the court cannot consider any objection other than the one specified, so that, if not subject to the objection, the demurrer must be overruled; and if a party demurs for a wrong reason he waives all others, however insufficient the pleadings may be in other respects.

2. In an action to recover the statutory penalty for cutting timber on plaintiff's land, the plea alleged that defendant entered under a conveyance of minerals on the lands with the right to enter for the purpose of mining, and of all the timber necessary for the development of the mines. *Held*, that a demurrer to the plea on the ground that it did not aver that it was necessary to cut the timber in question for the development of the mines, and that it was used for such purpose, was properly sustained.

3. Defendant, in its plea, set up title to the surface of the land, and showed specifically how it derived such title. The replication denied that defendant's grantor had such title in the land and trees as he claimed, which at the time of the alleged sale he could convey to defendant, and averred that plaintiff was the owner by conveyances previous to the one under which defendant claimed. *Held* that, though the replication was, perhaps, necessary, it was not subject to a demurrer interposed on the ground that it traversed the color of title given to plaintiff by defendant, that it brought plaintiff's title into question, and that the replication was inconsistent with the declaration in that it claimed the surface only, whereas the declaration claimed the land in fee simple, and that it claims more than the declaration.

**On Application for New Trial.**

An application for new trial, on the ground that at the time of cutting the trees and of the trial of the cause plaintiffs had conveyed the lands on which the trees were situated by a mortgage, is properly denied when the petition fails to show that defendant was prevented from making his defense by surprise, accident, mistake, or fraud; and even if defendant had known about the mortgage it could not have availed him as a defense, for the mortgagor, whether before or after default, is regarded as the owner of the property mortgaged as against all persons except the mortgagee.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Action by John F. Glover against the Turner Coal Company to recover the statutory penalty for cutting down trees. Judgment

was entered in favor of plaintiff, and defendant appeals. **Affirmed.**

As originally filed, the complaint contained five counts. In the first count the plaintiff claimed of the defendant \$4,000 "for willfully and knowingly, and without the consent of the plaintiff, and in violation of section 3296 of the Code of Alabama, cutting down, destroying, and taking away four hundred pine, oak, poplar, walnut, and hickory trees and saplings in the months of June, July, August, September, October, November, and December, 1891," from certain described property, "which said lands were not at that time, and are not now, the property of the defendant, but were and are the property of the plaintiff." By the second count the plaintiff claims of the defendant "the further sum of \$2,000 as damages for willfully and knowingly and without plaintiff's consent, and in violation of section 3296 of the Code of Alabama, having cut down and destroyed 200 pine trees, which were on the land described in the first count," etc. In the third count the plaintiff claimed of the defendant, under similar allegations, the like sum of \$2,000 for cutting down and destroying 200 oak trees and saplings. By the fourth count, under similar allegations, the defendant claimed of the defendant the like sum of \$2,000 as damages for cutting down and destroying 200 pine and oak trees and saplings. By amendment the fifth count of the original complaint was stricken out, and the sixth, which was in the following language, was supplied therefor: "And the plaintiff claims of the defendant the further sum of \$2,000, the value of timber cut down, destroyed, and converted by the defendant to his own use from the lands of the plaintiff as particularly described in the first count of the complaint, to wit, 400 trees and saplings, in the months of April, May, June, July, August, September, October, November, and December." The plaintiff demurred to the complaint as amended upon the grounds that "there is a misjoinder of counts, in that the 1st, 2d, 3d, and 4th counts are in debt and the 6th in assumpsit." This demurrer was overruled by the court, and the defendant then interposed a special plea, the substance of which is set out in the opinion. The plaintiff demurred to this plea upon several grounds. The sixth and seventh grounds are set out in the opinion. Upon the court sustaining the demurrer interposed by the plaintiff, the defendant amended his plea, and thereupon the plaintiff filed his replication to said plea, which is copied in the opinion. The defendant demurred to the plaintiff's replication on the following grounds: (1) That it traverses the color of title given to plaintiff by defendant, which is not traversable; (2) that it brings plaintiff's title into question, which is not allowable in this action; and (3) that said replication is inconsistent with the declaration, in that it claims the surface only, whereas the decla-

ration claims the land in fee simple, and that it claims more land than the declaration. The court overruled this demurrer to plaintiff's replication, and thereupon the defendant declined to take issue upon it, or in any way plead to said declaration. The judgment entry then recites that "therefore it is considered and adjudged by the court that the plaintiff is entitled to recover of the defendant the damages in this behalf sustained; but the amount thereof being uncertain, and it appearing to the court that in this cause a jury having been waived, as by the statutes in such cases made and provided, now, upon plaintiff's motion, the court proceeds to hear and determine this cause upon the proof produced by the plaintiff, and thereupon it is considered and adjudged by the court that the amount of plaintiff's damages be, and it is hereby, assessed at the sum of \$2,000." Among the evidence then introduced there was a deed from O. T. Lantrip to John F. Glover conveying the land involved in the suit from which the trees were cut, and there was also introduced a deed from John F. Glover to M. A. Glover, and one from M. A. Glover to John F. Glover. There were rulings of the court upon the defendant's objections to the introduction of these deeds in evidence, and also to the introduction of other evidence, but the opinion renders it unnecessary to notice them in detail.

#### On Petition for New Trial.

The other cause (No. 322) is an appeal from the court overruling and denying a petition of the defendant for a new trial. The ground of this petition was that at the time of the trial of the cause, and at the time of the cutting of the trees involved in the suit, John F. Glover and his wife had conveyed the lands upon which were situated the trees by a mortgage to one W. F. Peterson, and that, therefore, John F. Glover, the plaintiff in the suit, had no title thereto. The plaintiff demurred to the petition on the ground that it did not aver that the defendant was prevented from making his defense at the trial of the cause by surprise, accident, mistake, or fraud, and did not set up any facts or fact showing in what way surprise, accident, mistake, or fraud prevented the defendant from making the defense. John F. Glover, in response to the petition, filed his affidavit, in which he swore that the mortgage referred to in the petition had been paid and satisfied in full, and that nothing was due upon the same for a long time prior to the institution of this suit, and that the real estate from which the trees were cut was at the time of the institution of this suit, and was at the time of the making of the affidavit, the property of the plaintiff. The court refused the petition, and denied the application for a new trial.

A. Latardy, for appellant. Wade & Vaughan, for appellee.

#### On the Merits.

HARALSON, J. The fifth count in the complaint was withdrawn before the court passed on the demurrer to it. A new count (No. 6) was filed in substitution for No. 5, stricken out by amendment. The defendant thereupon demurred to the complaint as thus amended, on the specific ground that counts 1, 2, 3, and 4 are in debt, and the sixth in assumpsit. There is evidently a misjoinder of counts. The first four are causes of action for debt, proper in a case of this kind, and the sixth is in tort. It was not framed under section 3296 of the Code, as were the others. The demurrer is "that there is a misjoinder of counts." If it had stopped there, without stating in what the misjoinder consisted, it would have been general, and faulty, under section 2890, which forbids any objection by way of demurrer to be taken or allowed, which is not distinctly stated. Here, however, the defendant proceeded and stated distinctly what the ground of his demurrer was, viz. that the first four counts were actions in debt, and the sixth in assumpsit. The defendant had the privilege of not demurring at all. It is one he may waive. When he demurs for a wrong reason, he waives all others, even if good; for under our rulings this court, under said section of the Code, is prohibited from considering any other objection than the one specified, to which a plea or complaint may be subject; and, not being subject to the objection specifically stated, the demurrer must be overruled. *Land Co. v. Dromgoole*, 89 Ala. 507, 7 South. Rep. 444. In *Eads v. Murphy*, 52 Ala. 524, it is said: "When a demurrer is interposed, the court cannot consider any other objection than is specifically stated. However insufficient the pleadings may be in other respects, if it is not obnoxious to the particular objections assigned, the demurrer must be overruled." The purpose of the rule is to have defects pointed out, to give the party pleading an opportunity to cure them by amendment, if it can be done. *Sledge v. Swift*, 53 Ala. 114. The demurrer to the complaint was properly overruled.

This action was brought under section 3296 of the Code, which has received construction at our hands. In *Rogers v. Brooks*, (Ala.) 11 South. Rep. 753, it was held that a complaint which avers that plaintiff is the owner of the land from which the trees were cut, stating their number and description, and that they were willfully and knowingly cut by defendant, without plaintiff's consent, contained all the facts required to be alleged by the statute, and will be treated as being an action in debt. In *Allison v. Little*, 93 Ala. 152, 9 South. Rep. 388, it was held that the right of action under said section of the Code is given not to the person in possession, but to the owner of the land, whether he was in possession or not, at the time of the commission of the trespass. The demurrer to the

complaint having been overruled, the defendant pleaded specially that one Coleman T. Lantrip was seised of the lands described in the complaint, and before the alleged trespass conveyed to R. H. Turner the coal, iron ore, and other minerals on the lands, with the right to enter on the lands, and open drifts, slopes, and shafts for the purpose of mining coal, iron ore, and other minerals, and also all the timber and water on the same necessary for the development, working, and mining of coal, iron ore, and other minerals, and the preparation and removal of the same for market, and the right to build roads over the same, necessary for the convenient transportation of all such mineral products to market; also the right to build houses for all machinery. "And plaintiff, claiming said lands by color of parol demise for ten years, by the said Coleman T. Lantrip, made to him long before the conveyance aforesaid by Coleman T. Lantrip to said R. H. Hudson, entered on the lands above mentioned, and was possessed of the same, and defendant, afterwards, entered upon plaintiff's possession, as lawfully it might, in manner complained of by said plaintiff, and cut timber, as lawfully it might, and this is the injury complained of," and for which the plaintiff sues. The plaintiff demurred to this plea on many grounds, two of which—the sixth and seventh—are that "it is not averred in said plea that it was necessary to cut said timber for the development, working, and mining of said coal and iron and other minerals, and the preparation of same for market, and their removal," and "because it is not averred that said timber was cut and used for the necessary purposes set forth in the foregoing ground of demurrer." The court sustained the demurrer on these grounds, and the defendant asked and was permitted to amend his plea so as to meet these defects raised on demurrer. The demurrer was properly sustained, for an averment of the right to cut the timbers for necessary purposes of development is not an averment that they were cut for such purposes. But, if there was error in the ruling, it is without injury, since the defendant insists in argument that the plea, when properly and legally construed, means all that the plaintiff by his demurrer insists it did not contain, and that, in substance and effect, it was the same before as after amendment. The plaintiff replied to the plea as amended: "That at the time of the said Coleman T. Lantrip's pretended sale to R. H. Hudson, and said Turner's pretended purchase from him, (under and through whom the defendant claims its right to cut said trees and timber,) that the said Lantrip did not have the title nor right to said timber and trees, nor the right nor title to the surface of said land whereon said trees were located, and from which they were cut, \* \* \* but that the right and title to the same were in plaintiff," etc. This replica-

tion was, perhaps, unnecessary, as the plaintiff might possibly have availed himself of the same facts, by joining issue on defendant's plea; but, be that as it may, the replication was cautionary, and was, if true, a complete response to the plea. The plea sets up title to the surface of the land, and shows specifically how it derives such title,—through Turner, and he through Lantrip. The replication denies that Lantrip had such title in the land and trees as he claimed, which at the time of the alleged sale he could convey to defendant, and avers that plaintiff was the owner of the same by conveyance from said Lantrip, previous to defendant's conveyance from him. The replication was not subject to the demurrer, as the same was interposed by defendant, and the court committed no error in overruling it. The defendant declined to take issue on, or in any manner plead to, said replication.

It is unnecessary to consider the other assignments of error. The plaintiff introduced evidence tending to prove that he was the owner of the land from which the trees were cut, and the allegations generally of his complaints, and the facts set up in his said replication; but much of the evidence which it is said was offered and admitted is not set out in the bill of exceptions, and it is not stated that the bill contains all the evidence that was introduced. We must presume that there was sufficient evidence introduced to sustain the judgment rendered by the court, and the judgment is affirmed.

#### On Application for New Trial.

The case between the same parties, No. 322, submitted by agreement, and tried with the foregoing case, No. 296, is a petition for a rehearing in the last-named case, under section 2872 of the Code. The petition fails to show that the defendant was prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part. *Ex parte Wallace*, 60 Ala. 267; *Waldrom v. Waldrom*, 76 Ala. 289; *Barron v. Robinson*, 13 South. Rep. 476, (at present term.) Even if defendant had known about the fact on account of which he applies for a rehearing, viz. that there was a mortgage on the land from which the trees were cut, given by the plaintiff and his wife to a third person, it would have been of no avail as a defense to him, for the mortgagor, whether before or after the default, is regarded as the owner of the property mortgaged against all persons except the mortgagee. *Allen v. Kellam*, 64 Ala. 443; *Comer v. Sheehan*, 74 Ala. 457; *Marks v. Robinson*, 82 Ala. 69, 2 South. Rep. 292; *Cotton v. Carlisle*, 85 Ala. 177, 4 South. Rep. 670. If more were needed, the affidavit of J. F. Glover shows that the mortgage was on record at the day of the trial, and had been for a long time; that the same has been paid and satisfied in full, and that the mortgagee has no claim on the land, or interest in

it. There was no error in refusing the prayer of said petition. It was wholly insufficient for the relief it sought. Affirmed.

(100 Ala. 622)

**BAKER v. BOON.**

(Supreme Court of Alabama. July 27, 1893.)

**ACTION ON NOTE—PLEADINGS—NEW TRIAL—SURPRISE.**

1. In an action on a note, by the transferee against the maker, defendant pleaded that at the time of the execution of the note there were mutual unsettled accounts between the parties, and that the note was given to cover only the balance that should be found due the payee on a settlement of the accounts, and that "only a few dollars was in fact due." Plaintiff demurred to the plea (1) that "the maker attempted to show by a parol agreement that a different amount was to be paid than that specified in the note, at an indefinite time;" and (2) that "the plea attempted to change a written agreement by parol testimony." *Held*, that the demurrer was properly overruled.

2. Where plaintiff goes to trial without objection, he is not entitled to a new trial because of the absence of evidence to rebut the defense, of which he had notice by a special plea.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

Action on a promissory note by C. C. Baker against W. P. Boon. Defendant had judgment, and plaintiff appeals. Affirmed.

On the trial of the case, as is shown by the bill of exceptions, after the introduction of the note made by W. P. Boon to one J. Rich, and which had been assigned by J. Rich to the plaintiff, the plaintiff rested his cause. Thereupon the defendant, as a witness in his own behalf, testified that, upon Jake Rich asking him to give him the note in settlement of the defendant's account with the said Rich, the defendant demanded a settlement in full; that the said Rich stated that he did not have his books; and that he told the defendant to give him the note, and that they could have a statement afterwards. The defendant testified that: "I gave him [Rich] the note with the understanding that I should pay whatever amount was due him after we had settlement, and no more. I owed him some amount, but I didn't know what amount." The plaintiff moved to exclude the testimony of the defendant as to the understanding between him and said Rich at the time of the execution of the said note, and duly excepted to the court's overruling his motion. The defendant's testimony further tended to show that he had, since the execution of said note, tried repeatedly to get a settlement of his account with the said Rich, but had never been able to do so, and that since the making of said note he had ascertained that he owed said Rich only about \$15 or \$20. The defendant then introduced in evidence, against the objections and separate exceptions of the plaintiff, several statements of accounts which had been presented

to him by said Rich, and also introduced receipts given him by said Rich in payment of these several accounts, showing a balance due of only \$15 or \$20. The defendant, on his cross-examination, denied that the plaintiff ever came to see him about the note before he purchased it, and that he told the plaintiff that he had no defense to the note. He further denied that he had ever promised to pay the plaintiff as soon as the present suit was brought, and denied that he had ever admitted the indebtedness due on the note, either to the said Rich or to the plaintiff. In rebuttal the plaintiff introduced testimony which was in direct conflict with the testimony of the defendant,—to the effect that the defendant, on being seen by the plaintiff before he purchased the note from said Rich, admitted the indebtedness, and told the plaintiff that he had no defense to the said note, and would as soon pay him as said Rich; that he had on several different occasions admitted the indebtedness evidenced by the note, and had, since this suit was brought, promised to pay the same. Upon the introduction of all the evidence the plaintiff requested the court to give the following charges to the jury, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that the defendant, having given the note in evidence, payable in money, cannot now be heard to testify that the said note, or a part thereof, was to be discharged by a statement of accounts then pending between the maker and the payer of the note." (2) "The court charges the jury that the note before them is payable in money, and that they must not consider any evidence, if there be any, tending to show a parol agreement between the defendant and said Rich that said note was to be discharged, in part or in full, by crediting the same with an amount to be ascertained on the statement of an account between them, in answer to the complaint." After judgment was rendered for the defendant the plaintiff moved the court for a new trial on the grounds—First, that the court erred in its charge given to the jury; second, because the verdict of the jury was not supported in evidence, and was contrary to the law as given by the court; third, because the plaintiff was taken by surprise on the trial of said cause; fourth, because the suit was on a promissory note, and that the defendant had never denied the justness and validity of the said note until the day of the trial; fifth, that after the trial was taken the plaintiff was unable to show or prove the consideration of said note; sixth, because of the absence of the books of said Rich, on which the accounts were kept against the defendant, and that if he was granted a new trial he could and would obtain said books, and by their evidence break down the pleas of want and failure of consideration interposed by the defend-

ant. This last ground of motion for a new trial was supported by the affidavit of the plaintiff. The court overruled the motion, and the plaintiff duly excepted.

Wood & Mayfield, for appellant. Foster & Jones, for appellee.

COLEMAN, J. Appellant, Baker, sued the defendant upon a promissory note, which resulted in a verdict and judgment for the defendant. The ruling of the court upon questions arising upon two pleas are presented for consideration. The first plea, marked "A," was that of payment. To this plea there was a replication to the effect that plaintiff purchased the note upon the statement and representation of the defendant that the note evidenced a just claim, and that there was no defense against it. The plea of payment authorized the introduction of evidence to show the payment of the note at some time subsequent to its execution. Suffice to say there was no evidence introduced of this character, and this plea was not sustained.

The second plea was a special plea going to the consideration of the note. There was no replication to this plea. The gravamen of this plea is that at the time of the execution of the note there were mutual accounts between the parties, the balance not known, but that there was a balance, in some amount, due the payee, and the note was executed for an amount to cover the balance, and that only such amount as should be found due upon a statement of the accounts was the real consideration of the note, and the amount to be paid, and the plea avers that "only a few dollars was in fact due." To this plea two grounds of demurrer were assigned: First, that the maker attempted to show by a parol agreement that a different amount was to be paid than that specified in the note, at an indefinite time, and after a settlement of their mutual accounts; and, second, that the plea attempted to change a written agreement by parol testimony.

The court can consider no cause of demurrer not distinctly stated in the demurrer. Code, § 2690, and authorities thereunder cited. In *Ramsey v. Young*, 69 Ala. 157, it is said "that the consideration of contracts in writing is, in general, open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary, or contradict writings to receive parol evidence of the actual consideration, for the purpose of determining its validity or its failure, or that, from any cause, it is sufficient or insufficient to support the contract." *Tisdale v. Maxwell*, 58 Ala. 40; *Holland v. Barnes*, 53 Ala. 83. There is nothing in the plea to show that the payment was to be postponed, or that the note could be discharged in any particular manner; and the cases of *Land Co. v. Dromgoole*, 89 Ala. 505, 7 South. Rep.

444; *Doss v. Peterson*, 82 Ala. 253, 2 South. Rep. 644; *Hart v. Clark*, 54 Ala. 490,—have no application. The plea purports to show the real consideration for which the note was given. It was not subject to the particular objections directed against it by the demurrer, and it was properly overruled. These conclusions dispose of all the objections to the introduction of evidence, and also the exceptions to the refusal of the court to charge as requested by the plaintiff. All these exceptions are based upon the same principles of law, and which do not apply where the plea of failure or want of consideration is made to a suit upon a note, and the evidence is admissible under the plea. The plea was defective for indefiniteness as to the amount admitted to be due, but it was not objected to on this account. Issue was joined upon it, and there was evidence tending to support the plea. *Railroad Co. v. Graham*, 94 Ala. 545, 10 South. Rep. 283; *Allison v. Little*, 93 Ala. 150, 9 South. Rep. 388.

The application for a new trial was properly overruled. The record informs us that the parties agreed to go to trial upon the plea. There was no application for a continuance upon the filing of the special plea. The plaintiff was informed by this plea of the defense. He knew then whether he was prepared to meet it. He knew he did not have the books present. A party cannot speculate upon the results of a trial, and then become surprised at the result. There is no error in the record available to appellant. Affirmed.

#### GREEN v. STATE.

(96 Ala. 14)

(Supreme Court of Alabama. July 27, 1893.)

##### MURDER IN THE FIRST DEGREE—INSTRUCTIONS.

1. In a homicide case, failure to charge specially with reference to all the facts is not reversible error.

2. That a homicide shall be murder in the first degree, the elements of deliberation, premeditation, etc., need to have coexisted but a moment before the killing, and to have prompted the fatal act.

Appeal from circuit court, Sumter county; S. H. Sprott, Judge.

Stephoe Green was convicted of murder, and appeals. Affirmed.

The exception reserved to the ruling of the court upon the evidence was reserved to the court's overruling the defendant's objection to the following question: "What is the character of the country along the road from the cotton patch near Henry Green's house to the ravine at the five-mile post on the Gainsville and Livingston road, [the place where the killing occurred?]" For the evidence on this question, and the ruling upon it, see 12 South. Rep. 416. The defendant having requested the court to give his general charge to the jury in writing, the court, in answer to such request,

Instructed the jury as follows: "The defendant stands indicted for the murder of Harriett Marr. 'Murder,' under our statute, is defined as follows: 'Every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, perpetrated from a premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree. And every other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree. Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree, and manslaughter committed under any other circumstances is manslaughter in the second degree.' The indictment in this case charges murder in the first degree. That charge embraces, not only murder in the first degree, but also murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree. Murder in the first degree is the willful, deliberate, malicious, and premeditated killing of a human being. 'Willful' means governed by the will, without yielding to reason. 'Deliberate' means formed with deliberation, in contradistinction to a sudden, rash act. 'Malicious' means with fixed hate, or done with wicked intentions or motive, not the result of sudden passion. 'Premeditated' means contrived or designed previously. *The law fixes no particular length of time these elements shall exist in the mind. If they coexist but a moment before, and prompt the fatal act, it is sufficient.* There must have been a previously formed design to take the life of the individual slain, and death must have been the result of the voluntary, intentional employment of means calculated to produce it. It does not necessarily follow that, where life is taken in pursuance of a formed design, that the defendant must be guilty of murder in the first degree. There may be a formed design to take life by one acting entirely in self-defense. A person guilty of manslaughter may have instantaneously formed the design to take life, but to make it manslaughter there must be an absence of malice, deliberation, and premeditation. The design, in such case, is the result of sudden passion upon sufficient provocation, as distinguished from that formed design which results from malice, deliberation, premeditation. Murder in the second degree is the unlawful and malicious killing of a human

being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder in the first degree. Manslaughter in the first degree is the unlawful and intentional killing of a human being without malice, express or implied; and manslaughter committed under any other circumstances is manslaughter in the second degree. The defendant pleads not guilty, and this cast upon the state the duty to show beyond a reasonable doubt that the defendant committed the homicide charged, in some degree of criminality punishable by law. If the evidence satisfies you beyond a reasonable doubt that the defendant, without lawful justification or excuse, committed the homicide charged under the circumstances which fix either of these degrees of criminality upon him, then you cannot return a general verdict of not guilty. I have stated to you that, before the defendant can be convicted of any offense, that you must be satisfied of his guilt beyond a reasonable doubt; and, if you have a reasonable doubt of his guilt of any of the offenses embraced in the charge against him, then you would have to return a verdict of not guilty. The doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. You, gentlemen, are the exclusive judges of the evidence. It is for you to say what weight shall be given to the evidence of each witness. You cannot capriciously reject the evidence of any witness. It is your duty to reconcile the evidence of witnesses, if there is any conflict, if you can do so, and say what weight shall be given to it. You have a right, in weighing the evidence, to consider the manner and demeanor of the witnesses on the stand, and, if there is any conflict, is it as to any material matter? Where a deadly weapon is used, malice may be inferred from the use of such weapon, unless the facts and circumstances of the killing rebut such presumption. For instance, if a deadly weapon is used, and death results, but the facts of the case show that it was used in self-defense, then the presumption of malice from the use of such weapon is overcome. If the deceased died from the effects of a wound inflicted by a knife or stick in the hands of the defendant, and such wound was intentionally inflicted, in pursuance of a previously formed design to take her life, he would be guilty of murder. If, however, the fatal blow was inflicted in the heat of passion, and without the existence of such formed design, necessary to constitute murder, and it was unlawfully and intentionally done, this would be manslaughter in the first degree. On the other hand, if the de-

fendant was being attacked by Emma Marr, and he was without fault in provoking or bringing on the difficulty, and there was no other reasonable mode of escape, and if, in defending himself against such attack, he struck the blow, intending to strike and repel such attack, and unintentionally struck deceased, and killed her, then he would not be guilty of any offense. In other words, if the blow was aimed at and intended for Emma Marr, and if he had killed her, and the evidence disclosed that he was justifiable, and acted in self-defense, then he would not be guilty, though another was killed. After a careful examination and comparison of all the facts and circumstances in the case, if you are satisfied beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so return your verdict. If, however, you are not satisfied that there was that degree of premeditation and deliberation that would constitute murder in the first degree, but that he is guilty of murder in the second degree, you will so return by your verdict. And if you are not satisfied beyond a reasonable doubt that the defendant is guilty of murder either in the first or second degree, but you are satisfied beyond a reasonable doubt that he unlawfully and intentionally killed Harriett Marr, but without malice, then you would return a verdict of guilty of manslaughter in the first degree." The court further charged the jury, orally, as follows: "In like manner, if you are not satisfied from the evidence that the defendant is guilty of either murder in the first or second degree, or manslaughter in the first degree, but that he is guilty of manslaughter in the second degree, then you would return a verdict of manslaughter in the second degree." The defendant excepted to the court's general charge as a whole, and also separately excepted to that portion of the general charge which is italicized.

Smith, Vande Graaff & Travis, for appellant. Wm. L. Martin, Atty. Gen., and J. J. Altman, for the State.

COLEMAN, J. The defendant was tried and convicted of murder in the first degree, and sentenced to suffer the death penalty. This is the third appeal in this case; the defendant, having been convicted twice previously, and sentenced to death, and each time, on appeal, the case was reversed. We find no exception in the record to any ruling of the court which was not determined on the former appeal, or which has not been adjudicated in other cases. Under the statute, upon the request of the defendant, the judge was required to give his charge to the jury in writing.

The first exception is to the entire charge, as a whole. The rule in such cases is that if any part of the charge is free from objec-

tion the exception cannot be sustained. Railroad Co. v. Orr, 94 Ala. 602, 10 South. Rep. 167; Gibson v. State, 89 Ala. 121, 8 South. Rep. 98; Williams v. State, 83 Ala. 68, 3 South. Rep. 743; Irvin v. State, 50 Ala. 181. We are of opinion the entire charge, and every proposition of law asserted, are correct.

It is argued that the court failed to instruct the jury as to the law upon certain material facts introduced in evidence on the trial. The charge nowhere unduly emphasizes or gives undue prominence to any fact, or the testimony of any witness. The constituents of the degrees of murder and of manslaughter are correctly and clearly stated, and it is left to the jury to find from the facts which of the degrees of murder or manslaughter, if of either, the defendant was guilty. We cannot sanction the doctrine that, when the court is required to charge the jury in writing, it will be reversible error if the court is unable, at the time the charge is prepared, to remember all the evidence introduced on the trial of the protracted case, where a dozen or more witnesses are examined, and to charge specially with reference to all the facts. If this was law, but few convictions would stand. The contention is without authority to support it, and is unreasonable. It is the privilege of the defendant to call the attention of the court to any matter contained in the charge, deemed objectionable; and if the objection is well founded, unless corrected, it will be reversible error. It is also the privilege of the defendant to prepare written charges upon any and every question of law considered favorable to him, and, if correct, a refusal to give them is reversible error. All possible safeguards to protect a defendant on trial, charged with a criminal offense, are preserved for his protection. A party has the right to waive an exception to any objectionable charge, if he sees proper to do so. Holland v. Barnes, 53 Ala. 83.

The portion of the general charge specially excepted to has been so often adjudicated, we will do no more than cite a few of the more recent cases. Hornsby v. State, 94 Ala. 55, 10 South. Rep. 522; Cribbs v. State, 86 Ala. 613, 6 South. Rep. 109; Lang v. State, 84 Ala. 1, 4 South. Rep. 193; Mitchell v. State, 60 Ala. 26.

The objection to the testimony of witnesses, describing the surroundings of the place where the crime was perpetrated, was considered on a former appeal, and declared to be competent evidence. Green v. State, (Ala.) 12 South. Rep. 416. This testimony was admissible for two reasons: It enabled the jury to better understand the evidence of other witnesses, and it was not irrelevant upon the question of previous design. Much of the adjacent land across which the defendant and deceased passed was open, and any movements liable to be seen. The evidence tends to show the exact locality of



the crime was hidden from view, and defendant's knowledge of the character of the surrounding country, and the seclusion of the particular place, was fully established.

There is no error in the record, and the judgment of the court must be affirmed. It appearing that the day fixed for the execution of the sentence of the law has passed, this court now appoints the 15th day of September, next, on which day the proper officer of Sumter county will execute the sentence of the law, as pronounced by the court. Affirmed.

(98 Ala. 176)

**FOLEY v. FELRATH.**

(Supreme Court of Alabama. July 27, 1893.)

**SALE—WHEN TITLE PASSES—LOSS IN TRANSIT—LIABILITY OF PURCHASER.**

Where goods are delivered to a common carrier under a contract of sale giving the purchaser the right to return certain of them in case they did not prove satisfactory, and the goods are lost in transit, the vendor may recover their price from the purchaser, as the title passed on delivery to the carrier, subject to the exercise of the option to return.

Appeal from circuit court, Mobile county; James T. Jones, Judge.

Assumpsit by John Foley against Joseph Felrath. From a judgment for defendant, plaintiff appeals. Reversed.

Pillans, Torrey & Hanaw, for appellant. Faith & Ervin, for appellee.

HARALSON, J. Foley sued Felrath for \$502.56 for merchandise, goods, and chattels sold by him to said Felrath on the 1st of August, 1892, and on an open account and on account stated for like amounts. It was claimed by the plaintiff, and he so testified, that he was a manufacturer of gold pens in New York city; that on the 8th March, 1892, he was in Mobile, Ala., and while there was in the store of defendant, and sold to him a bill of goods in his line for \$502.56; that the goods were accordingly shipped to the defendant by plaintiff by the Adams Express Company, for which said company gave him a receipt; that at the time of the sale its terms and details were written down by plaintiff, one-half to be secured by defendant's note at four months, and one-half at six months; the last note, if all the goods were not sold in that time, might be paid in goods not sold, at defendant's option; that the sale was absolute, and not conditional; that defendant, after he received the goods, notified him that he had returned them by the express company, and afterwards the company brought the box of goods to plaintiff, and he would not receive them, because they were defendant's. The defendant contradicted this evidence of the plaintiff, and testified that plaintiff came into his store, and, representing himself as a large manufacturer of gold pens and novelties in that line, asked him to take the agency for him for the sale

of his goods in Mobile, and, as the result of their interview, defendant agreed to accept the agency, and that plaintiff should ship him, as such agent, \$500. worth of his goods for sale; that plaintiff represented that such goods should be "good sellers," and told defendant that he would not be required to pay out any of his own money for the goods, and plaintiff was to send out, at his own expense, private letters and cards, the printing to be paid for by defendant; that he agreed to take the agency, provided the goods shipped were as represented, and he was to pay no money; that plaintiff said that he could not let his goods go on four months' time unless defendant would give him a note which he could use as collateral to borrow money, and, on the assurance that defendant would not have to pay the note, for the reason that before it matured he would have sold goods enough to meet it, he gave him a note for \$250, not as purchase money, but as accommodation, and plaintiff was to send the goods for examination before he would accept them; that they were to be such as would be salable in the Mobile market; that the goods afterwards came by express, according to invoice sent with them, but were immediately returned to plaintiff, because not such as were promised to be sent, and were old style and unsalable. A correspondence immediately sprang up between them, in which the one contended there was an absolute sale, and he would not receive the goods back, but would hold the other responsible for their value, and the other that the transaction was not a sale, but an agency, and he would have nothing more to do with the goods, and would not pay for them. Finally, however, as the result of this correspondence, the defendant wrote to plaintiff, under date of April 21, 1892, to the following effect: "I have reconsidered the matter, and will accept the goods on condition that you exchange some high-priced goods, which I will return, for cheaper articles, more suitable for this market. Please favor me with the retail selling price of said line of goods in the north. I do not understand the invoice you sent me, and therefore would like for you to send me another, more explicit, giving the net retail price, and then allow me the discount; also, send the show case, as promised. Let goods come along." To this letter the plaintiff, on April 25th, after it was received, replied: "Thanks. Had much trouble, but all right now. Have sent you show case, and have told express company to deliver you goods. Most are marked, and you will find retail prices in this green circular, as sold by dealers here. You can exchange goods at any time. I was careful to send only good sellers, and, if not, will make all to your satisfaction. I will go on mailing private letters as soon as I get answer to this. Open up goods at once, and put out big pen, and push sales, and send me this note, and let

us be good friends." The evidence tends to show that the goods were shipped back to defendant by the express company, as requested by him, and in transit were lost or destroyed in a wreck. The defendant contends that the loss is the plaintiff's, that there was no delivery of the goods, for the reason that before accepting them he had the right to select from the lot such as he would return, according to the condition annexed to his agreement for them to be returned to him, and the sale, till this was done, was incomplete. On the other hand, the plaintiff maintains that the sale and delivery were complete, and the defendant is liable for the price of the goods, and must himself look to the express company for damages, if it has incurred liability for the nondelivery of the package.

The evidence tends to show, and it is without conflict as to the point, that the same package of goods, and the same goods that had in the first place been shipped to the defendant at Mobile by the plaintiff, which he received and examined, the invoice and prices for which had been furnished to him by plaintiff, and which he returned to plaintiff as not coming up to representations, were the identical package and goods which defendant, upon reconsideration, instructed the plaintiff to have returned to him by the express company. There was no mistake as to the identity, quality, and price of the goods. There had been, as we have seen, a spirited dispute between the parties as to the character of the transaction between them; the plaintiff maintaining all the while that defendant had purchased the goods, and that they were his property. The defendant finally yielded to plaintiff's contention, and wrote: "I have reconsidered the matter, and will accept the goods on condition that you exchange some high-priced goods, which I will return, for cheaper articles, more suitable for this market." What was it defendant had reconsidered? It could have been nothing but the very thing the plaintiff had been so pertinaciously pressing on him,—that the goods were sold and delivered to him, that the transaction was no agency, and he was liable, and must pay for what he had bought. He yielded the contention, and said, "I will accept the goods. \* \* \* Let goods come along." A sale has been defined to be "a transfer of the absolute or general property in a thing for a price in money." *Benj. Sales*, § 1. If anything remains to be done by either party to the transaction before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price. *Magee v. Billings-*

*ley*, 3 Ala. 679; *Bank v. Fry*, 69 Ala. 348, 75 Ala. 473; *Allen v. Maury*, 66 Ala. 17; *Wallis v. Howison*, 93 Ala. 375, 9 South. Rep. 594; *Cleveland v. Williams*, 94 Amer. Dec. 274; 2 Kent, Comm. 496. In *Allen v. Maury*, supra, we said: "Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind, expressed within a reasonable time." In *Greene v. Lewis*, 85 Ala. 221, 4 South. Rep. 740, it was held that where a horse was sold and delivered to a purchaser for a reasonable price, to be afterwards agreed on, the title at once passed, and the fact that the parties could not afterwards agree on a reasonable price made no difference in the character of the transaction. The court, in passing upon the question, stated: "The rule is settled that the title to personal property may pass to a vendee without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties." *Shealy v. Edwards*, 73 Ala. 175; *Wilkinson v. Williamson*, 76 Ala. 163. An option to purchase, if the party to whom the goods are transferred should like, is very different from an option to return the goods if he should not like, them. In the first case, the title will not pass until the transferee determines the option, if seasonably exercised; in the other, the title passes subject to the right to rescind and return, which is, in effect, a right to resell to his vendor. 2 *Benj. Sales*, p. 796, § 915, note 30; *Buswell v. Bicknell*, 17 Me. 344; *Hunt v. Wyman*, 100 Mass. 198. The case in hand was clearly one of a sale with right to rescind and return as to the high-priced goods. The contract of sale between the parties, as we have seen, rested at first in parol, about the terms of which they disputed. They eventually agreed upon its terms, and that agreement is in writing. There could no longer remain any dispute about it, and no parol evidence was needed to construe it. Its construction became a question of law for the court, and not for the jury, to determine. *Jones v. Pullen*, 66 Ala. 306; *Claghorn v. Lingo*, 62 Ala. 230; *Bernstein v. Humes*, 60 Ala. 582; *Gullmartin v. Wood*, 76 Ala. 209.

It is unnecessary for us, in the view we take of the case, to consider any of the charges given to which exceptions were reserved, or any of the assignments of error, except the ones based on the request for the general charge in favor of the plaintiff. The evidence is undisputed and in writing as to what the contract was, and, as its proper construction makes it one of sale and delivery of goods, the court should have given the general charge for the plaintiff, as requested. Reversed and remanded.

(38 Ala. 274)

**BIRMINGHAM MINERAL R. CO. v. CITY OF BESSEMER.**

(Supreme Court of Alabama. July 27, 1893.)

**INJUNCTION—PLATS—STREETS—RIGHT OF WAY.**

1. A temporary injunction will not be dissolved on motion on the denials of the answer where the answer sets up matters in avoidance or an independent defense.

2. A bill by a railroad company to enjoin a city from opening a street across its right of way without compensation showed that it had entered on the right of way, and constructed its road, under an agreement that the right of way should be conveyed to it in consideration of its constructing its road; that subsequently, in pursuance thereof, a conveyance was made to it of a right of way over certain lands in defendant city "as now surveyed, laid off, and drawn;" that in the mean time the owner of the land had filed a plat of the land, showing streets and the line of complainant's right of way, pursuant to Act Feb. 28, 1887, (Acts 1886-87, p. 93,) providing that the recording of such a plat shall be a conveyance in fee of the portions thereon marked or noted as donated to the public, and that the portions shown thereon as intended for streets and other public uses shall be held in trust for the purposes intended or set forth. *Held*, that the bill showed that the fee of the streets was conveyed to the public, subject only to complainant's right of way, and that the conveyance to complainant was in accordance therewith.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Suit by the Birmingham Mineral Railroad Company to enjoin the city of Bessemer. Decree for defendant. Complainant appeals. Affirmed.

Hewitt, Walker & Porter, for appellant. James E. Webb and Thomas M. Owen, for appellee.

COLEMAN, J. The Birmingham Mineral Railroad Company filed the present bill to enjoin the city of Bessemer from opening up Eighth avenue across its right of way, without first making compensation or resorting to condemnation proceedings under the statute. A temporary injunction issued in accordance with the prayer of the bill. The respondent demurred to the bill, and also filed an answer. The cause was submitted upon the demurrer to the bill, and upon motion to dissolve the injunction. The motion to dissolve the injunction is based upon two grounds: (1) The denials of the answer; (2) for want of equity in the bill. The court overruled the demurrer to the bill, but dissolved the injunction upon the denials of the answer.

The court was in error in basing the decree dissolving the injunction upon the denials of the answer. Where the facts averred, upon which the injunction is claimed, the burden of proving which are upon the plaintiff, are clearly and explicitly denied in the answer, generally the injunction should be dissolved; but where the answer sets up matter in avoidance, or an independent defense, the proof of which rests upon the respondent, the rule is otherwise. *Rembert*

*v. Brown*, 17 Ala. 667; *Jackson v. Jackson*, 91 Ala. 293, 10 South. Rep. 81; *Bolling v. Roman*, (Ala.) 10 South. Rep. 553; *Morris Canal, etc., Co. v. Mayor, etc., of Jersey City*, 12 N. J. Eq. 227; 10 Amer. & Eng. Enc. Law, 1018; *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. Rep. 23. We find in some instances, where an averment of fact made by the bill is denied in the answer, the denial is immediately followed by matters in avoidance, or matter in the nature of a defense, not responsive to the allegation of fact. We cannot consider the merit of the defense, presented by averments of this character made in the answer, upon a motion to dissolve the injunction.

The question of vital importance is that presented upon the motion to dissolve the injunction for want of equity in the bill. If there is no equity in the bill, then the injunction was properly dissolved, and the conclusion of the court must be sustained, although the reason assigned was not the proper one. In determining this question, the whole bill must be considered together, and if there be averments in the bill which, if standing alone, might give it equity, if there are other averments which contradict or qualify these facts, and which, if true, show that the bill is without equity, the bill cannot stand. Pleadings must be construed most strongly against the pleader. The material facts presented in the amended bill are substantially the following: About the 1st of April, 1887, the complainant, under a parol contract of purchase of the right of way from the Bessemer Land & Improvement Company, the consideration of which was an agreement to construct its railroad line over and along the right of way, entered into possession, and began the construction of the road, according to the agreement, and has been in possession of the same ever since; that the Improvement company owned the fee, and promised on its part to make a conveyance of the right of way. It may be that the facts here stated, if true, would remove the parol agreement from under the influence of the statute of frauds, and be effective to vest in the purchaser the right to compel a conveyance of the right of way. *Railroad Co. v. Davis*, 91 Ala. 615, 8 South. Rep. 349. In this agreement, as stated in the bill, the width of the right of way is not defined, but the agreement might not be void on this account. *Railway Co. v. Brown*, (Ala.) 13 South. Rep. 70. The bill, however, does not stop with the averments as to this parol agreement, but sets up the deed of conveyance made by the improvement company to show title in itself. This deed is made Exhibit A to the bill, and bears date June 15, 1887, and is made the evidence of plaintiff's right and title to the right of way. Whatever may have been the parol agreement, the deed seems to have been accepted as a complete execution of and compliance with the parol promise of

the improvement company, and furnishes the terms of the conveyance, the width of the right of way, the limitations, if any, conditions, and interest conveyed. It conveys the right of way "over the following lands in the city of Bessemer, as now surveyed, laid off, and drawn, to wit," etc. The grantor covenants that the premises are free from incumbrance; that it is selsed in fee; and warrants the title. This deed makes no reference to any prior or other agreement or contract of sale of the right of way. It will be noticed that the description of the right of way in the deed of conveyance refers to the city of Bessemer "as now surveyed, laid off, and drawn." The terms and provisions of this deed were sufficient to convey to the grantee whatever of interest was then owned by the improvement company.

In the third paragraph of the bill, it is averred "that on the 11th day of April, 1887, the Bessemer Land & Improvement Company filed for record in the office of the judge of probate a map of its lands included in the present corporate limits of the city of Bessemer, showing its streets, alleys, and avenues, which map is made Exhibit B to the bill." It is averred that, prior to the *granting* of the right of way, "no lots as shown on said map were sold or conveyed to any person whatever." The bill then undertakes by averment to assert complainant's understanding of what is shown by the map. The word "*granting*," which we have italicized, evidently refers to the deed of conveyance. Considering Exhibits A and B to the bill in connection with its averments, and we are led irresistibly to the conclusion that the complainant acquired no other rights or interest by its purchase of the right of way than that owned by the improvement company at the date of the deed of conveyance, to wit, June 15, 1887. It has been decided that "the mere laying out of the lots, and making a map showing streets, do not of themselves deprive the owner of the right to use the property as his own. There must be an acceptance of the dedication, of which the sale and purchase of lots are sufficient proof. The sales and conveyances of lots describing the streets as boundaries constitute covenants with the purchasers that the streets are dedicated to their use and the use of the public." *Evans v. Railway Co.*, 90 Ala. 58, 7 South. Rep. 758. Doubtless, it was under this view of the law that the pleader averred "there had been no sale of lots to any one" prior to the "*granting*." By a general law enacted February 28, 1887, (see Acts 1886-87, p. 93,) it is provided as follows: "Section 1. Be it enacted by the general assembly of Alabama that any person who shall wish to divide his lands into town lots, shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plot or map of said lands to be made, showing

the streets, alleys and public grounds, and giving the bearings and length of each boundary of every lot and block, and bearings, length, width and name of every street contained therein, and numbering each block and each lot in each block, progressively; such plot must show the relation of the land so plotted to the government survey. Sec. 2. The plots or maps having been completed, shall be certified by the surveyor and acknowledged by the owner of the land, or his attorney duly authorized, in the same manner as deeds of land are required to be acknowledged. The certificate of the surveyor and of acknowledgment, together with the plot, shall be recorded in the office of the judge of probate in the county in which the land is situated, in a book kept for that purpose, and such acknowledgment and record shall have like effect, and certified copies thereof and of such plot, may be used in evidence to the same extent and with like effect as in case of deeds. Sec. 3. The acknowledgment and recording of such plot shall be held in law and in equity to be a conveyance, in fee simple, of such portion of the premises plotted as are marked or noted on such plot as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in said plot, shall be held in that trust for the uses and purposes intended or set forth in said plot." The act then provides in what manner such plot may be vacated, and also makes provisions for towns or cities which had been laid off prior to its adoption. Leaving out of view the answer of the respondent, we can but conclude, under the averments of the bill, in connection with the map itself, that it was the purpose of the improvement company on the 11th of April, 1887, more than two months before the execution of the conveyance of the right of way to complainant, to comply with this act of the legislature. The filing for record of the map and its acknowledgment, in the manner prescribed by the statute, effected a conveyance in fee simple of such portion of the premises donated or granted to the public, "and the premises intended for any street, alleyway, common or other public use, as shown in said plot, were held in that trust, for the uses and purposes intended or set forth in said plot." The bill shows that on "the 24th day of August, 1887, the city of Bessemer was incorporated under the general laws of Alabama, and by such incorporation acquired whatever rights and interest were granted for streets, alleyways," etc., by the acknowledgment and recording of the map or plot of the city of Bessemer on the 11th of April preceding.

There is no question as to the vacation of any grant made in the map, as provided in the statute. The remaining and only question depends upon the construction of the map itself. Does the map show a reserva-

tion in the improvement company, the grantor, of a fee to the right of way along which the mineral railroad company's line was located, and which fee passed by its deed of conveyance of June 15, 1887, or does it not affirmatively show that, by virtue of section 8 of the above act, the fee passed, and was held in trust for the uses and purposes therein indicated, subject only to a right of way, for the mineral railroad, the course and location of which was indicated by the dotted lines, and its width by the straight lines on either side of the dotted lines? We think it perfectly clear that the latter conclusion is the correct one, and was so intended by the parties, as shown by the qualification in the deed of conveyance "over the following lands in the city of Bessemer, as now surveyed, laid off, and drawn." The construction contended for by appellant would divide the city into three parts,—north and south, separated by the Birmingham Mineral Railroad line of way and the line of the Alabama Great Southern Railroad; and into eastern and western parts, separated by the Birmingham Mineral, Kansas City, and other railroads running through the city, north and south. In determining the respective rights of the city, and the rights of way granted to the railroads or to public uses, acquired after the filing of the map and its acknowledgment, as provided in the statute *supra*, we hold the interest which passed by virtue of the statute is superior to any that could be conveyed subsequently, without regard to the terms and covenants of any such subsequent grant and conveyance. We do not wish to be understood as intimating that filing and recording the map and the acknowledgment thereto could in any way affect the vested rights of persons. We decide the case as presented in the pleadings, construing the bill most strongly against the pleader, and we have applied this same rule in our criticism of the answer. As advised by the pleadings, we do not see that the bill can be cured by amendment, but we make no decision upon this question. As it stands before us, it is without equity, and consequently the decree dissolving the injunction must be affirmed.

(98 Ala. 536)

DEAN v. EAST TENNESSEE, V. & G. RY.  
CO. et al.

(Supreme Court of Alabama. June 22, 1893.)

**INJURY TO EMPLOYE—PLEADING—VARIANCE.**

In an action for personal injuries, plaintiff alleged that at the time he was injured he was in the employ of two railroad companies, (defendants.) The evidence showed that the companies employed a common agent at a railroad crossing who had charge of the common office, and the freight of both companies, and who had under him a yard master, who employed plaintiff as switchman. The E. Co. employed the yard master and plaintiff; the L. Co. paying one-half the expenses. At the time of the injury, plaintiff was coupling cars in a train for the L. Co. *Held*, that at the time

he was not in the employ of the E. Co., and the variance was fatal.

Appeal from circuit court, Shelby county; Le Roy F. Box, Judge.

Action by J. C. Dean against the East Tennessee, Virginia & Georgia Railroad Company and the Louisville & Nashville Railroad Company to recover damages for personal injuries alleged to have been sustained by reason of the defendants' negligence. There was judgment for the defendants, and plaintiff appeals. Affirmed.

W. R. Oliver and L. A. Dean, for appellant. Pettus & Pettus, for the East Tennessee, Virginia & Georgia Railroad Company. Charles P. Jones, for the Louisville & Nashville Railroad Company.

**HEAD, J.** The plaintiff sues the two defendant companies jointly for a personal injury alleged to have been sustained by him through their negligence. There are three counts in the complaint. The first count alleges that on and prior to the day of the injury the two defendants operated and used a certain switch engine for the purpose of switching cars from one track to another, and in transferring cars from the East Tennessee, Virginia & Georgia Railway to the Louisville & Nashville Railroad, and vice versa; in the town of Calera, and that plaintiff was in the service of the two defendants as a switchman or car coupler, in connection with said switch engine, under the command and direction of one J. W. Rhodes, who was the yard master of the defendants at Calera, and while engaged in such service he was ordered by said yard master, under whose superintendence plaintiff then was, to couple cars that were standing on a side track on the Louisville & Nashville Railroad, in Calera, one of which was attached to the switch engine, and while attempting to make the coupling the iron drawheads of the two cars were driven in, and his arm was caught and injured, and that such injury was suffered by reason of defective works, machinery, or plants connected with or used in the defendants' business, to wit, the coupling and appliances used for connecting such cars, all of which, but for the want of proper care and diligence, would have been, or ought to have been, known to defendants, and were unknown to plaintiff. The second count is the same, except that, instead of alleging that plaintiff was "in the service of the defendants," it alleges that he was a switchman or car coupler in the railroad yards of the defendants at Calera. The third count is the same as the first, except that, instead of the expression above quoted, it alleges that plaintiff was employed by the defendants as a switchman and car coupler.

We cannot construe these varying averments otherwise than as meaning the same thing. Taking the averments most strongly against the pleader, we are forced to construe the expression that plaintiff was in the service of the defendants, as in the first count, and that he was a switchman or car coupler

in the railroad yards of the defendants, as in the second count, to mean that he was in the employ of both defendants, as alleged in the third count. Under the settled rule that the allegata and probata must correspond, to entitle plaintiff to recover, it was essential to prove that, in respect of the injury of which he complains, he bore the relation to the two defendants which he alleged. The existence of this status, as the plaintiff saw fit to allege it, must have been established as being related to the tortious acts alleged as causing the injury. The circuit court gave the general affirmative charge in favor of the defendants. The propriety of this instruction will be tested by a consideration of the evidence. The roads of the two defendants intersect or cross at Calera. By arrangement between the two companies, they employed a common agent at that place, (Bridges,) who had charge of the common office, and directed the employees who did the work of selling tickets, handling freight, and placing cars for both companies. There was also an officer known as "yard master," (Rhodes,) who was engaged in doing the moving and switching of cars for both companies from one road to the other, and on both roads. He did his work as directed by the said common agent, Bridges, or by the master of trains for the respective roads. This yard master, Rhodes, employed the plaintiff to work with him as switchman and car coupler, and he was so engaged at the time he was injured. The common agent, Bridges, testified that there was an agreement between the two companies that the East Tennessee, Virginia & Georgia Company should employ the force to do the work, and the Louisville & Nashville Company should pay half the expenses; that both Rhodes, the yard master, and plaintiff, the switchman, were employed by the former company, and the latter paid the former company one-half their wages. Bridges was paid by both companies, and it is conceded he was the agent of both. It does not appear whether he was authorized to employ and discharge the yard laborers, or not. The extent of his authority over them, so far as the evidence discloses, was to direct them in the discharge of their duties. It does not appear what person employed Rhodes, the yard master; the only testimony on that point being that of Bridges, the agent, that both the yard master and plaintiff were employed by the East Tennessee, Virginia & Georgia Railway Company.

Do these facts tend to show an employment of plaintiff, by both companies, to perform the service in which he was engaged when injured? The text-books lay down, as a general principle, that the relation of master and servant exists when the person sought to be charged as master has the right to direct and control the alleged servant in the performance of the work upon which he is engaged, and to accept or reject the rendi-

tion of service by such servant. Thus, in Wood, Mast. & Serv. § 305, it is said: "The relation of master and servant only exists where the person sought to be charged as master either employed or controlled the servant, or had the right of control over him, at the time when the injury happened, or expressly or tacitly assented to the rendition of the particular service by him." He must at the time have had the right to direct the action of the servant, and to accept or reject its rendition by him. This language is substantially reiterated in 14 Amer. & Eng. Enc. Law, 752. It may be conceded that under these principles of law, and the evidence, as we have stated it above, the arrangement was such as to create a relation of master and servant between the plaintiff and both these defendants. These relations, however, were several as to the defendants, except as to any service the plaintiff might perform for them jointly under it. If, under the arrangement, a service arose for and in behalf of both defendants, then the plaintiff, called upon to perform it, was, as to such service, in their joint employment; but if a particular service was performed for one of the employers alone, the other having no interest in or concern with it, then, as to such service, the plaintiff could not be said to have been in the employ of both jointly. The company, having no connection with the particular service being rendered, would have no control over the servant performing it; and, as to it, there would be no relation of master and servant between it and the servant. Apply these principles to the present case. The plaintiff's testimony is as follows: "I was directed by Yard Master Rhodes to couple two cars that were on the Louisville & Nashville side track. One of the cars was a Norfolk & Western car. That one had just been brought from the East Tennessee, Virginia & Georgia Railway track, and left it on the Louisville & Nashville side track, and then went with the switch engine, and got a Georgia Pacific car that was on the tank track of the Louisville & Nashville Railroad, and brought it to couple with the Norfolk & Western car, and it was these two cars I was directed to couple while they were on the Louisville & Nashville track, at Calera, Ala." Plaintiff was injured while attempting to effect this coupling. The other undisputed evidence shows that this coupling was being done in making up a train for the Louisville & Nashville Company to go through to Mobile and New Orleans over that company's road. One of the two cars in question was destined to Mobile, and the other to New Orleans, and the train being made up, and containing them, departed, shortly after the plaintiff's injury, to those points. It thus unmistakably appears, from the undisputed evidence, that the service plaintiff was engaged in, when hurt, was exclusively that of the Louisville & Nashville Railroad Company, in which the other

defendant had no interest, and, in respect of which, no right of control over the plaintiff. The averment of the complaint, in legal effect, is that, in respect of this service, the plaintiff was in the joint employment of both defendants. There is therefore a fatal variance between the allegations and the proof, and the general charge for the defendants was properly given. Affirmed.

(101 Ala. 368)

**SIMON et al. v. JOHNSON.**

(Supreme Court of Alabama. June 14, 1893.)

**AUTHORITY OF AGENTS—CUSTOM—EFFECT—NOTICE.**

1. A traveling salesman, selling by sample for credit or cash, to be paid on receipt of the goods, has no implied authority to collect the money agreed to be paid.

2. A custom in the town in which the goods were sold to pay such salesmen is not binding on nonresident principals, in the absence of evidence of notice to them of such custom.

Appeal from circuit court, Geneva county; J. M. Carmichael, Judge.

Assumpsit, counting on the general counts, by J. Simon & Son against J. J. Johnson. Judgment for defendant. Plaintiffs appeal. Reversed.

The plaintiffs introduced in evidence a verified account. The defendant testified in his own behalf that he bought the goods contained in the verified statement of plaintiff's account from one J. B. Carlisle, who was a drummer for plaintiffs; that he arranged with said Carlisle to discount said bill at 8 per cent. upon receipt of invoice, and that it had been his (defendant's) custom for 8 or 10 years to pay drummers for goods bought from them, and it was the custom of the merchants in Geneva to pay drummers the money for goods bought from them; that he had never bought but one bill before this one from the plaintiffs, and did not remember whether he paid the drummer, or remitted direct to the plaintiffs; and that he paid the present bill, less the discount, to the said Carlisle, and took Carlisle's receipt in full for the same, and wrote to the plaintiffs at once that he had paid the amount due them to said Carlisle; and that he did not think plaintiffs replied to said letter. The plaintiffs objected to the proof of the custom of the merchants of Geneva, "unless he first proved that it was the custom of J. Simon & Son to allow their drummers to collect for goods sold in Geneva." The court overruled this objection, and the plaintiffs duly excepted. The plaintiffs further objected to said proof on the ground that the time proven was not long enough to constitute a custom or usage. The court also overruled this objection, and plaintiffs duly excepted. In rebuttal, the plaintiffs introduced testimony to the effect that, on the receipt of Johnson's letter, they immediately wrote him that Carlisle was not au-

thorized to collect the amount due on said account, and that his receipt would not be recognized. Upon the introduction of all the evidence, the plaintiffs requested, among other written charges, the following: "If the jury believe the evidence, they will find for the plaintiffs." The court refused to give this, as well as other charges requested by the plaintiffs, and to the refusal to give each of them the plaintiffs separately excepted.

J. J. Morris and W. D. Roberts, for appellants. M. E. Milligan, for appellee.

**McCLELLAN, J.** The decided weight of authority—indeed, well-nigh all the adjudged cases—supports the proposition that a traveling salesman of merchandise, making sales by sample on a credit or for cash, to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser. 2 Amer. & Eng. Enc. Law, p. 355, and notes; Kane v. Barstow, 42 Kan. 485, 22 Pac. Rep. 588, 16 Amer. St. Rep. 490, and note on page 494; McKindly v. Dunham, 55 Wis. 515, 13 N. W. Rep. 485; Kohn v. Washer, 64 Tex. 131; Butler v. Dorman, 68 Mo. 298; Law v. Stokes, 90 Amer. Dec. 655; Kornemann v. Monaghan, 24 Mich. 36; Clark v. Smith, 88 Ill. 298; Higgins v. Moore, 34 N. Y. 417; Greenleaf v. Egan, 30 Minn. 816, 15 N. W. Rep. 254; Seiple v. Irwin, 30 Pa. St. 513. The particular facts of the Maine case relied on by counsel for appellee prevent it from being an authority against the proposition just stated. The opinion in that case, indeed, recognizes the soundness of the rule declared in Higgins v. Moore and McKindly v. Dunham, supra, and, in effect, bases the conclusion that payment was well made to the agent, mainly, if not entirely, on the facts that the "agent assumed to complete a contract of sale, specific in terms, stipulating that payment was to be made to himself," and that, "after the goods had been delivered, he presented for payment a bill, made upon a genuine 'billhead' of his principal." Neither of these facts is in the present case or was involved in the cases cited. Without committing ourselves to the effect accorded them by the Maine court, it is readily conceivable that there is much reason for according them an important influence in shaping the conclusion reached. Trainer v. Morrison, 78 Me. 160, 3 Atl. Rep. 185. The Vermont case, relied on by the appellee, involved the sale by one Allen, who was in fact a traveling salesman for plaintiff's firm, but who represented himself to be a member of the partnership, and, upon that representation, made the contract of sale with the defendants. This contract embodied a stipulation that defendants should pay Allen for the goods when he should come to their city on his next trip, in about three months; and the decision is based on this express stipulation for payment to Allen, in connec-

tion with the consideration that defendants had a right, under all the circumstances, to rely upon Allen's making a truthful report of the terms of the sale, and to suppose that the goods were sent pursuant to the contract as made,—a view which finds nothing in the present case to rest upon. *Putnam v. French*, 53 Vt. 402. The only case to which we have been referred, or which our own investigation has disclosed, that really sustains the position taken for appellee, is that of *Collins v. Newton*, 7 Baxt. 269. No great degree of investigation or consideration is evinced by the opinion of the court, and, in reaching the conclusion announced, no account seems to have been taken of the distinction, undoubtedly very important, between agents to make contracts of sale by sample to be filled through a delivery of the goods by the principal, time being given for payment, or payment to be made on delivery by the principal, and agents who, having the property of the principal in their possession for that purpose, sell and presently deliver it to the purchaser. The question has not been decided in Alabama. We are content, however, to follow the very numerous cases which hold that such an agent has no implied power to collect from purchasers for goods sold and delivered in the manner shown in this record. The agent has not the goods, and does not deliver them. *Prima facie*, his agency is discharged when he makes a contract of sale, and takes an order for delivery by the principal. The sole purpose of his itinerary is to induce parties having need of the wares in which his principal deals to buy them from the house he represents. In doing this, he, in a sense, has taken the place of ordinary advertisement, and orders through the mails to the wholesale dealer, which obtained in the course of such transactions before his day. Having done this in a given instance, at a particular place, and made report to his employer, he passes on, and it is the merest accident if he is again at that place at the time the bill falls due, or if the purchaser at such time knows his whereabouts. To hold that an agency simply to make and report such contracts of sale under these circumstances involves an agency to collect the contract price when the account matures,—a matter wholly beyond the exigencies of commerce, which brought these agencies into being, inconvenient of accomplishment, and entirely unnecessary, in such sort that it is to be assumed that the principal held the agent out as empowered to collect,—would be too radical a departure from elementary principles of the law of agency to be tolerated. To the contrary, we hold that a traveling salesman, making contracts of sale by sample, goods to be delivered by the principal, and the purchase money to be paid on delivery, or at any other time transpiring, or upon any other event happening in the future, is, upon these facts, and without more, wholly

unauthorized to receive payment, and, of consequence, that payment made to him will not discharge the debtor from his liability to the principal.

It is insisted, however, in this case, that the payment was authorized and justified by a custom prevailing generally in the town of Geneva (where the contract of sale was made, the goods delivered subsequently, and the price paid, also subsequently, to the agent) for payments to be made in this way. The plaintiffs, whom this agent was representing, lived and carried on their business in New Orleans. Conceding that the usage itself was established by the evidence, it did not authorize or justify the payment to the agent, or in any manner change or affect the rights of the principals, unless it had also been proved that they had notice of it. *German American Ins. Co. v. Commercial Fire Ins. Co.*, (Ala.) 11 South. Rep. 117. This was not only not proved, but there was no evidence adduced which legitimately tended to prove it. The only facts relied on as having such a tendency is that some years previously the defendant had purchased a bill of goods from a firm in New Orleans; paid the bill at maturity to the traveling salesman who took the order; informed the firm of the fact; that they did not dissent from or object to this mode of payment; and that one member of that firm is now a member of the plaintiffs' firm. It is, we think, too clear for discussion that, as proof of this one isolated transaction would be no evidence of the alleged custom, so notice of it would be no evidence of notice of such custom. Many of the rulings and instructions of the trial court are out of harmony with the law applicable to this case, as we find it to be. We need not particularize them. The judgment must be reversed, and the cause remanded; and, if the evidence on another trial is the same we find in this record, it will be the duty of the court, upon request, to give the affirmative charge for the plaintiffs.

Reversed and remanded.

(38 Ala. 40)

#### FOUNTAIN v. STATE.

(Supreme Court of Alabama. June 6, 1893.)

#### CRIMINAL PROSECUTION—SELLING MORTGAGED PROPERTY—INSTRUCTIONS.

1. On a prosecution for selling mortgaged property, the mortgagee testified that March 10th, when the mortgage fell due, defendant did not have possession of said property,—a yoke of oxen,—but that he did have them 10 days before. There was evidence that, in the preceding December, defendant had sold the oxen. *Held*, that an instruction that if the jury believed the testimony of the prosecuting witness, that defendant had the oxen in his possession about March 1st, they could not find him guilty of the sale in December was properly refused, as being argumentative, and giving undue prominence to the testimony of a single witness.

2. On a prosecution for selling a yoke of oxen mortgaged by defendant, an instruction



that if the mortgagee, at the time of taking possession of the mortgaged property, took an ox not covered by the mortgage, the presumption was that the ox was substituted for one of those covered by the mortgage, and that defendant could not be convicted of selling a yoke of oxen, as charged, is bad, as invading the province of the jury.

3. On a prosecution for selling mortgaged cattle, where defendant testifies in his defense, and his character for truth and veracity is impeached, a charge that his character in that regard has no bearing on the question of guilt is properly refused, as misleading.

Appeal from city court of Decatur; Wm. H. Simpson, Judge.

John Fountain was convicted of selling or removing mortgaged property, and appeals. Affirmed.

The evidence for the state tended to show that on December 15, 1890, the defendant bought of one C. E. Marks a yoke of oxen and wagon, and gave a mortgage on this property, and another yoke—a red ox and a brown ox—and wagon, which the defendant already had in his possession, to secure the payment of the debt so incurred. This mortgage became due on the 10th of March, 1891. When the mortgage fell due, on March 10, 1891, Marks went to the defendant, and called for the property, and found that the defendant did not have the red and brown oxen in his possession. The defendant told Marks that these oxen had died. Marks asked the defendant to show him where the carcasses were, and defendant went with him, and showed him one carcass, but could not find but one, which Marks claimed was the carcass of a cow which he himself had hauled off a few days before. Marks testified that he had seen these oxen in the defendant's possession about 10 days before this time. Marks got three steers and the two wagons from the defendant, and has never made any sale of this property under the terms of the mortgage. One J. I. Murphy, a witness for the state, testified that some time in the latter part of the year 1890, about the 1st of December, he saw the defendant offer for sale a yoke of oxen to one Edgefield, but did not remember the description of the oxen. One Breedlove, another witness for the state, testified that in December, 1890, the defendant sold to Edgefield a yoke of oxen; that he was uncertain about the date, but it was some time in December, 1890, before Christmas; and that he also heard the defendant say that he sold the oxen to said Edgefield. Taylor Harris, a witness for the defendant, testified that he hauled off for the defendant two dead oxen—one of which was a red one, and the other flea bitten—some time about January, 1891. The defendant, being introduced as witness in his own behalf, testified that one of the steers he mortgaged to Marks died about January 15, and the other about January 18, 1891, and that the oxen he sold to Edgefield were not the oxen covered by the mortgage which he had given to Marks, but that he sold them in December, 1890, before

he executed said mortgage. In rebuttal the state introduced two witnesses, who, after testifying that they were acquainted with the defendant, and knew his reputation for truth and veracity in the community in which he lived, testified that his reputation for truth and veracity were bad, and that they would not believe him on oath. Upon the introduction of all the evidence the defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them, as asked: (1) "If the jury believe the evidence, they must acquit the defendant." (2) "If the jury believe the testimony of Marks, that the defendant had the yoke of oxen in question in this case in his possession about March 1, 1891, they cannot find him guilty of the sale to Edgefield, in December, 1890." (3) "The fact that Marks did not get back the yoke of steers covered by the mortgage, by itself, does not furnish any presumption that the defendant sold or removed the yoke of oxen, as charged in the indictment." (4) "Unless it is proved, beyond a reasonable doubt, that the defendant sold or removed a yoke of oxen, the jury cannot find him guilty under the indictment. The sale or removal of one ox is not sufficient." (5) "If the jury find that Marks took from the defendant, at the time when he took possession of the mortgaged property, a steer not covered by the mortgage, the presumption is that this steer was substituted for one of the steers covered by the mortgage, and the defendant cannot be convicted of selling or removing a yoke of oxen, as charged in the indictment." (6) "If the evidence shows that the value of the property surrendered by the defendant to Marks, under the mortgage, was of sufficient value to satisfy the mortgage debt, the jury may look to this fact to determine whether the property was disposed of by the defendant, if disposed, with the intent to defraud Marks." (7) "The defendant's character for truth and veracity has no bearing whatever on the question of the guilt of the defendant, of the offense charged in the indictment."

Morris A. Tyng, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. What purport to be a motion for a new trial, and affidavits filed in support thereof, are copied in the transcript before us. This motion and these affidavits are, of course, no part of the record of the trial court, nor are they embodied in, or shown by, the bill of exceptions taken on the trial. Presented as they are, they are not presented at all, in legal contemplation, for revision by this court. We may say, however, that had the motion, the evidence in support of it, the judgment of the city court upon it, and the exception to that judgment, been properly shown by the bill of exceptions, the exception would be unavailing to the appellant. The verdict was not con-

trary to the law or the evidence, as insisted by the motion, in the sense of requiring the lower court, or this, to grant a new trial. *Cobb v. Malone*, 92 Ala. 630, 9 South. Rep. 738. The exceptions taken on the trial, upon which the motion is also based, were, as we shall presently see, without merit; and so far as the motion is predicated upon newly-discovered evidence, which is the only other reason advanced for the granting of a new trial, it is wholly insufficient in its averments, and entirely unsupported by evidence as to defendant's diligence, or lack of fault, in respect of the discovery and production of the alleged newly-discovered evidence on the trial.

The trial court committed no error in its rulings on defendant's requests for instructions. There was evidence from which the guilt of defendant might have been inferred, and hence charge 1, requested by the defendant, requiring an acquittal if the jury believed the evidence, was properly refused. Charge 2 was bad, in that it singled out, and gave undue prominence to, the evidence of one witness, and is therefore argumentative in its character. Charge 3 is also argumentative in form and substance, and is invasive of the province of the jury, in that it prescribes the weight they shall give to a particular fact, dissociated from other facts which the evidence tended to establish. Charge 4 is bad, in that it gratuitously assumes that the indictment charges that the defendant sold "a yoke of oxen." Charge 3, above referred to, is open, also, to the infirmities which affect charge 4. Charge 5 is faulty for that, among other things, it invades the province of the jury, by declaring to be a presumption of law what, at most, could be only a presumption of fact. Charge 6 is of a class very many times condemned by this court. The jury should not be told to look to this fact, or that they may consider that fact, etc., in reaching a conclusion as to the guilt of the defendant, or as to the existence of any material element of the offense charged. Moreover, this charge is abstract. There is no evidence in the case that the property surrendered by the defendant "was of sufficient value to satisfy the mortgage debt."

It may be conceded that the bad character of defendant, for truth and veracity, would not, of itself, have any bearing on the question of the guilt of the defendant, abstractly considered, or, in other words, that the fact that defendant was unworthy of credence did not tend to show that he was guilty of selling mortgaged property, as charged in the indictment. But, the defendant having testified for himself to facts tending to show his innocence, the testimony of other witnesses, that his character for truth and veracity were bad, and that they would not believe him on oath, was important for the jury to consider in reaching a conclusion of guilt *vel non*; and the necessary tendency

of this charge was to mislead them from a consideration of defendant's character, in this respect, in weighing the evidence. On this ground, if not on others, the seventh charge was properly refused. There is no error in the record, and the judgment must be affirmed.

#### KEITH v. BECKER.

(Supreme Court of Alabama, June 14, 1893.)

##### BILL OF SALE—CONSTRUCTION.

An instrument recited that the signer had sold to plaintiff's predecessor in interest his interest in the turpentine business, consisting of one distillery, store, coopering, spirit, and camp houses; "also one crop of boxes known as the 'S. Place,' four crops of boxes known as the 'G. Place,' all boxes cut on M. & O. R. R. lands by me to date, and to be used for such time as has been agreed on" with the railroad company; "all boxes cut upon my lands to date, and to be used for three years from date of this bill of sale." *Held*, that the signer's interest in the distillery passed by the instrument, and not merely the use of the property for three years.

Appeal from circuit court, Mobile county; James T. Jones, Judge.

Trover by Margaret Keith against Christian Becker. From a judgment for defendant, plaintiff appeals. Reversed.

McIntosh & Rich, for appellant. Gregory L. & H. T. Smith, for appellee.

HEAD, J. Action of trover for conversion of one turpentine still and fixtures. The plaintiff claims title as the successor in interest, under the exemption laws, of John N. Keith, her deceased husband, whose only title, if any he had, was acquired under and by virtue of the following instrument, executed to him by the defendant, Becker: "Mt. Vernon, Ala. Jan. 21-85. I have this day sold to John N. Keith my interest in the turpentine business, for the sum of fifteen hundred dollars, the receipt of which is hereby acknowledged. The timber and lands are excepted from the sale mentioned above. The business consists of one turpentine distillery, complete, store house, coopering house, spirit house, and camp houses; also one crop of boxes known as the 'Shepard Place,' four crops boxes known as the 'Greer Place,' all boxes cut on M. & O. R. R. lands by me to date, and to be used for such time as has been agreed upon between Becker & Keith and M. & O. R. R. Co.; all boxes cut upon my lands to date, and to be used for three years from date of this bill of sale. I hereby allow Mr. John N. Keith the privilege of cutting boxes on section 24 of my lands. The boxes cut on R. R. lands are sections 11, 13, 23, 25, 27, 28, 35; section 36 land of J. G. Webb. [Signed] O. Becker. Witness: James Cooper. James P. Callaher. Before me, this 24th day of Jan., 1885. [Signed] William Becker, J. P. M. C." Before the

evidence was closed, the court construed this instrument, and ruled that it sold only the turpentine business, and was not a sale of the property mentioned in the instrument, and that it only conveyed the use of the property for three years. In consequence of this ruling, the plaintiff thereupon took a nonsuit, with a bill of exceptions, and this is the only ruling assigned as error.

It is quite clear to our minds the circuit court erred in this construction. The instrument conveys the seller's interest in the turpentine business, and, in express terms, declares that the "business consists of one turpentine distillery, complete, store house," etc., naming other things; and, after mentioning all boxes cut on the Shepard and Greer places and on the Mobile & Ohio Railroad lands, and defining the times those boxes were to be used by the purchaser, the seller conveys the right to use, for three years from the date of the bill of sale, all boxes cut upon his own lands to date. The instrument is careful to define the duration of enjoyment of the boxes upon each of the several tracts of land mentioned. The purchaser was entitled to those on the Shepard place for one crop; to those on the Greer place for four crops; to those on the Mobile & Ohio Railroad lands for such time as had been agreed upon between Becker & Keith and Mobile & Ohio Railroad Company; and to those on his own lands for three years. The instrument is also careful to provide that the timber and lands are not sold. We think it cannot admit of doubt that Keith acquired by the bill of sale the interest of Becker in the distillery therein mentioned. There is nothing in the other questions raised in the argument of appellee's counsel.

Reversed and remanded.

(101 Ala. 353)

PRINCE et al. v. BISSINGER.

(Supreme Court of Alabama. June 13, 1893.)

NEW TRIAL.—EXCESSIVE DAMAGES.

In an action by contractors for refusing to permit them to perform a contract to build houses for defendant at a gross price of \$4,500, where one of plaintiffs estimated the cost of building at \$3,040, but omitted from his estimate certain items, the propriety of including which was not questioned when testified to by an expert, who placed their cost at \$1,100, the court, on plaintiffs refusing to remit \$150 from a verdict for \$500, properly granted a new trial.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Action by Prince & Blackman against S. Bissinger for breach of contract. There was a verdict for plaintiffs. From an order granting a new trial, plaintiffs appeal. Affirmed.

Roberts & Martin, for appellants. Borders & Carmichael, for appellee.

MCLELLAN, J.: Prince & Blackman, on the theory that they had entered into a con-

tract with Bissinger to build two certain store-houses in the town of Ozark for the gross sum of \$4,500, and that Bissinger had violated the contract, and refused to allow them to perform their part of it, bring this suit to recover \$800 damages, which they claim would have been their net profits had they been permitted to build the house according to the plans and specifications alleged to have been agreed upon. The jury returned a verdict for \$500 in favor of plaintiffs, and judgment was entered accordingly. On motion of defendant, the plaintiffs declining to abate their judgment to the extent of \$150, the judgment was set aside, and a new trial granted, on the ground that the verdict was excessive. We think this action of the court was free from error. The witness for plaintiffs, Prince,—one of them,—omitted from his estimate of the cost to his firm of erecting the building several items, which manifestly should have been included, and the propriety of including which was not questioned when they were deposed to by Tye, a disinterested and expert witness for the defendant. Without these items, the aggregate of the estimated cost, as testified by Prince, was about \$3,040. The aggregate of these improperly omitted items was about \$1,100, which, added to the patently faulty estimate of Prince, made the total cost \$4,140. This sum, deducted from the contract price of \$4,500, leaves a balance of \$360, only, instead of \$500, for which verdict was returned. To this conclusion the evidence was substantially without conflict. There was conflict in the evidence as to the amount of each item embodied in the estimate of Prince, but, in the conclusion we have reached, it has been assumed that the estimate of that witness, so far as it went, was correct. Whether that estimate, or Tye's, in respect of the items common to both, was correct, was a question for the jury, whose finding upon it should not be, and has not been, disturbed by the court. The judgment of the court, granting a new trial, is affirmed.

(98 Ala. 122)

SACKHOFF et al. v. VANDEGRIFT.

(Supreme Court of Alabama. June 22, 1893.)

CREDITOR'S BILL.—INJUNCTION.—CUSTODY OF THE LAW.

1. Attachment creditors, finding the debtor's stock of goods not enough to pay their claims, sued out an equitable attachment on goods in the store of one S., as having been fraudulently transferred to him by the debtor. S. replevied and gave bond. V., a creditor at large, thereafter filed a bill to subject to his debt the surplus of goods in S.'s hands after payment of the prior claim. He charged the fraud and insufficiency of assets, as the attachers had done: that, after giving the replevin bond, S. had gone on selling the goods, which were valued at much more than the prior claim; and that, unless restrained, S. would soon dispose of them,—and prayed for an injunction and receiver. It appeared that S. had largely increased his business and wealth about the time in question, while the

debtor's had been running down, and his purchases from the debtor had been made on unusual terms. *Held* a proper case for relief, a bond being required from V. to pay any damages resulting to S. from a wrongful appointment of the receiver.

2. When a chancery court has granted attachment creditors an equitable attachment on goods in the hands of one other than the debtor, as the latter's property, fraudulently transferred, said goods are not within the custody of the law, so as to preclude the same court, on a proper showing, from granting a creditor at large an injunction and receiver in respect to the surplus of said goods after discharge of the prior claim.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by A. S. Vandegrift, a creditor of one George Passe, against said Passe and R. C. Sackhoff and others, praying to have a receiver appointed for a certain stock of goods in the hands of said Sackhoff, and that said Sackhoff be enjoined from selling said goods, and that the same be held subject to an order of the court. From a decree appointing a receiver, Sackhoff appeals. Affirmed.

Mountjoy & Tomlinson, for appellant. R. H. Pearson, for appellee.

STONE, C. J. This cause was submitted to the chancellor for the appointment of a receiver, and one day's notice was given of the application. Notwithstanding the shortness of the notice, many affidavits were submitted for and against the motion, and the chancellor allowed a further extension of one day before making a final determination of that application. During this day of extension, other affidavits were filed. We do not feel authorized to draw a distinction between the court's action on the 19th, and the final action taken on the 20th, but will treat it as one decretal order, made and entered on the entire showing found in this record. Manifestly, the chancellor did not consider the decretal order as finally determined on until after the hearing on the 20th of December.

Vandegrift, a creditor at large of Passe, filed this bill for the purpose of collecting his claim, amounting to something over \$1,000. He sought to enforce collection by equitable proceedings, under the following averred facts: Passe had for some time been a merchant, doing business in Birmingham. In the fall of 1892, about November, his creditors had attached the goods in his store on claims amounting to much more than their value, and had thus broken up the business. The firm of Hodges Bros. was one of the creditors who attached that stock of goods. Soon after their attachment at law was thus levied on the goods in the said store in the avowed possession of Passe, they (Hodges Bros.) filed a bill in the chancery court of Jefferson county against Passe, Sackhoff, and others, alleging that the stock of merchandise in another store, which was being operated in the name of Sackhoff, was the property of Passe, and was placed

there for the purpose of defrauding the creditors of Passe; that their attachment levy on the goods in the Passe store would yield them nothing, because older attachments would exhaust the proceeds of that stock, and leave nothing for Hodges Bros. On these alleged grounds, Hodges Bros. prayed for, and obtained, an equitable attachment, which was levied on the stock of goods held in the store occupied by Sackhoff, for the debt charged to be due them from Passe, amounting to something over \$1,800. These goods were replevied by Sackhoff, by giving bond in double the sum claimed in the attachment, Cameron and Nolan becoming sureties on the bond. This bond has the condition prescribed for replevying property seized under writs of attachment, and bears date November 25, 1892. The present bill was filed December 16, 1892, and makes Passe, Sackhoff, Cameron, and Nolan parties defendant. It reiterates all the charges of fraud and fraudulent combination between Passe and Sackhoff, and charges, as Hodges Bros. had done in their bill, that the stock of goods in the Sackhoff store was the property of Passe, placed there for the purpose of defrauding his creditors, and that said stock of goods, so placed, was worth \$3,000 or more. Like the Hodges Bros.' bill, it makes very full charges of fraud against Passe and Sackhoff, and, as they had done, avers that the older attachments levied were much more in amount than enough to exhaust the said stock of goods, confessedly held in the name of Passe. The purpose and prayer of this bill are to enforce the collection of complainant's demand—something over \$1,000—out of that part of the stock in Sackhoff's hands which shall be left after paying the older attachment in favor of Hodges Bros. As an excuse or reason for invoking the restraining remedial power of the chancery court, in this case, it is averred that after the restoration of the stock of goods to Sackhoff, on the execution of the replevin bond in the Hodges Bros. suit, he (Sackhoff) resumed their sale, and is engaged in selling them, and, unless restrained, will soon dispose of them, and put their proceeds beyond the reach of the creditors of Passe, to whom they rightfully belong. The prayer of the present bill was, and is, that Sackhoff be enjoined from selling the goods, and that they be placed in the hands of a receiver, to be held by him subject to the order of the court. In the foregoing summary of facts, we have not undertaken to copy what is charged in the bills. We have simply stated, in general terms, conclusions of fact drawn from the averments, which are full and specific. The chancellor, first requiring of complainant a bond, with surety, conditioned to pay to Sackhoff such damages as he may suffer from the wrongful appointment of a receiver, made the appointment, requiring of the appointee a proper bond, with sureties. The present appeal suspended that order of

appointment, and presents for our consideration the single inquiry, whether the receiver was properly appointed, under the facts shown. Two grounds are urged why the decretal order appointing a receiver in this case should be vacated.

First, that, giving due consideration and weight to the affidavits made and submitted, the complainant failed to make such a case as would authorize the court to take the merchandise out of the hands of its possessor, and place it in the hands of a receiver. We have given careful consideration to the affidavits which shed light on this inquiry, and find them in very great conflict. Considered by themselves, the showing in favor of Sackhoff's purchase, and independent ownership of the goods, is in many respects strong. On the other hand, the proof of his former means and former rate of wages, the unusual terms on which the goods were alleged to have been furnished to him by Passe, and many other circumstances attending their dealings together, and their intercourse with each other, and, furthermore, the rapidity with which Sackhoff increased his business, its emoluments, and the means and resources he thus became the master of, while, in every respect, Passe's business became less remunerative.—less prosperous,—call for fuller and more satisfactory proof of the bona fides of the transaction than we find in the transcript before us. We forbear to comment with greater particularity, lest, perchance, we do injustice. Unusual as were the alleged terms on which Passe furnished goods to Sackhoff, rapid as the increase of the latter's business resources and profits is claimed to have been, we cannot, with certainty, affirm that the claim set up is impossible, and therefore unfounded. It is not so manifestly impossible as that, at this stage, we can pronounce it false. Still, we hold that weighed and determined by the affidavits, and what they disclose, the chancellor did not err in the appointment of a receiver, unless such appointment was improper, under the circumstances of this case to be considered further on. *Meyer v. Johnston*, 53 Ala. 237; *Kelly v. Trustees*, 58 Ala. 489; 2 Amer. & Eng. Enc. Law, 19; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. Rep. 731; *Heard v. Murray*, 93 Ala. 127, 9 South. Rep. 514.

It is contended, in the second place, that the goods having been seized and replevied under the attachment at the suit of Hodges Bros., and that suit not shown to have been disposed of, they were in the custody of the law, and therefore could not be seized, or the possession interfered with, at the suit of another. *Dollins v. Lindsey*, 89 Ala. 217, 7 South. Rep. 234, is one of the authorities relied on in support of this contention. See, also, *McRae v. McLean*, 3 Port. (Ala.) 138; *Langdon v. Brumby*, 7 Ala. v.138o.no.13—32

53; *Kemp v. Porter*, Id. 138; *Cordaman v. Malone*, 63 Ala. 556. In *Dollins v. Lindsey*, 89 Ala. 217, 7 South. Rep. 234, goods had been seized under attachments sued out against Price Bros., and Dollins had interposed a claim under the statute to try the right of property. He gave bond with sureties in accordance with statutory requirements, and the goods were restored to his possession. This suit was in the common-law court. Thereupon, *Lindsey & Co.* filed a bill to enforce the collection of a claim they asserted against Price Bros., and prayed for the appointment of a receiver to take possession of the goods which had been so seized under attachments at law, and claimed under the statute by Dollins. The bill contained no averment that the goods were of greater value than the amount of the debts under which they had been attached, nor does it appear that the bona fides of those debts was questioned. The chancellor appointed a receiver, and this court reversed the order, holding that, the property being in the custody of the law, that custody or possession could not be disturbed by the order of another court. There is a marked difference between that case and this. In that case the proceedings were in different courts, and there was no averment that the property attached was of value exceeding the amount of the debts under which it had been attached. In this case both suits are in the same court, and the averment is specific that the goods were worth four times the amount of the claim under which they had been seized. It is clearly the law that, if property seized under execution or attachment has value in excess of the claim under which it is seized, that excess of value, nothing else being in the way, is liable to the debtor's debts. *Scarborough v. Malone*, 67 Ala. 570. And courts should render all proper aid to make such right effective. In the case we have in hand, we can neither perceive nor conceive of any wrong done, or likely to be done, to Sackhoff. If the seizure be wrongful, he is indemnified against loss and injury by the bond the chancellor required complainant to give before appointing the receiver. The receiver's fidelity in the trust is secured by the bond, with sureties, the chancellor required of him. So much for Sackhoff's indemnity. Nor is the security of Hodges Bros., or of Cameron and Nolan, sureties on the replevin bond, in the slightest degree, imperilled. Neither the property nor its custody is carried from one court to another. Both suits are in one court,—the chancery court,—which can mold its relief to meet the exigencies of the case. Only the excess above requirements to pay the Hodges debt is sought to be condemned; and such claim cannot injure Hodges Bros., or Cameron and Nolan, sureties of Sackhoff. The chancellor will protect those prior, paramount claims, and

to this end may, if necessary, order the two suits to be heard together.

Hear the other side. If it be true that the goods were held by Sackhoff for the benefit of Passe, and as a means of defrauding the latter's creditors, and if it be true that the merchandise in controversy, in value, greatly exceeded the amount necessary to pay Hodges Bros. their claim, then to deny the relief prayed in this case is practically to permit the fraud to be consummated. This would be a perversion of the doctrine of noninterference with property in the custody of the law.

We have mentioned the fact that in this case both suits were pending in the same court, and that consequently the chancellor's order would not have the effect of taking property levied on under process from one court, and placing it under the control of another court. Cases may arise in which property is levied on under process from one court, which in value exceeds the demand under which it is seized and bonded. Whether another creditor, asserting his claim in another jurisdiction, may not reach that surplus of value, and make it available, is not presented by this record, and is not intended to be decided. We leave ourselves uncommitted alike on the right and the remedy, in such condition. The decretal order of the chancellor is affirmed.

(99 Ala. 161)

#### SIMS v. STATE.

(Supreme Court of Alabama. June 20, 1893.)

LARCENY—INTENT—INSTRUCTIONS ON EVIDENCE.

On a prosecution for larceny, where the evidence as to the intent with which defendant took the property is conflicting, the general charge in favor of defendant is properly refused.

Appeal from circuit court, Bullock county; J. M. Carmichael, Judge.

Dennis Sims was convicted of larceny, and appeals. Affirmed.

The testimony for the state tended to prove that the defendant caught the yearling alleged to have been stolen within 100 or 200 yards from the house of Jeff Turman, the alleged owner; that he led him away to his own home; and that after the expiration of 10 days or 2 weeks said Turman, on going to the house of defendant, found the hide of the yearling, which was identified to be that of the yearling owned by said Jeff Turman. The testimony for defendant was that the defendant had lost a yearling of similar description to the one owned by Turman, and like the one taken by the defendant under the circumstances narrated above, and that the yearling which was taken from near the house of Turman was that owned by the defendant.

Norman & Son, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. The question of the intent with which the defendant took and carried away the yearling was not free from doubt, and was one of inference from the evidence, proper to be determined by the jury. There were conflicts in the evidence; some tending to establish the case for the state; and different inferences as to the intent of the defendant in taking the animal may be reasonably drawn from it. In such a case the general charge in favor of the defendant was properly refused. *Johnson v. State*, 73 Ala. 523; *Bromly v. Railroad Co.*, (Ala.) 11 South. Rep. 341.

Affirmed.

(98 Ala. 45)

#### LOWERY v. STATE.

(Supreme Court of Alabama. June 8, 1893.)

CRIMINAL LAW—IMPEACHMENT OF WITNESS—TESTIMONY AT PRELIMINARY EXAMINATION—ADMISSIBILITY AT TRIAL—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—REMARKS OF COURT.

1. The testimony of a witness cannot be impeached by evidence of particular crimes.

2. Where a person living in another state testifies at a preliminary examination of a prisoner, after which he returns home, and is not seen again in this state, evidence of his testimony is admissible at the trial.

3. On a trial of a criminal case the court did not err in refusing to grant a new trial on the ground of newly-discovered evidence when there was no showing of diligence, and it did not appear that the facts offered to be proved could successfully be offered in evidence on another trial, and were certainly inadmissible as original evidence.

4. On a conviction of murder a new trial will not be granted on the ground that the trial judge "asked defendant's counsel in open court, in the presence of the jury, and while he charged the jury, if he insisted on the doctrine of self-defense," when no proof of the statement was found in the bill of exceptions, and no exception to the statement or charge was taken.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Thomas Lowery was indicted and tried for the murder of Jim Robinson, and he appeals from a conviction of murder in the second degree, and a sentence to the penitentiary for 30 years. Affirmed.

The testimony for the state tended to prove the killing of the deceased by the defendant by shooting him in the head with a pistol. The state was permitted by the court to prove the statements of an absent witness—one Swarm—that were made upon the preliminary examination of the defendant, upon a predicate laid by Z. P. Davis, who testified that on the day of the preliminary examination said Swarm was put on the stand for the state, and stated that he lived in Chattanooga, Tenn., and that he left Huntsville after the examination, and had not been seen since. Thereupon the state introduced one Grubbs as a witness, who testified as to the statements made by Swarm on the preliminary examination, and stated that the defendant had the opportunity of cross-examining the said Swarm, but

did not do so. The defendant objected to the testimony being introduced as evidence on this predicate, and duly excepted to the court's overruling his objection. The defendant also reserved an exception to the court's overruling his objection to the admission of the former testimony of one Beverly Anderson on the preliminary examination, which was introduced under similar circumstances. After verdict and judgment of killing, the defendant moved the court for a new trial on the ground that the defendant should have been granted a continuance as requested by him on account of the absence of his regularly employed attorney; that the defendant should have been granted a continuance on the ground of the absence of several material witnesses; and should be granted a new trial on the ground of a certain article which appeared in the *Huntsville Mercury*, a paper published in Huntsville, the place of the trial, during the progress of the trial; and "because the court asked the defendant's attorney in open court, in the presence of the jury, and while he charged the jury, if he insisted on the doctrine of self-defense in the cause;" and because of the discovery of material evidence since defendant's trial and conviction, which evidence was particularly set out in the affidavit of the witness Walker Haywood, who would testify to such evidence. The substance of this affidavit was that the said Walker Haywood would testify that within two or three weeks after the killing he was talking with Ann Robinson, the wife of the deceased, and one of the principal witnesses for the state, about the killing, who told him that the defendant had complained to her that his wife had told him that deceased had outraged her, and that he was angry and indignant about it; that neither the defendant nor his counsel were aware of Haywood's knowledge of these facts at the time of the trial. The court overruled the motions for a new trial, and the defendant duly excepted.

Wm. L. Martin, Atty. Gen., for the State.

**COLEMAN, J.** The defendant, Lowery, was convicted of murder in the second degree. The questions for consideration arise upon the admission and exclusion of evidence, and the refusal of the court to grant a new trial. One of the witnesses examined for the prosecution on cross-examination, for the purpose of impeaching her testimony, was asked if she had not been guilty of certain specified acts of adultery. An objection to the question was sustained. It may be that on cross-examination a witness who has testified to the good character of a defendant, as evidence to be considered in connection with other evidence affecting the question of guilt or innocence, for the

purpose of testing the extent of the witness' information, or the soundness and bona fides of his opinion, may be asked on cross-examination if he had not heard that the defendant had been accused of certain named offenses of a character similar to the one with which the defendant was charged. To illustrate: A man charged with murder or robbery. A witness testifies to the defendant's good character for peace and quietude. On cross-examination the witness may be asked if he had not heard that the defendant had killed a man, or, in the other case, that the defendant had been accused of a certain robbery. This is permissible only on cross-examination, not for the purpose of proving or disproving the defendant's good character, but as affecting the bias, extent of the information, and credibility to be given to the testimony of the witness. *Ingram v. State*, 67 Ala. 72; *Moore v. State*, 68 Ala. 362; 1 *Best, Ev.* § 261; *Stoudenmeyer v. Williamson*, 29 Ala. 564; *Moulton v. State*, 88 Ala. 116, 6 *South. Rep.* 753; *Hussey v. State*, 87 Ala. 133, 6 *South. Rep.* 420. It is not permissible to prove good or bad character, either of a party on trial or of a witness, to fortify or impeach his testimony by proving particular acts. This principle is clearly settled. *Walker v. State*, 91 Ala. 79; 9 *South. Rep.* 87; *Moore v. State*, supra; *Morgan v. State*, 88 Ala. 223, 6 *South. Rep.* 761; *Moulton v. State*, 88 Ala. 116, 6 *South. Rep.* 753; *Nugent v. State*, 19 Ala. 540; *Hussey v. State*, 87 Ala. 133, 6 *South. Rep.* 420. There was no error in sustaining the objection to the questions.

The court permitted proof of the evidence given by a witness on the preliminary trial of the defendant, but who was absent at the time of the present trial. We think the predicate for the introduction of this evidence brought the case fairly within the rule which authorizes the introduction of such evidence. It was shown that the absent witnesses were examined at the preliminary trial; that defendant had an opportunity to cross-examine them; that these witnesses resided in the state of Tennessee, and that after the preliminary trial the witnesses returned to their homes in Tennessee, and had not been seen in this state since their examination. The evidence was admissible under the rules declared in the following cases: *Daniels v. Hamilton*, 52 Ala. 108; *Pruitt v. State*, 92 Ala. 41, 9 *South. Rep.* 406; *Perry v. State*, 87 Ala. 30, 6 *South. Rep.* 425; *Lowe v. State*, 86 Ala. 47-52, 5 *South. Rep.* 435; *South v. State*, 86 Ala. 617, 6 *South. Rep.* 52.

The granting or refusal of an application for a continuance is left to the sound discretion of the trial court, and its action in this respect is not revisable here. In fact, there is no evidence that defendant made known to the court he was not ready for trial, or that he applied for a continuance.

The motion for a new trial, based upon newly-discovered evidence, was not sustained by sufficient proof. No showing as to diligence is made, and it is not clear that the facts offered to be proven by the witness Haywood could be successfully offered in evidence, on another trial; certainly not as original evidence. The one ground upon which the motion for a new trial is predicated, which probably is meritorious, is that the court "asked defendant's counsel in open court, in the presence of the jury, and while charging the jury, if he insisted on the doctrine of self-defense." We have examined the bill of exceptions carefully, and find no proof of this statement by the court, or any exception to any statement or charge of the court. We cannot consider it. There is no error in the record, and the case must be affirmed.

(30 Ala. 519)

**MEYER et al. v. KEITH.**

(Supreme Court of Alabama. June 13, 1893.)

**ATTACHMENT—JUDGMENT BY DEFAULT—RECITALS AS TO SERVICE.**

1. A recital in a judgment entry in attachment that notice was given as required by law is insufficient to sustain a judgment by default.

2. Personal judgment by default can be rendered against a nonresident in attachment on statutory notice.

Appeal from circuit court, Geneva county; J. M. Carmichael, Judge.

Action by attachment, sued out by W. J. Keith against V. & A. Meyer & Co. The attachment was executed by serving a garnishment on three different parties. Judgment for plaintiff. Defendants appeal. Reversed.

The complaint contained only the general counts. The judgment entry is in the following language: "January 16, 1892, came the garnishee, C. R. Keith, and answers orally to the indebtedness in twenty-three hundred and fifty dollars, due to the defendants by promissory notes due in January and March, 1891, and came the garnishees Holloway and Gilchrist, who file there their answer in writing, admitting indebtedness in the sum of eleven hundred and twenty-six and 70/100 dollars, due by note the 1st January, 1891, and suggest that the Mutual National Bank of New Orleans claims the debt. It is agreed by the court that notice issue to said Mutual National Bank of New Orleans to come in and propound its claims to said debt. And proof being made known to the court of the publication of notice of the nonresidence of the defendants in the Geneva Record, a newspaper published in said county, for the term required by law, and the defendant being called, came not, but made default. It is thereupon ordered by the court that judgment be rendered against the defendants, with a writ of inquiry," etc.

Tompkins & Troy, for appellants.

**HEAD, J.** The recitals of the judgment entry do not sufficiently show that the notice required by the statute of the issuance and levy of the attachment was given. A recital, as in the present case, that notice was given as required by law will not sustain a judgment by default. Code, § 2936; *Dow v. Whitman*, 36 Ala. 604; *Brinsfield v. Austin*, 39 Ala. 227; *Diston v. Hood*, 83 Ala. 331, 3 South. Rep. 746. The complaint, so far as the transcript shows, was not marked "Filed" by the clerk. That should be attended to. We do not decide that a complaint found in the transcript, and certified to by the clerk, in his general certificate, as a part of the record of the proceedings, will not be regarded by us as a part of the record because not so marked. We simply call attention to the irregularity, which appellants insist upon now as a ground of reversal, that it may be cured.

It is insisted by appellants that no personal judgment by default can be rendered against a nonresident in attachment on statutory notice, but that the judgment should be one of condemnation only. The question has been settled contrary to this contention by the decisions of this court, from which we are not inclined to depart.

Reversed and remanded.

(301 Ala. 344)

**ELLIOTT v. SIBLEY et al.**

(Supreme Court of Alabama. June 8, 1893.)

**CORPORATIONS—SALE OF SHAREHOLDER'S STOCK—INJUNCTION TO RESTRAIN—AVERMENTS OF BILL—SUFFICIENCY.**

1. Where a bill is filed to enjoin the sale of stock of a shareholder to satisfy an indebtedness due the corporation, on the ground that the debt is not due, or has been paid, or that the corporation is indebted to complainant to a greater amount, and the bill prays for a statement of account, the corporation is an indispensable party.

2. In such a bill, complainant should aver a readiness to pay whatever may be found due by him on a statement of account.

3. To enforce a lien on stock, under Code, § 1674, for a debt due by the stockholder to the corporation, there is, prima facie, no action necessary on the part of the directors.

4. A court of equity will inquire into the regularity of an election of directors of a corporation only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of relief depends on its decision.

5. In a bill to enjoin a corporation from selling stock belonging to complainant to pay an alleged indebtedness of complainant to the corporation, averments that on a settlement of accounts there would be found a balance due complainant, without any allegation as to the insolvency of the corporation, or other facts to justify the interposition of a court of equity, are insufficient.

Appeal from chancery court, Cherokee county; S. K. McSpadden, Chancellor.

Bill by J. M. Elliott against William O. Sibley, as president of the Round Mountain Coal & Iron Company, and J. W. Davis, J. M. Clarke, and Charles H. Phinize, to have defendant Sibley enjoined from selling



certain shares of stock alleged to be owned by the complainant, and also to have the other defendants removed from their offices, as directors of the Round Mountain Coal & Iron Company. From an order dissolving the injunction, and sustaining certain grounds of demurrer interposed to the bill of complaint, complainant appeals. Affirmed.

The motion to dissolve the injunction was based on the denials to the answer. The demurrers interposed to the bill of complaint, which were sustained by the court, were the following: (3) The Round Mountain Coal & Iron Company is a necessary party complainant or defendant. (4 and 12) Said bill does not aver a readiness or willingness on the part of complainant to pay what may be due to said corporation. (7) The proceeding to sell the stock is not without authority of law, because no authority or order by any of the board of directors is necessary for said sale. (8) The account for improvements claimed by complainant in his bill is not the proper charge against said respondents. (9) Said account does not present matters that are the proper subject for adjustment and cognizance by a court of equity, against respondents. (13) The bill does not tender, or give sufficient excuse for not tendering, what may be found to be due said corporation by the complainant. (15) Said bill is null, in that it seeks to enjoin the sale of stock, and at the same time to remove certain persons, alleged to be improper members of the board of directors. (17) There is a misjoinder of parties, in that William O. Sibley, the rightful president, is joined with those alleged to be spurious members of the board of directors. (18) There is a misjoinder of causes of action, in that the bill seeks to enjoin the sale of stock, and, at the same time, to remove from office certain directors.

Carden & Bilbro and Dortch & Martin, for appellant. J. L. Burnett, for appellees.

**COLEMAN, J.** The object of the present bill was to enjoin Sibley, the president of the Round Mountain Coal & Iron Company, a corporation, from selling certain shares of stock belonging to complainant, Elliott, and also to have removed from office certain persons claiming to be directors of said corporation. The bill avers that Sibley advanced to complainant \$500 in money, for which complainant executed his note, to be expended by complainant in the adjustment of a lawsuit in which the corporation was interested, and 50 shares of stock were placed in the hands of Sibley as collateral for the advance of the money; that the \$500 were expended according to agreement, and afterwards Sibley transferred the note and shares to the corporation. The bill also avers that the corporation claimed an indebtedness from complainant, on a rental contract, of over \$3,000, and, to pay this alleged indebtedness, Sibley, the president, was proceeding to sell complainant's shares of stock, but that, in fact, on a settlement of accounts, there would be a balance due complainant, over and above the rental indebtedness, of more than \$4,000. A temporary injunction issued, upon the filing of the bill. Respondents moved to dismiss the bill for want of equity, demurred to the bill, assigning various grounds of demurrer, and, upon the denials of the answer, moved to dissolve the injunction. At the hearing, the motion to dismiss the bill for the want of equity was denied. Several grounds of demurrer were held to be good, and the injunction was dissolved. From the rulings of the court dissolving the injunction, and sustaining certain grounds of demurrer, the complainant appealed.

It requires neither argument nor citation to show that where a bill is filed to enjoin the sale of stock of a shareholder to satisfy an indebtedness due the corporation, upon the grounds that the debt is not due or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a statement of account, the corporation itself is an indispensable party. It is also elementary that in such a bill, mutual indebtedness existing, the complainant should offer to do equity; should aver a readiness to pay whatever may be found due from him upon the statement of the account. It may be that, to authorize a suit for an unpaid subscription for stock, there should be some action on the part of the directors, as was declared in *Moses v. Tompkins*, 84 Ala. 613, 4 South. Rep. 763, though this would depend somewhat upon the character of the subscription, and the charter or by-laws of the corporation. Chapters 7, 8, Cook, Stock, Stockh. & Corp. Law. But these principles have no application where the corporation is proceeding to collect a past-due debt, fixed by contract between the parties, and for which the other stockholders are in no way liable. On such an indebtedness, the debtor, although a stockholder, is treated as a stranger. Section 1674 of the Code declares a lien upon the shares of stockholders for any debt or liability incurred to the corporation by such stockholder, and provides for the sale of the same. To enforce such a lien, *prima facie*, no action is necessary on the part of the directors. These principles dispose of all the errors assigned as to the ruling of the court upon the demurrers to the bill, except that of multifariousness.

It is urged that the bill is multifarious, in this: that the bill seeks to enjoin the sale of complainant's stock, and in the same bill it is sought to enjoin certain parties from acting as directors, on the ground that their election was illegal and void. The rule declared by this court is that "a court of equity will not primarily take jurisdiction to

edness, Sibley, the president, was proceeding to sell complainant's shares of stock, but that, in fact, on a settlement of accounts, there would be a balance due complainant, over and above the rental indebtedness, of more than \$4,000. A temporary injunction issued, upon the filing of the bill. Respondents moved to dismiss the bill for want of equity, demurred to the bill, assigning various grounds of demurrer, and, upon the denials of the answer, moved to dissolve the injunction. At the hearing, the motion to dismiss the bill for the want of equity was denied. Several grounds of demurrer were held to be good, and the injunction was dissolved. From the rulings of the court dissolving the injunction, and sustaining certain grounds of demurrer, the complainant appealed.

determine the legality of an election of directors, or to remove a director who is in possession of the office. The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally, in a suit of which the court has rightful jurisdiction, and the grant of relief depends upon its decision." *Perry v. Oil-Mill Co.*, 93 Ala. 364, 9 South. Rep. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747. The relief sought in the present case is against the corporation. The validity of the claims of the corporation against the complainant, and his defense to the note, and the rightfulness of his claim for improvements, which he avers to be in excess of his indebtedness for rent to the corporation, in no way depend upon any act of the alleged illegal directors, or of the corporation since their election. The note for \$500 passed to the corporation before their election, and the rental contract was executed prior to their election. Whether, therefore, the election of these directors was legal or illegal, can have no influence upon his right to relief. We hold, therefore, complainant's bill does not present a case which will authorize a court of equity to inquire into the legality of the election of the directors. It does not present a case so much of multifariousness as a want of equity, in this respect. We have not overlooked the fact that complainant's claim for improvements seems to be based upon a resolution adopted at the meeting of the directors, alleged by complainant to have been an illegal meeting of directors. Upon the denials of the answer, the court decreed a dissolution of the injunction. The rule is not inflexible that a temporary injunction will be dissolved, upon the denials of an answer, however definite and specific. Facts and circumstances attending each case should be considered, and whether, and how far, the denials of the answer are sustained by them. The consequences to the parties should enter into and weigh in forming a proper conclusion. Amendable defects are to be considered as amended, when there is equity in the bill. *East & W. R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275. We are clear that, as to the shares of stock pledged as collateral security for the payment of the note for \$500, the injunction was properly dissolved. The allegation of the bill, that the money was advanced to complainant to be expended in the adjustment of a lawsuit, is specifically denied. The execution of a note which apparently bears interest, and the pledge of the stock to secure its payment, do not comport with complainant's claim, but tend to support the averment of the respondents, that the note was executed for a loan of money to complainant.

As to the claim of complainant for improvements, which, he avers, is in excess of

the debts due from him for rent, and which complainant asks to be applied in extinguishment of his own indebtedness, the principle which governs was stated in *Gafford v. Proskauer*, 59 Ala. 264, as follows: "But if it becomes necessary for the mortgagor to resort to equity for relief, upon the ground that he has a proper set-off against the mortgagee, he must show some other fact than the mere existence of the demand which is the proper subject of set-off."

The bill does not aver the insolvency of the Round Mountain Coal & Iron Company, or any fact in respect to the alleged claim for improvements which justifies the interposition of a court of equity to enjoin the sale of the stock for the payment of the debt admitted to be due. *Tate v. Evans*, 54 Ala. 16. In fact, the corporation is not even a party defendant to the bill. But considering all necessary averments and amendments made, the specific denials of the answer, the resolution of the board of directors authorizing the improvements, the failure of the bill to bring complainant within the terms of the resolution, upon which he bases his claim, we think the court was justified in decreeing a dissolution of the injunction. There is no error in the record available to appellant, and there are no cross assignments of error by appellees. Affirmed.

(101 Ala. 340)

HERRING et al. v. RICKETTS et al.

(Supreme Court of Alabama. June 13, 1893.)

PROBATE OF WILL—VALIDITY—INFANT NEXT OF KIN—SERVICE OF NOTICE—CONCLUSIVENESS OF ORDER.

1. Service of notice of probate proceedings, made on infant next of kin by handing them copies, instead of leaving copies with their custodians, is insufficient, and the proceedings will be set aside on application to that effect.

2. On a petition to vacate the probate of a will, there is no presumption in favor of the order of probate.

Appeal from probate court, Jefferson county; M. T. Porter, Judge.

Petition by Mattie L. Herring and others against W. A. Ricketts, administrator de bonis non, and others, to set aside, annul, and vacate the probate of the will of Mary A. Thompson, deceased. From an order dismissing the petition, petitioners appeal. Reversed.

McGuire & Collier and J. M. Russell, for appellants. Webb & Tillman, for appellees.

McCLELLAN, J. This is a proceeding in the probate court to set aside, annul, and vacate the probate of the will of Mary A. Thompson, deceased. The application for probate was filed by William M. Thompson, one of the next of kin of the testatrix. He was a minor, as were also all the next of kin, 6 in number, 4 of them being under 14, and 1, the youngest, only 8 years of age.

The grounds of the present application are that notice of the proceeding for probate was never legally served on these infants, and that no guardian ad litem was appointed, or consented to act, or is shown by the record to have acted, for them, on the hearing of the petition for probate. The record shows that service of the notice was made, in each instance, by handing a copy to the infant next of kin. By all the authorities, this was not a sufficient service upon them. The copy should have been left with the father, mother, guardian, or other person having the custody of the minor defendants. *Warner, Serv. Paper, 6; McIntosh v. Atkinson, 63 Ala. 241; Cook v. Rogers, 64 Ala. 408; Carter v. Ingraham, 43 Ala. 78; Gayle v. Johnston, 80 Ala. 395.* Statutes and rules of this court prescribing the manner of service upon infants are strictly construed, and must be strictly complied with. *Coster v. Bank, 24 Ala. 37; Carter v. Ingraham, 43 Ala. 78.* There was therefore more than mere irregularity of service on the next of kin of the testatrix. There was, in truth, no legal service at all upon them, and they were not before the court. *Bruce v. Strickland, 47 Ala. 195.* There being no service upon these infants, the appointment of a guardian ad litem for them was unauthorized, and, to say the least, irregular; and this, of course, though the appointment, consent to act, and appearance of such guardian had, in other respects, been formal and regular. 10 *Amer. & Eng. Enc. Law, pp. 690, 691; Clark v. Glimmer, 28 Ala. 266; Bondurant v. Sibley's Heirs, 37 Ala. 565; McIntosh v. Atkinson, supra; Cook v. Rogers, supra; Irwin v. Irwin, 57 Ala. 614.*

Under the settled doctrine of this court, applicable to the state of case presented by this record, the probate court, in our opinion, should have granted the petition of appellants, Herring and others, and, in consonance with its purpose and prayer, have vacated, set aside, and revoked the probate of the will of Mary A. Thompson, deceased. As was said in *Kirby v. Kirby, 40 Ala. 495*: "Under a practice established in this state by a series of decisions, which, from their long standing, should not now be questioned, it is settled that any distributee of the estate of the testator, entitled to notice of the probate of the will, and not having received such notice prior to the probate, may make an application to the court in which the will was probated to vacate and revoke the probate, and that the same should be granted, if it appear that the applicant was entitled to notice, and none was given." *Roy v. Segrist, 19 Ala. 810; Bradley v. Andress, 27 Ala. 596; Lovett v. Chisolm, 30 Ala. 88; Hall's Heirs v. Hall, 47 Ala. 290, 295; Dickey v. Vann, 81 Ala. 425, 8 South. Rep. 195.* This application does not proceed on the theory that the probate of the will was void, but that it was irregular, errone-

ous, and voidable, and being a direct, and not a collateral, attack, the concession that the probate court is one of general jurisdiction, in respect of the probate of wills, and that the usual presumptions of regularity and validity incident to the judgments of such courts are to be indulged in support of the order of probate here made, will not avail the appellees. It is no more competent to support the probate of this will by such presumptions on this proceeding than it would be on appeal. The argument in this connection would be forceful if this were a collateral attack. Being direct, however, these considerations are of no importance. Of course, when the probate of a will is set aside and vacated on the application of one who, being entitled to, had not, notice of the proceeding to that end, the paper may again be propounded for probate, and probated; but the existence of this right affords no ground to deny the application for the vacation of the irregular probate. The two proceedings are entirely distinct; and, indeed, a second probate cannot be had until the first, and merely voidable one, has been vacated. When this has been done, the proceeding for probate is de novo, and must conform, of course, to statutory requirements, in all respects, as if the original irregular probate had not been decreed.

Without going into the question as to the formality and regularity or sufficiency of the record in respect of the guardian ad litem, aside from the infirmity of his appointment, resulting from a want of service upon the infants, it is clear, we think, that the probate court erred in denying the application to vacate the probate, and its judgment must be reversed. The cause will be remanded.

(98 Ala. 57)

## JOHNSON v. STATE.

(Supreme Court of Alabama. June 13, 1893.)

## BREAKING INTO RAILROAD CARS—EVIDENCE.

1. On a trial under Code, § 3787, for breaking into a railroad car "upon or connected with a railroad in this state," it is not necessary to prove that the car was "standing on" the tracks of the railroad company.

2. When the car broken into was alleged to be the property of the B. Railroad Company, evidence that the stock of the B. Company was owned by the L. Company is incompetent to show any variance on the question of ownership.

Appeal from criminal court, Jefferson county; Samuel E. Greene, Judge.

Warren Johnson was indicted, tried, and convicted for burglarizing a railroad car, and appeals. Affirmed.

The state introduced evidence tending to show that the goods alleged to have been stolen were taken from the car at Bessemer, in the yards of the Birmingham Mineral Railroad Company, after the said car had been sealed, and that the defendant was the guilty party. The state then introduced in evidence the charter of the Birmingham

Mineral Railroad Company, to show that it had been properly organized. Upon the cross-examination of D. W. Barnes, who had testified that he was the special agent of the Louisville & Nashville Railroad, the defendant asked the witness the following question: "If the Birmingham Mineral Railroad Company was not owned and operated by the Louisville & Nashville Railroad Company?" The court sustained the state's objection to this question, and the defendant duly excepted. The defendant then offered to show by said witness "that the original incorporators did not operate the road, but that the same was a part of the system of the Louisville & Nashville Railroad Company, and was operated by said company." The state objected to the introduction of this testimony. The court sustained the objection, and the defendant duly excepted. Upon the introduction of all the evidence the defendant requested the court to give the following written charge, and duly excepted to the court's refusal to give the same: "(1) That the jury must believe from the evidence beyond all reasonable doubt that the car broken and entered was standing on the track of the Birmingham Mineral Railroad Company before they can find the defendant guilty."

Wm. L. Martin, Atty. Gen., for the State.

MCCLELLAN, J. The indictment in this case charges that the defendant, "with intent to steal, broke into and entered a railroad car, the property of the Birmingham Mineral Railroad Company, a body corporate, upon or connected with a railroad in this state," etc. The averment that the car was "upon or connected with a railroad in this state" follows the language of the statute, (Code, § 3787;) and the physical connection of the car with the railroad need only be shown, as here averred. If it were necessary to prove, as is asserted by the charge which was refused to the defendant, that the car was standing on the track of the railroad company, the statute would be in great degree emasculated, and this in a manner which finds no pretense of authorization in its spirit or letter, since with such a construction it could have no application to a car temporarily derailed, and this though the derailment might be the work of persons intending to break into it, and done to the end that they might break and enter with impunity. The charge was properly refused. The only way in which one incorporated company can in any sense own another incorporated company is through the ownership by the one of the shares of the capital stock of the other, and in such case the assets of the latter continue to be the property of the corporate entity in all respects as if the shares of its stock were owned by individuals, instead of the other corporation; and so, too, the operation by one of another corporation by virtue of such ownership is only through the instrumentality

of the former's ownership and control of the shares of stock of the latter, as it would be operated were the controlling interest in its capital stock held by an individual. In the one case, as well as and no more than in the other, the property of the company so owned and operated is in that company, and properly so laid in indictments for offenses committed against it, and is not, nor to be, laid or proved in the stockholders, whether they be one or many individuals or another corporation; and no inquiry as to who are such stockholders, or as to their operation of the corporation, is permissible. This was the inquiry sought to be gone into by the defendant through a question propounded to the witness Barnes as to whether the Birmingham Mineral Railroad Company was not owned and operated by the Louisville & Nashville Railroad Company, and the other testimony proposed to be adduced in that connection. If the purpose of defendant in this connection was to show that the Louisville & Nashville Railroad Company was the lessee of the road and equipment of the Birmingham Mineral Railroad Company, and in that capacity had possession of the car broken and entered, the mere fact that the Louisville & Nashville Company operated said road was not competent evidence of such lease. If the fact existed, there was better evidence of it than that sought to be adduced; and, moreover, the fact of operation would not show a lease, as, non constat, the operation of the road may well have been only in the capacity of an agent of the Birmingham Mineral Company. The evidence was properly excluded, even if it be conceded that had there been a lease the property in the car and its contents should have been laid in the lessee, which we do not decide. Affirmed.

(101 Ala. 381)

**TOWN OF AVONDALE v. McFARLAND et al.**

(Supreme Court of Alabama. June 20, 1893.)

**MUNICIPAL CORPORATIONS—CHANGE OF STREET GRADE—DAMAGES TO ABUTTING OWNERS.**

Under Const. 1875, art. 14, § 7, requiring corporations invested with the rights of eminent domain to "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," a town is liable for damages caused by so changing the grade of a street as to prevent the natural flow of water from adjacent lots. *City Council v. Maddox*, 7 South. Rep. 433, 89 Ala. 181, followed. *City Council v. Townsend*, 4 South. Rep. 780, 84 Ala. 478, and 2 South. Rep. 155, 80 Ala. 489, overruled in part.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action by J. H. McFarland and others against the town of Avondale to recover for damages to plaintiffs' property by changing the grade of a street. Plaintiffs had judgment, and defendant appeals. Affirmed.

M. A. Mason, for appellant. W. F. Dickenson, for appellees.

STONE, C. J. The transcript before us shows without material conflict, as we think, the following state of facts: The town of Avondale was laid off into lots, with places for streets marked off. One of the streets passed over low, wet ground; so low and wet that to fit it for travel as a highway, and render it convenient and safe for use as a street, it was necessary to fill in and raise its grade. Adjoining this unimproved street was a lot which corresponded in grade with the street in its natural, unimproved stage. Plaintiffs below (appellees here) purchased this lot, and erected upon it a dwelling, which was occupied by one or more of them. After this the town authorities filled in and raised the grade of the street, so as to make it safe and convenient as a highway. The effect of thus raising the grade of the street was to check the natural flow of water from plaintiffs' lot, and cause it to stand upon it six or eight inches in depth. It is not claimed that this work was done unskillfully or carelessly, but it is complained that no escape or outlet was provided by which the water could flow off. On the other hand, the town authorities made proof tending to show that it was not practicable to provide an escape or outlet for the water, except across other lots that were private property. We propose to consider only a single question, namely, whether in laying off lots and streets, dedicating the latter and selling the former, it is part and parcel of the implications of the contract of sale that the corporate authorities shall have the right and power to so change and improve the streets as to make them safe and convenient highways for the public, and this without being required to make compensation to the lot owner for the injury done his property.

Section 7, art. 14, of the constitution of 1875 ordains that "municipal and other corporations, and individuals vested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements." In *City Council v. Townsend*, 80 Ala. 489, 2 South. Rep. 155, and 84 Ala. 478, 4 South. Rep. 780, the foregoing question was answered by this court in the affirmative. In the later case of *City Council v. Maddox*, 89 Ala. 181, 7 South. Rep. 433, the court was equally divided on the foregoing inquiry, leaving it undecided. If the duty and liability to make good the damage done is in all cases absolute, without regard to the conditions hypothesized above, then the rulings of the circuit court in this case are free from error. On the other hand, if the rulings in *Townsend's Case* are followed, the judgment of the circuit court must be reversed, for

the rulings are not reconcilable with those cases. The majority of the court concurs in and adopts the opinion of Justice Somerville as pronounced in *City Council v. Maddox*, 89 Ala. 181, 7 South. Rep. 433; and, as the principles of that opinion were given effect to in the trial of this case in the circuit court, the result is an affirmance of this case. The decision in the *Townsend Cases*, 80 and 84 Ala., 2 and 4 South. Rep., is overruled to the extent it conflicts with this opinion. Affirmed.

(98 Ala. 157)

### SANDERS v. EDMONDS.

(Supreme Court of Alabama. June 20, 1893.)

REVIEW ON APPEAL — SUFFICIENCY OF EVIDENCE — PRESUMPTIONS — GENERAL AFFIRMATIVE CHARGE.

1. When the evidence is conflicting, or different inferences can be reasonably drawn from it, or where there is any evidence tending to establish the case of the other side, the general affirmative charge should not be given.

2. When the bill of exceptions does not purport to set out all the evidence, it will be presumed that there was testimony to support the giving by the lower court of the general affirmative charge, if, under any state of proof, it would be free from error.

Appeal from circuit court, Sumter county; S. H. Sprott, Judge.

Assumpsit by J. B. Sanders against William Edmonds to recover a balance due on a contract. From a judgment for defendant, plaintiff appeals. Affirmed.

W. K. Smith, for appellant. J. J. Altman, for appellee.

HARALSON, J. The plaintiff was the only witness examined in the cause. By his evidence it appeared that he was under written contract with the defendant to work for him during the year 1887 for \$250, and for 144 pounds of bacon and 12 bushels of meal; that he received from defendant \$200, and the bacon and meal; that after he had performed the year's work, the defendant presented him with his account for the year, which showed a balance due him of \$5.77; that defendant, in said account, allowed him only \$200 for services; and that he still owed him \$50, which he demanded, and defendant refused to pay. On his cross-examination he stated that defendant presented him in January, 1888, with his account for 1887, which account showed that defendant owed him \$5.77, which he paid to plaintiff, and which he accepted. But he does not say he accepted that sum in full payment and discharge of the balance due and claimed on said account; and whether he did or not was a question of fact properly to be left to the determination of the jury, under appropriate instructions from the court. The plaintiff's evidence tends to show that he did not accept said sum intending it to be in payment of the amount he claimed as the balance due on the account for the year,

but that he accepted the same as a payment on that balance. For the defendant, it may be said, the evidence was not without tendencies to show that plaintiff did accept said sum in full payment. The court thought so, for it gave the general charge in favor of the defendant, which was improper in the state of proof as shown.

We have repeatedly held that when the evidence is conflicting, or where different inferences can be reasonably drawn from it, or where there is any evidence tending to establish the case of the other party, the general affirmative charge should never be given. *Bromly v. Railroad Co.*, (Ala.) 11 South. Rep. 341, and authorities there cited. The bill of exceptions does not purport to set out all the evidence, and the rule in such case is that presumption will be indulged that there was testimony to support the ruling of the court, if, under any state of proof, it would be free from error. *Alexander v. Alexander*, 71 Ala. 295; *Railroad Co. v. Kolb*, 73 Ala. 405; 3 Brick. Dig. p. 406, § 43. In obedience to this established rule, we feel constrained to hold that as there might have been other evidence introduced, not set out in the record, which would sustain the ruling of the lower court, it was introduced, and the judgment of the court must be presumed to be correct. Affirmed.

(99 Ala. 246)

LEE v. KING, Clerk.

(Supreme Court of Alabama. June 13, 1893.)

**MATERIAL MEN'S LIENS—SALE—ALIAS WRITS.**

1. In an action to enforce a lien for materials furnished for the erection of an hotel, the judgment declared a lien on the building and the material therein and thereabout, and on the lot. A petition for an order commanding the issue of a second writ for the sale of the material alleged that the building and lot had been sold, but that a balance remained unpaid on the judgment. *Held*, that the order was properly refused where it was not shown in the petition or in the judgment that the material had any connection with the erection of the building, or was intended to be used therein.

2. It was also properly disallowed where it was not shown that in filing the claim for a lien, or in the suit or complaint in which judgment for the lien was rendered, there was any mention of or claim on the material, but, on the other hand, the verdict shows either that there was no such claim or that it was disallowed.

3. It was also properly denied where it was not averred of what the materials consisted, and no description was given whereby the sheriff would be informed of what he was commanded to seize.

4. It was also properly denied where it was not averred who was the owner of the material.

5. Act Feb. 12, 1891, (Sess. Acts, p. 578,) relative to mechanics' and material men's liens, gives no lien on materials not used or employed in the building.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

Application by Robert A. Lee for mandamus to J. C. King, clerk of court, to issue

an alias writ. From an order denying the application, petitioner appeals. Affirmed.

J. C. Richardson, for appellant. C. E. Hamilton and L. M. Lane, for appellee.

STONE, C. J. This was an application to the circuit court of Butler county for a mandamus or mandatory order to the clerk of that court, commanding him to issue an alias venditioni exponas on a certain judgment therein described, of which the petitioner, R. A. Lee, represents himself as transferee and owner. The judgment was recovered by mechanics and material men for work and labor done and materials furnished in the erection of an hotel building on a certain described lot in the city of Greenville. The purpose and effect of the suit and judgment were the ascertainment and adjudication of the amount due plaintiffs, and the decision and declaration of a statutory lien in their favor for its enforcement, under the act approved February 12, 1891, (Sess. Acts, p. 578.) Judgment was by default, the suit not being defended. The pleadings in that case are not before us, but the judgment itself, reciting the verdict of the jury on which it was rendered, is made part of the petition. The jury's finding was as follows: "We, the jury, assess the amount of plaintiffs' damages at \$8,025.00, and find that the Greenville Hotel & Improvement Company was and is, as alleged in said complaint, the owner of the land and hotel building described therein, and that as such owner contracted with the plaintiffs for the erection of the said hotel building on the lot as alleged therein, and that said plaintiffs under such contract have done work and labor and furnished material for and used on said building and its erection under said contract with the defendant, and that the amount thereof now due and unpaid and owing by the defendant to the plaintiffs is the sum of \$8,025.00; and further find that the plaintiffs filed their lien and gave notice according to law and as alleged in said complaint, and that the plaintiffs have a lien on said hotel building and the lands described in said complaint for the sum of \$8,025.00." The judgment of the court pronounced on this verdict declared a lien on the hotel and on the lot on which it was erected for the payment of said judgment for \$8,025, and for the costs of the suit. We have no means of knowing, but suppose the verdict covers and includes all the property embraced in the complaint; particularly so as the judgment was by default, and no defense being made.

In the petition before us it is conceded that the hotel and the lot it stands on have been sold, and the proceeds applied to the payment of the judgment; but it is claimed that a balance is left unpaid. The purpose of the present application is to obtain an alias venditioni exponas for the collection of that

balance. The averment in the petition under which this relief is sought is in the following language: "The sheriff of Butler county, Alabama, sold said lot and the hotel building situated thereon, but did not sell the material therein or thereabout; that a large amount of material condemned by said judgment remains in and about said hotel building unsold, and that the said judgment remains in part unsatisfied, and in full force and effect." We have copied above the entire finding of the jury, as disclosed in the judgment, and the record furnishes no other information on the subject. In the judgment pronounced on this verdict we find this language: "It is further considered, ordered, and adjudged that the said plaintiffs have a material man's and mechanic's lien, as contractors of the defendant, upon said hotel and lot and material therein and thereunto belonging for the said sum of \$8,025, and all cost in this behalf expended; and that the said hotel and material therein and thereabout, and the said lot of land hereinbefore described, be, and the same is hereby, condemned to the payment and satisfaction of said [lien,] and the amount hereinabove stated, to wit, \$8,025, and all cost in this behalf expended." The relief prayed in this case was that the clerk of the circuit court be ordered and required "to issue a writ of venditioni exponas, commanding the sheriff of Butler county, Alabama, to sell the said material in and about the said hotel building, as ordered by the said judgment." The record contains no fuller or other description of "the material in and about the said hotel building" except that which we have copied. The circuit court disallowed the motion, and denied relief, and from that order this appeal is prosecuted.

In addition to the lot of land on which the hotel was erected, and the hotel itself, which the judgment of the court ordered sold, the judgment declared a lien on and condemned to sale "material therein and thereabout;" the connection in which these words were used showing that they referred to material in and about the hotel. It was to obtain a sale of this alleged material that the alias venditioni exponas was moved for in this case. Of what that material consisted, its description, quantity, or value, neither the judgment entry nor the motion for mandamus informs us. Neither is its ownership averred, nor is it anywhere stated that it is material which was used or intended to be used in the erection of the hotel. We hold that the circuit court rightly disallowed the mandatory order, for the following reasons: First. It is not shown in the judgment entry, or in the petition for the mandatory order, that the material referred to had any connection whatever with the erection of the hotel, or was intended to be used therein. Second. It is not shown that either in filing the claim in the office of the judge of probate, or in the suit or

complaint in which judgment was recovered, declaring the lien, said material in or about the hotel was mentioned, or any claim to it asserted. The verdict of the jury shows either that no such claim was set up, or, if set up, it was disallowed by them. Third. The act of February 12, 1891, (Sess. Acts, p. 578,) gives no lien on materials not used or employed in the building, etc.; and the lien, when given, attaches only to the building, article, or improvement into which it becomes incorporated, and not to the unincorporated or unused material. Fourth. It is neither shown nor averred of what the alleged material consisted, nor is any description given whereby the sheriff would be informed what he was commanded to seize. Fifth. It is not averred who was the owner of the said material. It may have been unused material, supplied by the contractors. If so, we can perceive no obstacle to their possessing themselves of it as their own. If it was the unused material of the Greenville Hotel & Improvement Company, petitioner fails to show he had any lien upon it; and it is not perceived there was any obstacle to its seizure under execution against the corporation or company.

We have not considered whether mandamus would be the appropriate remedy if appellant had shown a right to relief. We decide nothing on that question. In any view of the case, appellant can take nothing by his appeal. Affirmed.

(98 Ala. 608)

AMERICAN MORTG. CO. OF SCOTLAND,  
Limited, v. INZER et al.

(Supreme Court of Alabama. June 8, 1893.)

MORTGAGES—SALE OF PREMISES BY MORTGAGEE—  
RECOVERY OF SURPLUS OF PROCEEDS—EVIDENCE  
—DEFENSES.

1. In an action by executors of a mortgagor to recover, on a sale of the mortgaged premises, a surplus of the proceeds left in the hands of a senior mortgagee after full satisfaction of the debt, where defendant pleads that a third person holds a second mortgage on the premises to secure an indebtedness greater in amount than the surplus, and that defendant is liable to the second mortgagee for the surplus, and it appears that a demurrer to the plea was filed, but the record fails to show that any ruling was made on it, the demurrer must be considered as abandoned, and consequently it is reversible error to exclude evidence of the second mortgage.

2. In an action by the executors of a mortgagor to recover from a senior mortgagee a surplus of the proceeds arising from a sale of the mortgaged premises, the fact that a third person holds a second mortgage on the premises which has not been satisfied is no defense; for, though the second mortgagee may maintain an action against defendant to have the surplus applied to his mortgage, he is not compelled to do so, but may collect the entire debt from plaintiffs.

Appeal from circuit court, St. Clair county; Le Roy F. Box, Judge.

Assumpsit by H. J. Inzer and Varina Inzer, as executors of the estate of Joseph Y.

Inzer, deceased, against the American Mortgage Company of Scotland, Limited, to recover an alleged surplus arising from the proceeds of the sale of certain mortgaged property, under a power of sale contained in a mortgage executed by plaintiffs' testator and wife to defendant. Judgment for plaintiffs, and defendant appeals. Reversed.

Caldwell Bradshaw and Jas. E. Webb, for appellant.

**HEAD, J.** This is an action by the executors of a deceased mortgagor to recover from the mortgagee an alleged surplus of the proceeds of the sale of the mortgaged premises left in the hands of the defendant after full satisfaction of the mortgage debt. Among others, the defendant interposed a special plea, alleging that plaintiffs' testator executed a second mortgage on the premises to W. H. Skaggs, to secure an indebtedness greater in amount than the alleged surplus, which mortgage is in force, and creates a valid lien on the premises, and that defendant is liable to said second mortgagee for the surplus. There is copied in the transcript a demurrer to this plea, but the record fails to show any ruling upon it. We are therefore forced to treat the demurrer as abandoned, and consider that issue was joined on the plea. This being so, the defendant was entitled to prove its plea, and, in the effort to do so, offered to introduce in evidence the said Skaggs mortgage, the execution of which was admitted in an agreed statement of facts. The plaintiffs objected to its introduction; the court sustained the objection; and the defendant excepted. This was error, for which the judgment must be reversed.

We are persuaded that, in fact, the court sustained the demurrer to the special plea referred to, but for some cause the record failed to show it, and that the only controversy between the parties on that plea was whether in law the defendant can defend against the plaintiffs' demand by showing its liability to the second mortgagee for the money in its hands, without an averment that that liability had been discharged by payment of the money to such second mortgagee. So impressed, we will indicate our opinion upon that question, that the litigation may not be unnecessarily protracted.

It is not denied that the second mortgagee, under the facts stated in the plea, is entitled to an action against defendant to recover the money which the plaintiffs seek to recover in the present action, (*Webster v. Singley*, 53 Ala. 208, citing *Hitchcock v. Lukens*, 8 Port. [Ala.] 333, and *Huckabee v. May*, 14 Ala. 263;) but, nevertheless, we are of opinion that the defense is not a good one. In *Sharpe v. Wharton*, 85 Ala. 225, 8 South. Rep. 787, following *Cook v. Field*, 3 Ala. 53, we held that a judgment against a garnishee, without satisfaction thereof, is no

defense to an action by the creditor. It was said that, "if an unexecuted judgment against the garnishee would be a bar to a suit against him by the original creditor, it might happen that he would not be compelled to pay the debt at all, as the judgment of the attaching creditor might never be enforced." We think the principle is the same here. Indeed, it applies with more force, if possible. The estate of the plaintiffs' testator is liable to Skaggs for the full amount of the mortgage debt, upon the personal obligation of the testator. Skaggs may at any time enforce this liability against the plaintiffs, to the extent of collecting the entire debt, without ever proceeding to collect from the defendant the said surplus arising from the mortgage sale, to be applied in diminution of his claim. To allow the defense here attempted would be to create an effectual bar to a recovery of the surplus by the plaintiffs, although they may hereafter be compelled to discharge the entire Skaggs debt.

Reversed and remanded.

(36 Ala. 55)

#### SMITH v. STATE.

(Supreme Court of Alabama. June 13, 1893.)

##### CRIMINAL LAW—SETTING CASE FOR TRIAL.

Under Acts 1872-73, p. 261, making it the duty of the clerk of the city court of Montgomery to set criminal cases other than capital cases for trial, it is no ground for arrest of judgment that, at the time a case was set, the accused was not present, either in person or by attorney.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Robert Smith was convicted of larceny, and appeals. Affirmed.

C. H. Roquemore, for appellant. Wm. L. Martin, Atty. Gen., for the State.

**HARALSON, J.** The defendant was indicted in the city court of Montgomery, at its October term, 1892, for grand larceny. He was tried on the 14th of November, following, and was convicted, and sentenced to the penitentiary for three years. He moved in arrest of judgment, upon the ground that the day for the trial of his cause was set by the clerk of the court, without any order of the court setting the cause for trial, and that the defendant was in custody of the court when the clerk set the day for trial, but was not present, either in person or by attorney, at that time. This motion was overruled by the court. There is no bill of exceptions in the cause, and it is brought here on the record, showing the facts above stated.

At the session of the legislature for 1873, an act was passed (Acts 1872-73, p. 261) making it the duty of the clerk of the city court of Montgomery to set the criminal cases pending in said court for trial, commencing on Monday of the second week of the July term, and on Monday of the February and



October terms of said court, and to summon the witnesses in each case for the day set for the trial thereof, and requiring him, in setting causes, to be governed by the rules and statutes regulating the setting of civil cases for trial in said court, so far as the same were applicable, and not inconsistent with said special act. By proviso, capital cases were exempted from the operation of the statute. At the time of this enactment, there was no statute which made it the duty of clerks of courts to set down criminal causes on the dockets of the courts for trial on particular days, but they were tried whenever reached,—a practice expensive to the state, parties, and witnesses, and productive of much public inconvenience. The obvious design of this special act was to facilitate the trial of such cases, at a saving of much of the expense and annoyance incident at the time to their trial in the court. It did not deprive defendants of any right or privilege they theretofore enjoyed, but rather gave them opportunity for a more certain, speedy, and satisfactory trial. Later, in 1877, the legislature passed a similar general statute, appearing in the Code of 1876 as section 4869, and in that of 1886 as section 4447, making it the duty of the clerks of courts to set for trial all cases in their courts, except capital cases and cases of parties in custody, for particular days, and no case so set to be called before the day of its trial. This statute, however, made no reference to any special statutes on the same subject, contained no repealing provisions, and did not in any wise affect this special law for the Montgomery city court. *Mobile & O. R. Co. v. State*, 29 Ala. 573; *Pearce v. Bank*, 33 Ala. 693; *Jefferson Co. v. Truss*, 85 Ala. 490, 5 South. Rep. 86. The special statute and the general one on the subject, each prescribing duties to be performed by clerks of the courts in the matter of setting their dockets, are directory merely, and, when complied with by those officers, abridge no constitutional or other right of defendants to fair and impartial trials, but, rather, are promotive thereof. The city court committed no error in overruling the motion in arrest of judgment. Affirmed.

(101 Ala. 359)

### TOWN OF LUVERNE v. SHOWS.

(Supreme Court of Alabama. June 13, 1893.)

#### TOWNS—ORGANIZATION—BOUNDARIES.

Act Feb. 6, 1891, declares that the corporate limits of the town of Luverne shall be one mile "each way, north, south, east, and west, from the courthouse square, as laid out by the Luverne Land Company." The square was 200 feet north and south by 100 east and west. The town at the time of the passage of the act was incorporated under the General Laws, its boundaries being "one-half mile each way from the courthouse, reserved as per the Luverne Land Co." survey. *Held*, that the area of the town did not consist of two strips of land—one 200 feet wide, running east and

west, and one 100 feet wide, running north and south—crossing at right angles, but a saloon 200 yards southwest of the courthouse square was within the corporate limits.

Appeal from circuit court, Crenshaw county; John P. Hubbard, Judge.

Action by Thomas W. Shows against the town of Luverne to recover money paid for a liquor license. Judgment for plaintiff. Defendant appeals. Reversed.

Gamble & Bricken, for appellant. M. W. Rushton and I. H. Parks, for appellee.

COLEMAN, J. Thomas Shows, having paid to the municipal corporation of the town of Luverne, under protest, \$500 for a license to retail spirituous liquors, instituted the present action to recover back the money. Plaintiff contends that by a proper construction of the act of the legislature incorporating the town, his place of business was not within the corporate limits. We need not consider some of the difficulties in plaintiff's way if this were true, but will rest our decision upon the case made by him. Acts 1890-91, p. 403, approved Feb. 6, 1891, after incorporating the town of Luverne, declares that the corporate limits shall be "one mile each way, north, south, east, and west, from the courthouse square, as laid out by the Luverne Land Company, and recorded in the probate office of said county." "The courthouse square," from the map, seems to be a block 200 feet south and north by 100 feet east and west. The plaintiff's place of business was about 200 yards southwest from the courthouse square. According to plaintiff's contention, the area incorporated consists of 2 strips of land, 200 feet wide, running east and west, and 100 feet wide running north and south, crossing each other at right angles, including the courthouse square as the center, and, his place of business being in a southwestern direction from the square, he is neither west nor south, and consequently his place of business is not within the corporate limits. The argument is wholly untenable. Tested by a meridian line, he is west of the square; and by latitude, he is south of the square. A further reading and construction of the act, in the light of facts, demonstrates more conclusively, if possible, that there is no merit in the contention. At the time of the adoption of the act of the legislature, *supra*, incorporating the town of Luverne, the town was an existing municipal corporation, incorporated under the General Laws of the state. Its boundaries at that time were "one-half mile each way from the courthouse, reserved as per the Luverne Land Co." survey or plat. The map or plat of the town, as incorporated under the General Laws, shows that plaintiff was included within the corporate limits as then incorporated. As a matter of course, "one-half mile each way from the courthouse" would

include plaintiff, whose place of business in the town during the years 1889 and 1890 was only 200 yards from the square, and has never been changed. The act of the legislature of 1890-91, *supra*, further provided that "the present and future inhabitants of said town shall be and continue the body politic and corporate, under the name and style of the town of Luverne." Under the proof the plaintiff and his place of business were expressly declared to be included in the "body politic and corporate of the town of Luverne." Other provisions of the act manifest with equal clearness the legislative intent. Would not a fair interpretation of the act fix the boundary line of the corporate limits to be that of a circle, with its center at the "courthouse, as per the Luverne Land Company's survey or plat?"

The circuit court erred in rendering judgment for the plaintiff. A judgment will be here rendered for the defendant. The cost of appeal and of the trial court will be taxed against the plaintiff.

Reversed and rendered.

(98 Ala. 355)

AIKEN v. STEINER et al.

(Supreme Court of Alabama. June 13, 1893.)

EXEMPTIONS—PARTNERSHIP—FRAUDULENT CONVEYANCES.

Where one member of a partnership, who is insolvent, sells, for cash, his entire interest in the firm to his copartner, the purchasing partner cannot hold the property as exempt, against a creditor of the partnership, though the partnership assets are less than \$1,000 in value.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action in attachment by Steiner & Lobman against W. G. Aiken & Co. After levy of the writ on a stock of goods, W. G. Aiken interposed a claim to the property as exempt to him, its value being less than \$1,000. Plaintiffs had judgment on a trial of the claim, and defendant Aiken appeals. Affirmed.

The cause was tried on the following agreed statement of facts: "The debt of plaintiffs was a debt made by W. G. Aiken & Co., and is just and unpaid. That, before the attachment was levied, O. H. Vincent, who was a partner of said firm of Aiken & Co.,—and that he and W. G. Aiken were all and the only partners,—sold his interest in all the firm assets of Aiken & Co. to his copartner, W. G. Aiken, for a valuable consideration, to wit, \$400, in cash, and put him [in] possession. That the amount of \$400 is a fair price for the interest of said Vincent in said goods. That the said W. G. Aiken owns no other property except that mentioned in his affidavit claiming the exemption in this case. Plaintiffs' debt was a subsisting liability before the sale of the as-

sets of the partnership, and the retiring partner was insolvent at the time he sold out. The sale was had four days prior to the levy of the attachment." This being all the evidence, the court, at the request of the plaintiffs, gave the general affirmative charge in their behalf.

M. N. Carlisle, for appellant. Thos. H. Watts, for appellees.

COLEMAN, J. The facts in the case are agreed upon, and present but one question for our consideration. The partnership assets of a firm composed of two members are of less value than \$1,000, and the members of the firm own no other property. One member, who is insolvent, sells out, for a cash consideration, his entire interest in the partnership, to his copartner. Can the purchasing partner hold the property, under the exemption laws, against a creditor of the partnership?

Creditors of a partnership have no claim to, or lien upon, partnership property, but the partners themselves have such a lien upon partnership effects, for the payment of partnership debts; and so long as the partnership exists this right of each partner may be made available to the creditors of the firm, upon the principle of subrogation. *Reese v. Bradford*, 13 Ala. 837. It is clearly settled as the law of this state that partners cannot, during the existence of the partnership, claim an individual exemption in partnership property, when taken under legal process for partnership debts. *Giovanni v. Bank*, 55 Ala. 305; *Schlapback v. Long*, 90 Ala. 525, 8 South. Rep. 113; *Terrill v. Hurst*, 76 Ala. 588; *Levy v. Williams*, 79 Ala. 171. The exemption laws were made for the benefit of individuals, and not for the benefit of partnerships, as such. So long as the partnership existed, neither the partnership nor the individual members of the firm were entitled to claim any part of the assets as exempt from partnership debts.

Under the facts of this case the selling partner was insolvent. The purchasing partner owning no property, except that which had constituted the assets of the firm, with outstanding partnership liabilities, unprovided for, the law conclusively presumes that the parties knew the effect of their transaction would be to hinder, delay, and defraud the partnership creditors. A sale by the partnership to a third party for a cash consideration, with such notice, would be declared fraudulent and void. Upon what principle of equity, or of sound reasoning, can it be held that the partners cannot make a valid sale to a third party, so as to defeat their firm creditors, yet the creditors may be defeated by a sale under the same circumstances by one partner to his copartner? Neither party owns any individual interest in partnership property, ex-

cept such as remains after payment of all partnership debts. We are of opinion, and declare the law to be, that any disposition of property for a present consideration, and which was liable to a debt then existing, made to hinder, delay, or defraud the creditor,—all the parties to the transaction having knowledge of, and participating in, the fraudulent purpose,—is fraudulent and void as to such creditor, whether between individuals, or a partnership, to a third party, or between the partners themselves, and the exemption laws furnish no protection to a grantee, under such circumstances. It cannot be the law that property which is subject to legal process may become exempt property by a fraudulent sale entered into by the seller and purchaser for the express purpose of defrauding the creditor; the purchaser benefiting the fraudulent debtor by a cash payment, which cannot be reached by the creditor, and the purchaser, who was also a debtor, secure such a benefit to himself. The precise question has not been decided by this court, but in a number of decisions it is declared: "One partner may sell to his copartner, and if the sale is fair it will vest the exclusive title in his copartner." *Reese v. Bradford*, 13 Ala. 847. "In such case, if the sale is fair,—no fraud intended,—an exemption may be claimed." *Levy v. Williams*, supra. "It is lawful for the partners, in case of dissolution by consent, to agree that the partnership property shall belong to one of them; and if the same is bona fide, and for a valuable consideration, it will transfer the property to such partners, free from the claims of joint creditors." *Mayer v. Clark*, 40 Ala. 270. "Partnership property may be, in good faith, and before execution, converted into separate property, and an exemption may then be claimed in it by the partner whose property it becomes." 17 Amer. & Eng. Enc. Law, p. 1336. The rights of partners, as between themselves, and the equity of partnership creditors, was elaborately considered in the case of *Arnold v. Hagerman and Arnold v. Bank*, reported in 45 N. J. Eq. 186, 17 Atl. Rep. 93; and the conclusion of the court on the question under consideration was as follows: "Generally speaking, this equity of creditors continues only so long as the rights of the partners against each other subsist; but if the partners have put an end to their rights, with intent to hinder, delay, or defraud the partnership creditors, in pursuit of this equity, then this equity of creditors may still remain." "If a firm, and all its members, be insolvent, and the insolvency be patent to all the members, a transfer of the partnership property to one of the firm will be considered as made with intent to hinder, delay, or defraud the firm creditors." These are sound, wholesome principles, and accord with our views. It is upon such principles only that partnership affairs can be properly adminis-

tered and settled with justice to partnership creditors.

Upon the agreed facts, the court properly instructed the jury, at the written request of the plaintiffs, to find the issue in their favor. Affirmed.

(99 Ala. 319)

### GIDDENS v. BOLLING.

(Supreme Court of Alabama. June 14, 1893.)

#### QUIETING TITLE—LACHES—ESTOPPEL.

Where complainant procured a loan of defendant on certain land, representing that his wife had joined in the due execution and acknowledgment of the mortgage, had allowed him to foreclose, and had rented the land from him after purchase at foreclosure, and executed notes to him for the rent during several years, a bill by him to quiet title to the land, on the ground that his wife had not signed the mortgage, will be dismissed.

Appeal from chancery court, Pike county; John A. Foster, Chancellor.

Bill to quiet title by J. C. Giddens against R. E. Bolling. Bill dismissed. Complainant appeals. Affirmed.

The bill sets out that complainant was the owner in fee of 1,436 acres of land, which is particularly described, lying and being in the county of Pike, in this state; that he is, and has been for about 20 years past, a married man, the head of a family, and resides on the lands described, with his family, as their homestead, and was residing thereon at the date of the mortgage he executed on said lands to the defendant, hereinafter referred to; that on the 14th day of February, 1885, he executed a mortgage on said lands to the defendant to secure an indebtedness of \$7,500, evidenced by his promissory note for that sum, bearing date with the mortgage; that there were included in the mortgage excessive usurious charges, which were unjust; that his wife, Mrs. Martha A. Giddens, refused to sign said mortgage, and never in fact signed the same, and never authorized any person, for her, and in her stead, to sign it, and never acknowledged it before any officer, separate and apart from her husband, in the manner required by law to alienate her homestead. Complainant claims, as he is advised, that the mortgage has no binding force upon the realty therein described, and is absolutely void; but, if he is mistaken in that, he avers that it is void as to his homestead of 160 acres, and the appurtenances thereon, not exceeding \$2,000 in value; and he selects and describes the particular 160 acres of land, out of the whole tract, which he claims to be exempt to him as his homestead, free from any binding force of said mortgage. He also avers that the mortgage is outstanding, has been recorded in the office of the probate court of Pike county, and continues to be, and is, a cloud on his title to said lands. There is no offer in the bill to repay the money he received from the defendant, nor, in any manner, to do equity; and

there is no charge of fraud or collusion on the part of the defendant, or officer purporting to take the acknowledgment of the mortgage, or on the part of any person. The prayer of the bill is for a decree declaring said mortgage to be void, and of no force or effect, as to complainant's homestead; that an account be taken between complainant and defendant; that defendant be required to deliver up said mortgage for cancellation; that it be declared void and canceled; that the record thereof be stamped so as to show its invalidity; and for general relief. There was a demurrer to the bill because it was indefinite in its allegations as to usury, and because there was no offer to pay to complainant what defendant owes him, or what may be found to be due to him, and a motion was also made to dismiss the bill for want of equity. The chancellor overruled the demurrer and the motion to dismiss. The defendant answered, admitting the making of said mortgage, and attaches a copy thereof as a part of his answer, to which is appended, in due form, an acknowledgment by complainant and his wife, Martha A. Giddens, purporting to have been made before, and certified by, S. H. Burgess, a justice of the peace for Pike county, Ala., and also a certificate, in due form, by the same officer, of his examination of Mrs. Giddens, separate and apart from her husband, in the manner required by statute for the conveyance by a married woman of her homestead. Said mortgage contained the real estate described in the bill, and a large lot of personal property belonging to the former, and was foreclosable on the 1st January, 1886. It gave the defendant the right to purchase the property at any sale that might be made of the property under the mortgage, and, in the event of his becoming the purchaser, the person whom he might, by indorsement on the mortgage, authorize to execute title, might make conveyance to, and invest all the right and title of complainant in, him. The defendant further states that after having given notice by publication, in the manner and for the time required by the terms of the mortgage, he proceeded on the 11th day of February, 1886, to sell the lands described in the mortgage at public auction, at the Artesian Basin, in the city of Montgomery, for cash, and at the sale became the purchaser of the same, and received title thereto from E. P. Morrisett, who made the conveyance under authority of the mortgage; that all the personal property in the mortgage was appraised, by agreement, by disinterested parties, and defendant took it at the appraised valuation, and gave complainant credit therefor on his mortgage debt, and after giving him credit for the amount the land brought at said sale, and the value of the personal property, and all other credits to which he was entitled, there remained due on the mortgage the sum of \$2,000. De-

fendant avers in his answer that he never heard until the fall of the year 1888 that Mrs. Giddens claimed never to have signed said mortgage; that complainant represented to him that the mortgage had been duly executed by his wife, and defendant advanced him the money he let him have on that representation, which he believed to be true; and he denies the allegations of the bill that said Martha A. refused to sign said mortgage, and never authorized any person, for her, and in her stead, to sign it, and that she never acknowledged the same before any officer, separate and apart from her husband. On final hearing the chancellor denied the relief sought, and dismissed the bill.

Gardner & Wiley and A. A. Wiley, for appellant. E. P. Morrisett, for appellee.

HARALSON, J. There is no allegation or proof in this case that the defendant, Bolling, or any other person, practiced any fraud upon Mrs. Giddens to procure her signature and acknowledgment of the mortgage before the justice of the peace. The proof is undisputed that the mortgage was executed and acknowledged in Pike county, and delivered to defendant in Montgomery. The defendant testifies that he never heard of the alleged failure and refusal of Mrs. Giddens to sign or acknowledge the mortgage until the year 1888,—more than two years after it had been foreclosed,—and the proof is abundant to show that the defendant took the mortgage, and parted with his money, bona fide, without any notice of the alleged falsity of the certificate of acknowledgment by the wife, and in full reliance upon the truth of the same. The question which lies at the foundation of the homestead claim of Mrs. Giddens, on the ground upon which the bill places it, viz. that she never signed or acknowledged the mortgage, has recently received careful consideration at our hands, and the principle which controls in such an issue, as we then announced, is that when there has been no appearance before the officer, and no acknowledgment at all made, the fact may be shown in disproof of the officer's certificate, even against bona fide mortgagees and purchasers, and his false certificate is void; "but when there is an appearance and acknowledgment, in some manner, then the official certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee." *Grider v. Mortgage Co.*, 12 South. Rep. 775, (at present term); 1 Amer. & Eng. Enc. Law, p. 160, § 6. The evidence upon the issue whether Mrs. Giddens ever signed and acknowledged the mortgage, on the part of the complainant, is that she swears she

never did either; that her husband, the complainant, and Burgess, the justice, came to her on the 14th February, 1885, and her husband said to her he desired her to sign the mortgage, and she replied that she would not do so, whereupon her husband signed her name to the paper, and handed it to Mr. Burgess, the justice. And yet she swears directly afterwards that she first learned that her name was signed to said mortgage of 1885 in the fall of 1888, when her husband showed the mortgage to her, and asked her if it was her signature, and she informed him it was not. She also testified she never heard of the sale of the lands under the mortgage until the fall of 1888, although they had been advertised for sale, and the personal property included in the mortgage was appraised by parties who went to her house for the purpose, and remained overnight. The plaintiff corroborates this statement, saying he believed he had the right to sign her name; that he handed it to Burgess, the justice, who filled out the certificates, and asked his wife no questions; that he carried the mortgage to Troy to be recorded, with instructions to forward to defendant, at Montgomery, and it was sent to him through the mails. Mrs. E. V. Boykin, a sister of complainant, testifies that she was present when Mr. Giddens and the justice came to the house, on the 14th February, 1885; that Mrs. Giddens did not sign the paper, but refused, after which complainant and Burgess each wrote on it, and both left the house; that Mr. Burgess did not say anything about the paper; did not take Mrs. Giddens' acknowledgment to it, separate and apart from her husband. These three witnesses—complainant, his wife and sister—are the only ones who testify that the mortgage was not signed and acknowledged by Mrs. Giddens. The proof on this point by the defendant may be briefly stated. Burgess, the justice, on being shown the certificates to said mortgage, swore "that the same is true. Both of said certificates attached to said mortgage, which is attached to R. E. Bolling's testimony, marked 'Exhibit B' to same, are true. The separate acknowledgment of Mrs. Giddens, as well as the acknowledgment with her husband, took place at her residence, at Briar Hill, Ala. I saw and talked to Mrs. Giddens, herself. \* \* \* She acknowledged that she had signed said mortgage, but I did not see her sign it. I cannot possibly be mistaken about her acknowledging that she signed said mortgage. I am not related to or connected with R. E. Bolling, and have no interest in the result of this suit." The defendant testifies that in the fall of 1888 he proposed to complainant that if he could raise \$7,000 he would convey to him the place; that the same could be raised by a loan on the property; and then complainant, for the first time, told him that his wife objected to signing any papers for a loan because her examination

separate and apart from her husband, in the execution of the mortgage of 1885, had never been taken; that he went to Briar Hill to see Mrs. Giddens about the matter, and she informed him that she had not signed the mortgage, but that her husband, at her request, signed her name for her to it; and, further, that Alonzo P. Smith was present, and heard the interview. The witness Alonzo P. Smith testified that he was present at that interview, and heard Mrs. Giddens say to Mr. Bolling that she did not sign the mortgage, but had authorized or told her husband to sign her name for her. E. P. Morrisett testified that he had acted as attorney for defendant in his transaction with complainant; that, at the time of the delivery of the mortgage of 1885 by complainant to defendant, they both came to his office in Montgomery, and submitted to him, as an attorney, whether or not said mortgage had been properly executed and acknowledged; that he had had a number of interviews with said Giddens about this mortgage, had foreclosed the same for defendant, bought in the property for him, drawn rent notes from complainant to defendant for the property since the sale, and heard for the first time from defendant, in the fall of 1888, and afterwards from complainant and his wife, that she claimed never to have executed and acknowledged the mortgage. Witness further stated that he went to see Mrs. Giddens in reference to her execution of this mortgage, and in reply to his question, "If he had understood correctly that she had said that her husband had forged her name to the mortgage, and taken it to defendant to raise money on," she replied: "No; that she had said she did not sign it, but had told him he might sign her name to it, if he desired, but that she would not do it."

The evidence of the complainant is entitled to no consideration at our hands. By his conduct, if not by his words,—which spoke as plainly as words could,—he represented to the defendant that his wife had duly executed and acknowledged the mortgage. He got the money of the defendant on the mortgage by the deception he practiced. He allowed him to foreclose it, and afterwards, for several years, rented the lands from him, and executed his notes to him for the rent; and not till the fall of 1888 did he disclose to him that there was any infirmity in his mortgage. We are forced to discredit his account of the transaction. For obvious reasons, we decline to discuss the evidence of Mrs. Giddens and Mrs. Boykin, where it is brought into contradiction with the evidence of the defendant and his witnesses. Upon a careful review of it all, we are forced to the conclusion that Mrs. Giddens acknowledged the mortgage before the justice, in the manner he certifies. This was a bill, as has been stated, to remove a cloud from title to land. The complainant made no offer to repay the money he had obtained on the mort-

gage from the defendant, which remained due and owing to him thereon, and submit himself, as he should have done, to the authority and jurisdiction of the court in that behalf, and for this it ought to have been dismissed, on the motion of defendant. *Grider v. Mortgage Co.*, supra. The chancellor found against the complainant on the facts, denied the relief sought, and dismissed the bill. We find no error in the rulings of the lower court, of which the plaintiff can complain, and its decree is affirmed.

(98 Ala. 593)

**DILLARD et al. v. SAVAGE.**

(Supreme Court of Alabama. June 14, 1893.)  
REVIEW ON APPEAL—GRANTING NEW TRIAL—SUFFICIENCY OF EXCEPTIONS—ASSIGNMENT OF ERRORS.

1. An exception to the allowance of a motion for a new trial, merely stating that "said attorneys appeared in open court, and excepted to the action of the court in granting said motion, and in setting aside said verdict," does not raise the question of the sufficiency of the notice of the motion to the opposite party.

2. An assignment of error, that "the court erred in the order and judgment of June 6, 1892, by setting aside the verdict of the jury in said cause, and by granting to the plaintiff a new trial," is insufficient to raise the question whether proper notice of the motion for a new trial was given to the adverse party.

3. The action of the lower court in granting a new trial will not be reversed, unless the evidence plainly and palpably supports the verdict.

Appeal from circuit court, Mobile county; W. E. Clarke, Judge.

Ejectment by Maria L. Savage against O. E. Dillard and others. From an order granting a new trial after verdict for defendants, they appeal. Affirmed.

Gregory L. & H. T. Smith, for appellants.  
T. A. Hamilton, for appellee.

STONE, C. J. The present case is one in which a new trial was granted. By rules of practice adopted and prevailing in the circuit court of Mobile county, Mondays are set apart as motion days; and, when the motion is for a new trial, "at least one entire day's notice shall be given to the opposite party, or his attorney." The motion was set for Monday, June 6, 1892, and the notice of the motion was served on counsel on Saturday, June 4th. The motion was heard and granted on Monday, defendants' counsel not appearing. It is claimed that, as the intervening day was Sunday,—dies non juridicus,—there was a failure to give the one entire day's notice, and that the order granting a new trial must be set aside for that reason. *Robertson v. State*, 43 Ala. 325. The only exception reserved to the action of the court was in the following language: "On Monday, June 13, 1892, said attorneys appeared in open court, and excepted to the action of the court in granting said motion, and in setting aside said verdict." The only

error assigned is that "the court erred in the order and judgment of June 6, 1892, by setting aside the verdict of the jury in said cause, and by granting to the plaintiff a new trial of said cause."

Exceptions, to avail in this court, must be specific; must so specify the point of objection as to direct attention to the error complained of. 3 Brick. Dig. p. 80, § 33 et seq. But this principle must not be extended too far. If the exception presents the point of objection so as to be readily understood, this is enough. We are simply following an established rule, not declaring a new one. We think the exception reserved in this case, and the error assigned, only question the propriety of the order granting the new trial, and do not raise the inquiry of the time when it was heard, or the sufficiency of the notice. The presiding judge heard the testimony of the witnesses, observing their manner, and had better opportunities for pronouncing on its weight and convincing power than we can have. He was possibly dissatisfied with some parts of the instructions he had given the jury. We cannot know the motives which influenced him, further than the order he granted indicates them. The evidence set out in the bill of exceptions does not so "plainly and palpably support the verdict" as to call for, or justify, a reversal of his order granting a new trial. *Cobb v. Malone*, 92 Ala. 630, 9 South. Rep. 738; *White v. Blair*, (Ala.) 10 South. Rep. 257; *City of Mobile v. Murphree*, (Ala.) 11 South. Rep. 201.

Affirmed.

(98 Ala. 371)

**ZACHRY v. LOCKARD.**

(Supreme Court of Alabama. June 14, 1893.)  
RIGHTS OF WIDOW—POSSESSION OF SEPARATE ESTATE—EFFECT ON DOWER AND DISTRIBUTIVE SHARE.

Code, §§ 2354, 2355, providing for the defeat or reduction of a widow's dower or distributive share in her husband's property in case she has any separate estate, applies, though the separate estate consist exclusively of a vested estate in remainder.

Appeal from probate court, Pike county; W. J. Hilliard, Judge.

Proceeding by M. E. Zachry, administratrix of A. T. Lockard, deceased, for the allotment of dower to M. J. Lockard, widow of said deceased. From a decree setting apart dower, regardless of the value of separate property of the widow, the administratrix appeals. Reversed.

Hubbard, Wilkerson & Hubbard, for appellant. M. N. Carlisle, for appellee.

MCOLELLAN, J. This is a proceeding prosecuted by the administratrix of the estate of A. T. Lockard, deceased, for the allotment of dower to M. J. Lockard, the widow of the intestate. It was sought in the court below, by appropriate averment,

and the offer of testimony in support thereof, to reduce the allotment below one-third of decedent's lands, by showing that the widow owned a separate estate, consisting of a vested remainder in certain lands devised by her father to her mother for life, remainder to her in fee. The probate court declined to allow this to be done, and entered a decree setting apart dower, regardless of the value of this separate property of the widow, upon the theory, we infer from the argument of counsel, that inasmuch as dower is intended as a provision for the support of the widow during her life, and inasmuch as she derived no rents, incomes, or profits, as a remainderman, pending the life estate, which may, indeed, continue beyond her own life, it could not have been the purpose and intent of the legislature, in the enactment of sections 2354 and 2355<sup>1</sup> of the Code, to defeat or reduce dower allotment by reference to, and to the extent of the value of, such separate estate. We find no warrant for this idea in the statute. Nor do we conceive, even from the standpoint of the legislator, any reason for its accommodation therein. The operation of the statute does not depend upon the result of an inquiry as to whether the separate estate of the widow, in its existing form, is presently productive of an income. That it is not is a fact which goes in diminution, but is not entirely destructive, of its value. If the criterion acted on by the probate court were the proper one, a case might readily be conceived in which separate estate of the widow, of great value, and presently vested, not only in title, as this is, but in possession as well, could not be taken into the account, because it could not be rented under existing circumstances, as, for instance, a vacant lot in a city. But it is not the criterion by which to determine the question at all. In the contemplation of the statute, and in point of fact, every species of property of a vested character, as to title, whether it be in possession, or the possession be postponed to some future time or event which must transpire, and whether it be rent yielding or not, may be presently applied to the support of the owner. A vested estate in remainder is as much property as an estate in possession. A fee so vested is only less valuable than a fee in present, in that possession and enjoyment are postponed during the life estate. Such an estate

<sup>1</sup>Code, §§ 2354, 2355, provide that if any woman, having a separate estate, survive her husband, and such separate estate, exclusive of the rents, income, and profits, is equal to, or greater in value than, her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of, her husband's estate; and if her separate estate be less in value than her dower, as ascertained by such rule, so much must be allowed her, as, with her separate estate, would be equal to her dower and distributive share in her husband's estate.

is as alienable, of course, as an estate in possession; and by alienation, by a bargain and sale of the fee, to vest in the possession and enjoyment of the purchaser upon the falling of the life estate, the widow may convert its value into money for her support, or into other property which will yield an income commensurate with the income derivable from the dower interest, or that part of it against her claim to which the value of her separate estate in remainder is set off. We repeat, there was no reason for the legislature to exclude this character of property from the computations required by sections 2354 and 2355 of the Code, and it is not excluded therefrom. The probate court, therefore, erred in excluding the testimony offered by the administratrix as to the value of Mrs. Lockard's remainder in the lands devised by her father, and in its judgment, allowing dower without reference thereto. Its decree must be reversed, and the cause will be remanded.

(99 Ala. 250)

COLBY v. ST. JAMES COLORED M. E. CHURCH.

(Supreme Court of Alabama. June 14, 1898.)

MECHANICS' LIENS—ENFORCEMENT IN EQUITY—  
REPEAL OF STATUTE.

Code 1886, § 3048, providing that a mechanic's lien may be enforced by bill in equity if the amount involved exceeds \$100, is not in conflict with Acts Feb. 12, 1891, § 8, giving the circuit court jurisdiction of actions to enforce liens of such amount, as there is no inconsistency in giving a remedy in law and one in equity; consequently the former section is not affected by section 9 of the latter act, providing for the repeal of all laws in conflict with its provisions.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Bill in equity by Willis D. Colby against the St. James Colored Methodist Episcopal Church to enforce a mechanic's lien. From a decree for defendant, entered upon an order sustaining a demurrer to the bill, plaintiff appeals. Reversed.

The defendant demurred to the bill, and, among other grounds, assigned the following: First, because the said bill shows on its face that a court of equity has no right to hear and determine the matters complained of in said bill of complaint; and, fifth, because, under the laws of Alabama, said suit should have been brought in the circuit court, or a court having like jurisdiction, of the county in which the property is situated. Upon the submission of the cause upon the demurrers the chancellor sustained the first and fifth grounds, and the complainant now brings this appeal, and assigns as error this decree of the chancellor.

Hill & Hill and L. C. Dickey, for appellant. Lane & White, for appellee.

HEAD, J. Chapter 3, tit. 2, pt. 3, of the Code of 1886, comprised the General Stat-

utes of this state when that Code was made and adopted, which defined, declared, and provided for the enforcement of liens of mechanics and material men. The chapter embraced 31 sections, numbered 3018 to 3048, inclusive. The first of these sections declared the lien, and the remaining ones made many provisions, such as regulating the priorities of liens, the rights of lessor and lessee, the procedure necessary to effectuate the lien, and for its enforcement in the courts. Section 3028 was as follows: "When the amount involved exceeds fifty dollars actions for enforcement of liens under this chapter shall be brought in the circuit court, or court having like jurisdiction, of the county in which the property is situated; in all other cases such actions shall be brought before justices of the peace." The next section (3029) prescribed the pleading and practice in such actions. Section 3048 was as follows: "Any lien provided for under the provisions of this chapter, when the amount claimed is not less than one hundred dollars, may also be enforced by bill in equity, without alleging or proving any special ground of equitable jurisdiction." In practice, under this system of laws, the courts of law and equity were invoked for the enforcement of these liens, either tribunal being selected, as the pleasure of the party suing might dictate; and it has never been objected, that we are aware of, and indeed could not be plausibly argued, that there was such incongruity or inconsistency in the two sections as they stood in the Code, as that both could not stand and be well administered. The two, being in pari materia, were treated as giving the remedy by bill in equity, in addition to the jurisdiction of the courts of law conferred by the first, although that section is complete in itself, and without more would be held to confer the jurisdiction exclusively upon courts of law, in the absence of special grounds of equitable interposition. *Walker v. Daimwood*, 80 Ala. 246; *Chandler v. Hanna*, 73 Ala. 392. With this chapter of laws in force, on February 12, 1891, the general assembly passed an act "to provide liens for mechanics and material men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041, of the Code, and section 3027, as amended by the Acts of 1888-89." The first section of this act declares an express repeal of the Code sections just enumerated, and the remaining sections of the act then proceed to make provisions supplying, in modified form, the deficiencies in the system created by this repeal, and making some new provisions touching subjects not before provided for; and the last section of the act declares the repeal of all laws in conflict with the act. It will thus be observed that by this act 7 particular sections of the Code chapter were expressly repealed, and 24 retained, unless they or some of them

were also repealed by reason of inconsistency, as declared by the last section of the act. Now, we find by comparison that the several sections of the new act, interlaced and supplemented by those Code sections which were not repealed by name, form a congruous and harmonious system for the establishment and enforcement of liens of mechanics and material men; and, while the act itself may be capable of enforcement, as a system complete in itself, without the Code sections retained, yet the retained sections are well adjusted to the provisions of the act, and supply many provisions useful to the ease and efficiency of the system created by it. We therefore feel no hesitation in holding that the legislative intention was that the laws of this state in reference to these liens should consist of the several sections of the act of February, 1891, interlaced and supplemented, as we have said, by those sections of the Code which were not repealed; the whole forming a complete system for the regulation and enforcement of all rights arising under it.

Now, it will be noticed that section 3028 of the Code, above copied, which conferred the jurisdiction on courts of law, was one of the expressly repealed sections; but in lieu thereof section 8 of the act was adopted, which provides "that when the amount involved exceeds one hundred dollars action for enforcement of lien under this chapter shall be brought in the circuit court, or court having like jurisdiction, of the county in which the property is situated; in all other cases such action shall be brought before justices of the peace, whose judgments shall be executed as now provided by section 3037 of the Code." This repeal of 3028, and the adoption of this section 8 of the act, manifestly had no other purpose than to change the jurisdiction of the circuit court as to sum from a minimum of fifty to one hundred dollars; to increase that of justices to one hundred dollars, and supply the omission effected by the repeal of section 3037 as to how justices should enforce their judgments. The effect is precisely the same as if the section (3028) had not been repealed, and the new section adopted in its place, but had been amended by changing fifty to one hundred dollars, and providing the manner of enforcing justices' judgments. Thus, when we view the entire law as it was thus formed by the act of 1891, we find it in its structure in effect the same as the chapter of the Code in force at the adoption of the act. Provisions of the old system are modified, and new ones added, but the structure of the law is the same, and in it we find the two sections—the one conferring jurisdiction on courts of law and the other on courts of equity—standing together just as they did before. We are of the opinion that the jurisdiction of equity



in such cases was not repealed or impaired, and that the city court erred in so holding. Reversed and remanded.

(99 Ala. 216)

### GERMOLGEZ v. STATE.

(Supreme Court of Alabama. June 15, 1893.)

GRAND JURY—FORMATION—ERRORS IN NAMES—PLEA IN ABATEMENT—INDICTMENT—INDORSEMENT OF NAMES OF WITNESSES.

1. Where the minutes of the court show that the grand jury was regularly formed, and that certain errors in the names of grand jurors as they appear in the record were clerical errors, made by the clerk in transcribing the names of jurors regularly drawn and summoned by the sheriff, as shown by his return, such errors do not affect the validity of an indictment returned by such grand jury.

2. Code 1886, § 4445, provides that no objection can be taken to an indictment by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law, etc. *Held*, that it was not error to strike a plea in abatement because of clerical errors made by the clerk in transcribing the names of grand jurors into the record.

3. It is not a valid objection to a grand jury that the court supplied the places of those who failed to appear without first making an order discharging them.

4. It is no objection to an indictment that the solicitor indorsed additional names of witnesses on the indictment after it was returned into court.

Appeal from circuit court, De Kalb county; John B. Tally, Judge.

Nick GERMOLGEZ was convicted on an indictment for selling intoxicating liquors without a license, and appeals. Affirmed.

The defendant filed a plea in abatement going to the formation of the grand jury which preferred the indictment, the grounds of which plea are stated in the opinion. The solicitor moved the court to strike said plea in abatement from the file, because the same was frivolous. The court granted the motion, struck the plea from the file, and the defendant duly excepted.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was indicted for retailing spiritous liquors without a license. The defendant filed a plea in abatement, going to the formation of the grand jury, which presented the indictment. In writing up the record of the organization of the grand jury, and of those summoned and not attending, the clerk wrote in one place "W. J. Free," instead of "W. J. Free," and in another place "J. I. Taylor" instead of "J. I. Hagler." The minutes of the court themselves furnish abundant evidence of the regular formation of the grand jury, and that these were mere clerical errors of the clerk of the court, in transcribing the names of the jurors who had been regularly drawn and summoned by the sheriff as

shown by his return into court, all of which is of record. *Tanner v. State*, 92 Ala. 1, 9 South. Rep. 613, and authorities there cited. Section 4445 of the Code of 1886 declares that "no objection can be taken to an indictment by plea in abatement, or otherwise, on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law," etc. This section has been frequently considered by this court, and judicially construed, before its adoption in the present Code. In the case of *Billingslea v. State*, 68 Ala. 486, it was said: "There are but two classes of cases in which objections can be sustained to an indictment when they are based on irregularities in the organization of a grand jury: First, where such jurors were not drawn in the presence of the officer designated by law; second, where there is some order of the court below, or some action of the presiding judge, appearing of record in the cause, and relating to the organization of the grand jury, which is without warrant in the statute, or is contrary to its provisions. This embraces some judicial order or act of the court, as contradistinguished from any act of its officers while ministerially executing any such order when lawfully made."

The second ground of objection is that the court made no order discharging those who failed to appear, but supplied their places without first making an order discharging them. The objection is without merit, under the principles decided in *Billingslea v. State*, supra; Crim. Code, p. 133, (section 9 of act.)

The other objection to the indictment, viz. that it was indorsed "R. M. Blevins, Foreman," instead of "Richard M. Blevins," and that the solicitor indorsed the names of other witnesses in the indictment after it was returned into court, are wholly destitute of merit. The objection to the introduction of testimony on the trial is equally untenable. *O'Brien v. State*, 91 Ala. 25, 8 South. Rep. 560.

Affirmed.

(100 Ala. 101)

### Ex parte THOMAS.

(Supreme Court of Alabama. June 15, 1893.)

ARREST WITHOUT WARRANT—COMMITMENT AFTER EXAMINATION.

Where an officer arrests a person without a warrant, as guilty of a felony, and the magistrate who investigates the charge finds the offense has been committed, and that the accused is probably guilty, a commitment, in default of bail, is lawful.

Appeal from probate court, Butler county; Zell Gaston, Judge.

The petitioner, George Thomas, made application for a writ of habeas corpus, veri-

fied by affidavit, addressed to the judge of probate of Butler county, asking that he be discharged from the custody of the sheriff, who then restrained him of his liberty. The probate judge denied the writ, and the relator appeals. Affirmed.

The petitioner introduced evidence showing that on May 3, 1893, he was arrested by a member of the police force of the city of Greenville, and carried before the mayor of the said city, on the charge of larceny from a dwelling house; that no affidavit had been made, charging him with any offense, and no warrant had been ordered for his arrest; that on the hearing of the case the mayor, acting as ex officio justice of the peace, by virtue of the powers conferred upon him by the charter of the city of Greenville, committed the prisoner to jail, on default of bail, to await the action of the grand jury. Upon these facts the court refused to discharge the prisoner, and remanded him to the custody of the sheriff.

Richardson & Hamilton, for appellant.  
Wm. L. Martin, Atty. Gen., for appellee.

**HARALSON, J.** Section 4262 of the Criminal Code authorizes an officer to arrest any person without warrant, when a felony has been committed by the party arrested, though not in his presence; and in *Williams v. State*, 44 Ala. 41, it was held that an arrest without a warrant is not illegal; that it is the issue of a warrant without oath or affirmation which is forbidden by the constitution. *Floyd v. State*, 82 Ala. 23, 2 South. Rep. 633. But, aside from this, when a party is arrested on a criminal charge, without a warrant, and is taken before a magistrate, who investigates the charge, and it appears to him that the offense has been committed, and there is probable cause to believe that the defendant is guilty thereof, and he commits him to jail, in default of a bond, if the offense is bailable, or without bond, if not bailable, the commitment is legal. As conservators of the peace, magistrates are authorized, not only to issue warrants of arrest, but to commit persons already before them, when the occasion for the commitment judicially appears. *Ex parte Graves*, 61 Ala. 384; *Ex parte Riley*, 94 Ala. 82, 10 South. Rep. 523.

Habeas corpus denied.

#### **WORTHINGTON et al. v. HATCH.**

(Supreme Court of Alabama. June 15, 1893.)

TEMPORARY INJUNCTION—DISSOLUTION ON ANSWER.

Complainants, lessees of a quarry from defendant, filed a bill to enjoin an action of forcible detainer, alleging that he had leased them the quarry fraudulently stating that he had a leasehold interest therein; that other parties claimed the quarry, and that complainants had entered into a lease with them. Defendant, by his answer, denied all allegations

of fraud, and alleged that he had a lease from the true owners of the property. *Held*, that a temporary injunction was properly dissolved on the answer.

Appeal from chancery court, Blount county; Thomas Cobbs, Chancellor.

Bill by J. W. Worthington & Co. against L. D. Hatch for an injunction restraining the defendant from the prosecution of an action of unlawful detainer against the complainants. From a decree of the chancellor dissolving the injunction on the denials of the answer, complainants appeal. Affirmed.

The complainants averred in their bill that on July 25, 1891, the defendant came to them and represented that he was the owner of the leasehold interest for a term of years in a certain quarry, and proposed to lease said property for a term of 60 days to the complainants for the purpose of mining limestone rock therefrom, which the defendant claimed he had the right to do under his lease, and that at the expiration of their 60-days lease, which the complainants entered into at the instance of the defendant, they renewed said lease for another term of 60 days, on the faith of the defendant's representation that he had a leasehold interest in said quarry, and had the right to lease it to the complainants. The bill then avers "that respondent's representation as to his ownership of said lands under said leasehold were false, and that they were made fraudulently for the purpose of inducing orators to enter into said contract on the faith thereof, and that orators did enter into said contract on the faith of such false and fraudulent representations." The bill then further avers that at the time of making the said contract with the defendant, and at the time the defendant brought his action of unlawful detainer, the quarry and the adjoining property thereto were owned by other parties, who had never made any lease of said property to the respondent, and had never made any conveyance of any kind vesting in the respondent any leasehold or other interest in the said land. The bill then further averred that, after renewing the lease for an additional 60 days, the defendant, on the faith of his averment of ownership as above stated, and before the complainants discovered that the defendant had fraudulently deceived them as to his right and title to the land, and on the faith of such representations, the complainants had been induced to make many valuable contracts for the supply of limestone from said quarry, and before these contracts could be met, the true owners of said property demanded of the complainants the possession thereof, and notified the complainants that unless they delivered possession of them they would at once oust complainants from said land; and that thereupon, in view of the irreparable damage that would result from the complainants being ousted from said property, and upon defendant's not offering, or being unwilling, to

protect them in their possession, and being insolvent, and therefore unable to reimburse the complainants for the damage resulting from said ouster, the complainants thereupon entered into a lease contract with the true owners of said property at the expiration of their lease with the defendant. The bill then showed that the defendant instituted against the complainants an action of unlawful detainer for the property, after the expiration of their lease with the defendant. Upon these facts the complainants prayed for an injunction restraining the respondent from the further prosecution of said suit of unlawful detainer, and that upon final judgment and decree the chancellor would order that the contract of lease made between the complainants and the defendant be rescinded. The defendant, by sworn answer, answered the bill, denying all the material allegations contained therein, and averring the existence of the lease between him and the true owners of the property by which he had a leasehold interest in said property for a term of five years from the year 1888; and upon the denials of the answer the defendant moved to dissolve the temporary injunction which had been issued. Upon the submission of the cause on this motion the chancellor dissolved the injunction, and this decree is now assigned as error.

Walker Percy, for appellants. Lomax Pittman, for appellee.

**HEAD, J.** The sworn answer of respondent contains a full, explicit, and complete denial of every allegation of fraud charged in the bill. These allegations are essential to the equity of the bill, if, indeed, with them there is an equity,—a question we do not now decide. It is a clear case calling for dissolution of the injunction on the denials of the answer, and the decree of the chancellor is affirmed.

(38 Ala. 604)

TRUETT et al. v. WOODHAM et al.

(Supreme Court of Alabama. June 13, 1893.)

APPEAL—RECORD—EVIDENCE.

Testimony found in the transcript on appeal from the probate court to the circuit court cannot, in the absence of a bill of exceptions or agreement making it part of the record, be considered by the circuit court, or by the supreme court on appeal therefrom.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Buford Truett and others propounded for probate the will of Curtis F. Truett, deceased. From a judgment of the probate court admitting it to probate, J. J. Woodham and others, contestants, appealed to the circuit court, where the judgment was reversed, and proponents appeal. Reversed.

Roberts & Martin, for appellants. Jere N. Williams, for appellees.

STONE, C. J. Appellants propounded for probate in the probate court of Dale county a paper purporting to be the last will and testament of their father, Curtis F. Truett, deceased, they claiming to be the sole beneficiaries under the will, and that no executor was named therein. Appellees are, also, children of the testator, and appeared in the probate court, and contested the alleged will. The probate judge being disqualified by reason of relationship to some of the parties, the issues were tried before a special judge and a jury. The trial resulted in a verdict, and judgment thereon, in favor of the proponents, and by such judgment the will was admitted to probate and record in said court. An appeal was taken by the contestants from the judgment of the probate court to the circuit court of Dale county, and the record recites that the case was submitted in the circuit court for "final decree" in vacation, the judgment to be entered as of term time. The transcript filed in the circuit court on the appeal from the probate court contains what purports to be the testimony offered on the trial in the probate court, objections thereto, and exceptions to rulings of that court on the testimony, and in the giving and refusal of charges; but there was no bill of exceptions, or agreement of counsel, making the testimony part of the record in either the probate or circuit court. The circuit court rendered a judgment reversing the judgment of the probate court, and remanded the cause for further proceedings, but it does not appear upon what grounds the reversal was based.

Appeals in this class of cases are authorized by section 3641 of the Code to be taken from the probate court by the party aggrieved to the circuit or supreme court, and by section 3642 of the Code an appeal to the supreme court is authorized from the judgment on such appeals to the circuit court; and by section 3648 of the Code either party is authorized, by bill of exceptions, to reserve any charge, opinion, ruling, or decision of the court, or of the judge, touching the matter of controversy, which would not otherwise appear of record, and such bill, when duly signed, becomes a part of the record. The testimony found in the transcript of the proceedings of the probate court, which was filed in the circuit court, not having been incorporated in a bill of exceptions, was not before the circuit court on the appeal, and could not be considered by it for any purpose, nor can it be considered here. The judgment of the circuit court on the appeal before it could only be rested on the record, and the judgment of the circuit court must likewise be reviewed in this court on the record alone. The case of *Bradley v. Andress*, 30 Ala. 80, was an appeal to this court from a judgment of the probate court admitting a will to probate

and record after a contest before the court and a jury. The testimony taken before the probate court was set out in the transcript, but there was no bill of exceptions making it a part of the record. The judgment entry recited that the testimony of the witnesses was reduced to writing by the probate judge, and that it was agreed by counsel that all the testimony of all the witnesses examined in the case, and reduced to writing by the court, should be regarded as part of the record. It was held that neither the decree nor the agreement of counsel mentioned the name of any witness, nor described the testimony of any witness by any such identifying feature as to leave no room for mistake, and that this court could not conjecture or intend that the statements of certain witnesses appearing in the transcript "contained the testimony, and all the testimony, of all the witnesses." Much less can we, in the case now under consideration, indulge conjecture or intendment, where there is neither a bill of exceptions, agreement of counsel, nor any matter of record identifying the testimony copied in the transcript as the testimony, and all the testimony, introduced on the trial in the probate court. The judgment of the circuit court, therefore, could only be based, as we have said, upon the matters of record appearing in the transcript from the probate court, and the judgment of the circuit court can likewise be reviewed here upon such record alone. The record consisted of the petition for the probate of the will, the grounds of contest, the judgment of the probate court, and the orders and proceedings of the court made thereon. This constitutes all we can regard as a record of what was done in the probate court. We find in the transcript what purports to be a copy of a paper, which, in some of its provisions, is testamentary in form. It purports to have been executed by "Curtis F. Truett" <sup>her</sup> and "Zilpha X Truett," and to have been <sup>mark</sup> witnessed by "S. E. Truett" and "M. A. X <sup>mark</sup> Balkum." The only evidence of its being a copy of the paper offered for probate is the following statement, found in the unauthenticated narrative of the proceedings had in the probate court: "The said paper so propounded as the will of Curtis F. Truett, and so admitted in evidence, is as follows." This does not, and cannot, make it a part of the record. *Pinney v. Werborn*, 72 Ala. 58, 62. We repeat, there was no bill of exceptions in this case, showing what the testimony was, or even showing the form of the execution or attestation of the paper offered for probate. We cannot, in the absence of such record evidence, presume error in the rulings of the probate court, and make such presumed errors a ground of reversal. 2 Brick. Dig. p. 781,

§ 118. Coming before the circuit court, and before this court, as the expurgated record compels us to treat the question, we feel forced to indulge all presumptions necessary to a legal and formal execution of the will; and the probate court being, for this service, a court of general jurisdiction, we must indulge every reasonable presumption in favor of the correctness of its rulings. That requires us to presume that there was testimony before the probate court which, in connection with the language of the instrument, established its testamentary character, and warranted its being admitted to probate and record as a will. The grounds of contest found in the record, and upon which the issues for the jury were made up, show that the precise issue submitted to the jury was whether the will was attested by two witnesses, "who could and did write their names as witnesses." The verdict of the jury necessarily implies that they found that issue in favor of the proponents; and in the absence of the will, and all the testimony, we cannot presume the verdict of the jury, and the judgment thereon, are erroneous. Even if it were shown that this allegation was made good, this, of itself, would furnish no ground for withholding probate of the will, as was declared in *Garrett v. Heflin*, 13 South. Rep. 326, (on a former day of this term.) The judgment of the circuit court will be reversed, and the cause remanded to that court, with directions to enter a judgment affirming the judgment of the probate court.

(99 Ala. 239)

## PARKER v. PARKER.

(Supreme Court of Alabama. June 13, 1893.)

SETTLEMENT OF ESTATE — PARTIES—GUARDIAN AD LITEM—COSTS.

1. A decree in a bill by a widow to compel a settlement by the administrator of the estate of her husband will be set aside when the minor heirs are not made parties thereto.

2. On a bill filed by a widow to compel the settlement of the estate of her deceased husband, an allowance to the solicitors of complainant of an attorney's fee as representing the minor children of deceased is error where the children are not made parties to the bill.

3. In such case the defendant's solicitor cannot properly represent the minors, their interests being adverse to that of defendant.

Appeal from chancery court, Dale county; John H. Foster, Chancellor.

Bill by Laney J. Parker against H. Z. Parker to compel the settlement of an estate of which he was administrator. Decree for complainant. Defendant appeals. Reversed.

Complainant represented that she had been twice married,—the first time to Stephen D. Parker, who died intestate, in July, 1886, leaving four minor children, whose names and ages are given, the youngest being 8 years old and the oldest 14; and the last time to W. F. Parker, the present husband. That her first husband, Stephen D.

Parker, at the time of his death, and for a number of years before, was a partner with his father, the defendant, H. Z. Parker, who conducted a mercantile business in the town of Ozark, in said county of Dale, under the firm name of H. Z. Parker & Son, and that they did a large and successful business. That upon the death of her said husband, on her application, she was appointed by the probate court of said county, and became, the administratrix of the estate of her said deceased husband, but that the defendant was her trusted adviser, and attended to all the business for her, about which she knew but little, and was administratrix really only in name. She further represents that when she married the second time she did so in opposition to the advice and wishes of her own and her husband's family, and they advised her to resign the administration of her former husband's estate. Accordingly she filed her statement for a settlement, prepared for her by the defendant, and resigned the administration. That she consented, and the defendant became the administrator de bonis non of said estate, and the guardian of her minor children, and since then she knows nothing about the business of the estate. That in December, 1889, the defendant made a partial settlement of his administration, which purported to show all the assets of the estate, but it was a very unsatisfactory statement to complainant. She avers that defendant is an old man, and is incapable of managing the affairs of the estate. That he seems to take no interest in the business. That he has an extensive business of his own, which he neglects, and knows and cares nothing for the distributees of the estate of her husband. Its management is intrusted to strangers. That he has failed to account for the property on the inventory and appraisal. That as surviving partner of H. Z. Parker & Son he has failed to settle the copartnership business, which is so connected with the estate as that the aid of a court of chancery is necessary to finally settle the administration of said estate. The prayer of the bill is "that the said H. Z. Parker, administrator, be made a party respondent to this bill of complaint; that he be required to come into this honorable court and settle the affairs of said estate; \* \* \* that he be required to state an account between himself and the decedent as partners, and also that he be required to state his account as administrator of said estate; \* \* \* and upon a final hearing, the settlement being completed, oratrix prays that said Parker be removed as administrator and guardian as aforesaid, and that oratrix or some other person, who to your honor may seem capable and trustworthy, and to have the interest of the distributees at heart, be appointed in his stead; and for all such other and further general and special relief as the facts in the premises may warrant." Process was prayed against

the said H. Z. Parker, as administrator, alone, and as such he is the only defendant to the bill. The minor children and heirs of said Stephen D. Parker are not parties, either as complainants or defendants. No process was prayed against them, none was ever issued and served, and no guardian ad litem appointed for them; and yet there appears in the record what purports to be an answer to the bill, filed by J. D. Bailey, "guardian ad litem for the above-named heirs." He never appeared in the case again, so far as appears, either in person or by attorney, except to file a written motion in behalf of the minors, as their guardian ad litem, to have a credit claimed by the complainant for a \$500 investment in railroad stock disallowed. The defendant answered the bill, admitting the copartnership, giving the terms of it,—contrary to the allegations of the bill,—which the evidence afterwards showed to be correct, admitting the allegations of the bill as to the administrations of said estate, of his connection with the business of the estate and copartnership, but denied that he had neglected either, or that either had been mismanaged; that he proceeded promptly to wind up the affairs of the copartnership, and to collect its assets, and to that end the goods and assets of the firm on hand at the death of his son were inventoried and appraised at their value, and under the orders of the court the goods were sold, and he purchased them at their appraised value, and he was ready and willing to settle in the court under the bill as surviving partner and administrator. For purposes unnecessary to state other allegations were made, and the answer was prayed to be taken as a cross bill. The complainant answered it as such. It appeared in evidence that the partnership owned several parcels of real estate, and among them the storehouse and lot on which they did business in the town of Ozark. The evidence tends to show that J. W. Brooks conveyed that property to H. Z. Parker & Son by deed on the 11th December, 1878, and it is stated that the complainant introduced the deed in evidence, but it nowhere appears in the record. It also further appears that after the death of Stephen D. Parker the defendant procured the complainant, in consideration of \$250, to execute a deed to him of her husband's interest in the lot, but for what purpose or on what authority is not shown; and it is stated that complainant offered that deed also in evidence, but it is not to be found in the transcript. The proof tends further to show that H. Z. Parker paid \$500 for the firm out of his own means for this property, and that the deceased partner never paid any part of it. After the death of the deceased it is shown without conflict that H. Z. Parker erected on the lot belonging to the firm a brick building, used for an hotel above, with two stores beneath, at a cost of \$7,500, which was paid out of his own means,

and for this sum he seeks to be reimbursed out of the partnership assets, if the property is not adjudged to be his.

The chancellor on final hearing on pleadings and proofs rendered four decrees, which are assigned separately as being erroneous. The first was a decree taking jurisdiction of the settlement of the estate of said intestate, Stephen D. Parker, and ordering a reference to the register, requiring him to state an account on final settlement of the partnership of H. Z. Parker & Son with H. Z. Parker as surviving partner, and requiring said Parker to file with the register within 30 days his account and statement for such final statement, with instructions appropriate for the proper statement of such account. It was further ordered that, "as soon as the report of the register hereinbefore ordered in regard to the partnership of H. Z. Parker & Son shall be filed and confirmed, that said H. Z. Parker, as administrator of the estate of S. D. Parker, deceased, is hereby required to file with the register of this court his account and vouchers for a final settlement of the same," and that the register proceed thereupon to audit and state said account on final settlement of said estate. The other decrees were those which passed upon the reports of the register and the final decree settling the partnership accounts between the defendant and the estate of his deceased partner, and of final settlement and distribution of the estate of said Stephen D. Parker.

M. Solle and W. D. Roberts, for appellant. Borders & Carmichael, for appellee.

**HARALSON, J.** The assignments of error are so general, and the transcript so voluminous, that one would hardly ascertain in what the alleged errors consisted, except for the fact that the appellant's counsel have called attention to them in the brief they have filed. The fact seems to have been overlooked by the court and counsel on both sides that the infant distributees of the intestate whose estate the bill in this case was filed to settle have not, as complainants or defendants, been made parties to the suit. The complainant filed the bill, as one would suppose, more especially in the interest of her children, as, together, they were more largely interested than she. They owned four-fifths of the assets of the estate of their deceased father when finally settled; and the lands of the intestate—the estate being solvent—descended to them, subject only to the widow's dower, if she was entitled to any. On the death of the deceased partner, the firm of which he was a member was eo instanti dissolved, and one of the consequences of the dissolution by death was (subject to well-defined limitations) that the distributees, as to the personal assets, became joint owners, and the heirs, as to the realty, became tenants in

common with the surviving partner. Story, Partn. § 346. The title to the personal assets in a case of the kind devolves on the survivor, to be used for the purpose of paying the debts of the partnership, and thereafter for distribution among the representatives of the deceased; but the title to the real property of the firm devolves on the heirs of the deceased member, subject, in equity, to be converted into partnership effects and uses for certain partnership purposes. In any suit, therefore, touching the interest of a deceased partner in the lands of the partnership, his heirs are necessary parties. *Abernathy v. Moses*, 73 Ala. 381. And it may be stated as a general rule that in a bill for final settlement of the estate of a deceased intestate all the next of kin are necessary parties, so that, as Story expresses it, "the rights and claims of all may be conveniently established at the same time and in the same suit." Story, Eq. Pl. §§ 39, 205, 207; *Teague v. Corbitt*, 57 Ala. 537. And when a suit in equity cannot be disposed of properly on its merits for the want of necessary parties, objection may be taken on error, and, in the absence of objection, by the court *ex mero motu*. *Lawson v. Warehouse Co.*, 73 Ala. 294; *Boyle v. Williams*, 72 Ala. 353; *Prout v. Hoge*, 57 Ala. 29.

As the case must be reversed because the infant children of the deceased intestate, who were his only next of kin and heirs at law, were not made parties, it may be well, for the purposes of another trial, to refer to some of the alleged errors in the final decree. On the ground that the interests of the complainant and infants in the litigation were supposed to be in substantial accord,—without reference to the fact whether they were employed by the guardian *ad litem* of the infants, or represented them by other authority,—the chancellor allowed the solicitors of the complainant \$200 as a fee for their representation of said minors in this suit. He also allowed \$100 to the defendant's solicitor for his services as guardian of said minors, and to the guardian *ad litem* he allowed a fee of \$20. These allowances were not proper. The infants were not parties to be represented by anybody; and, if they had been, their interests were opposed throughout to those of the defendant, and, in one aspect of the case, to those of the complainant. The guardian *ad litem* of minor defendants in any cause is their responsible representative; and no one can properly represent an infant as guardian *ad litem* or as his attorney who has an engagement to represent an adverse interest, however slight.

It is said the defendant was improperly charged with \$232 "on the Deshazo mortgage." On his statement of the receipts of the partnership we find he charges himself with this amount as collected from W. L. Deshazo. Defendant sought to show

that this was a mistake, and he ought not to have charged himself with that item. The only evidence we have on the subject is that of L. W. Kolb, taken before the register, and it is rather indefinite; too much so to be well understood. It was as follows: "W. L. Deshazo borrowed \$200, and interest, \$32, from Mrs. L. J. Parker, [the complainant.] Mr. H. Z. Parker bought the mortgaged property, paying the difference between the mortgage and the value of the property, and gave Mrs. Parker credit for \$232 on her account at the store of H. Z. Parker, which included both her account as administrator and individual." If Mrs. Parker lent Deshazo her own money, and took a mortgage to secure it, and the estate of S. D. Parker had no connection with the loan, and H. Z. Parker purchased the mortgage from her, and paid her, by giving her credit at his own store, and it was inadvertently charged as an item of receipt by him of money for the partnership of H. Z. Parker & Son, the mistake ought to be corrected. It would be wrong, in such case, to charge him with it.

It appears from the evidence that the defendant advanced to complainant, since his administration for herself and children, for support and maintenance, the sum of \$954.33. The court required it to be ascertained how much of this sum was expended for the benefit of each distributee, and the amounts to be charged to them, respectively, in distribution. On a legal settlement, this would have been proper, if it was ascertained these sums were necessary to be advanced.

The evidence tends to show, though it is presented in an imperfect and very unsatisfactory form, that the storehouse and lot in Ozark was purchased for, and conveyed by the seller to, the firm of H. Z. Parker & Son; but it does appear that the purchase money was all advanced by H. Z. Parker, and none of it by the deceased partner. Defendant charged the amount of the purchase money, with interest, to the firm, as so much money paid by him on account of the purchase of the property, and to this credit he was entitled. For some unexplained reason he procured a deed from the complainant purporting, as the evidence tends to show, to convey the interest of her deceased husband in said lot to him. After the dissolution of the partnership by the death of his copartner, the defendant erected a brick building on said lot, the upper part of which is used as an hotel, and the lower for two storerooms, which he paid for out of his own means, and which cost him, as is agreed, \$7,500; and this sum he seeks to have credited to himself on the partnership settlement. The chancellor refused, on final decree, to pass upon the interest of the heirs in the property, holding that the question was not properly before the court, but it did charge the defendant with the increased rents of the property,

growing out of the improvements put on the lot by the defendant. There is every reason to have this question settled in this suit. With all the parties in interest before the court, it is better to have it done than to force them to resort to another bill for the purpose. *McMaken v. McMaken*, 18 Ala. 578; *Story*, Eq. Pl. § 72. It does not require partition to be made, as was supposed, before the interests of the survivor and of the heirs of the deceased partner in this property may be adjudicated. Without passing on the question now, we may refer to what the authorities seem to hold. Mr. Freeman, in his work on Cotenancy and Partition, says: "Neither cotenant has any power to compel the other to unite with him in erecting buildings or making any other improvements upon the common property. If either chooses to make such improvements, he cannot recover from the others their share of the expense incurred thereby, in the absence of an express agreement on their part, or such a course of dealing as to convince the court that a mutual understanding existed between them to that effect." *Freem. Coten.* § 262; *Dech's Appeal*, 57 Pa. St. 472; *Ford v. Knapp*, 81 Hun, 522; *Bazemore v. Davis*, 55 Ga. 504; *Wlrod v. Keller*, 89 Ind. 382; *Becknel v. Becknel*, 23 La. Ann. 150. And on this subject, see our own adjudications. *Ferris v. Improvement Co.*, 94 Ala. 557, 10 South. Rep. 607, and authorities there cited. And as to whether or not the cotenant making such improvements may be charged with the increase of the productive value of the property resulting from his improvements, see *Freem. Coten.* § 262; *Nelson v. Clay*, 7 J. J. Marsh. 138. We have made the foregoing suggestions on the record as it now appears. When new parties are made, new facts and questions may arise, variant from those now presented.

Reversed and remanded.

(36 Ala. 568)

BRUNSON et al. v. McLENDON et al.

(Supreme Court of Alabama. June 14, 1893.)

PAYMENT—WHAT CONSTITUTES—SETTING OFF ACCOUNTS—APPLICATION OF PAYMENTS.

1. Plaintiff firm, after selling its stock of goods to defendants, dissolved; it being agreed that all debts due the firm should be paid to two members thereof,—C. and W. Subsequently, C. and W. having a claim against defendants for \$200, and defendants holding a duebill of C., W., and another person for \$300, it was agreed that this duebill should be accepted by C. and W. in payment, pro tanto, of defendants' gross indebtedness to them and plaintiff firm, and the balance was paid to C. and W. in money. *Held*, that the acceptance of such duebill by C. and W. did not constitute payment of plaintiffs' claim.

2. In such case it would be presumed that C. and W. applied the duebill to the payment of their separate liability, to the extent thereof, and that the money payment was applied on defendants' indebtedness to plaintiffs.

Appeal from circuit court, Crenshaw county; John P. Hubbard, Judge.

Action by J. C. McLendon & Co. against William Brunson & Co. for a balance due on the price of goods sold. From a judgment for plaintiffs, defendants appeal. Reversed.

W. D. Roberts, for appellants. M. W. Rushton, for appellees.

MCOLLELLAN, J. J. C. McLendon & Co., merchants, sold their stock of goods to William Brunson & Co., on time, for \$3,000, with interest, and dissolved; J. C. McLendon retiring from the firm, under an agreement that Curtis and Wright, the other partners, should assume all liabilities of J. C. McLendon & Co., and that all debts owing to the partnership should be paid to Curtis and Wright. This action is prosecuted by J. C. McLendon & Co. against Brunson & Co. for a balance of the purchase price of the goods. Under a plea of payment, the following facts were developed: Curtis and Wright, before suit was brought, made a final settlement with Brunson & Co., which was intended and agreed between the parties to it to cover, and be in satisfaction of, the claim of McLendon & Co. against defendants for balance on sale of goods. At the time of this settlement the defendants owed Curtis and Wright \$200. They (defendants) held a duebill of Curtis, Wright, and Payne for between two and three hundred dollars. Curtis and Wright accepted this duebill in payment, pro tanto, of defendants' gross indebtedness to them and to the firm of McLendon & Co., and defendants paid the balance to Curtis and Wright in money. It was also shown that, by the contract of dissolution of the copartnership of J. C. McLendon & Co., it was stipulated that "all debts owing to said partnership are to be paid to Curtis and Wright, and all demands on said partnership are to be paid by said Curtis and Wright, who assume all liabilities of the late firm of J. C. McLendon & Co." Further than this, it does not appear that McLendon ever assented to the settlement made between Curtis and Wright and the defendants. On this state of case, the court, among other things, charged the jury that "if Curtis and Wright received said duebill on Curtis, Wright, and Payne in settlement of said amounts due from the defendants, then the plaintiffs would not be stopped from recovering in this action by reason of such settlement with such duebill," and refused to instruct them, at the request of defendants, that "if the jury believe from the evidence that at the time the defendants used the duebill on Curtis, Wright, and Payne, that the defendants were indebted to Curtis and Wright in the sum of about two hundred dollars, and the settlement was made, both as to the indebtedness to J. C. McLendon & Co. and to Curtis and Wright, at the same time, and the balance was paid to Cur-

tis and Wright in money, then the law would presume that the duebill was applied to the debt due Curtis and Wright, so far as to the amount of their debt." Exceptions were reserved to the action of the court in each of these particulars, and upon them arise the only questions presented by this appeal.

That Curtis and Wright, though there had been a dissolution of the firm of McLendon & Co., had no authority to receive in payment of a debt due that partnership the satisfaction of a debt which they owed the partnership debtor, is too well settled to require discussion. *Cannon v. Lindsey*, 85 Ala. 198, 3 South. Rep. 676, and authorities there cited; *Manning v. Maroney*, 87 Ala. 563, 6 South. Rep. 343. Nor do we conceive that the particular stipulations of the agreement of dissolution, or the fact that the duebill received by Curtis and Wright bears also the name of Payne, could prevent the application of this principle in the premises. Curtis and Wright were not authorized by the stipulations referred to to devote the assets of the partnership of McLendon & Co. to the payment of a debt due by them and Payne to the defendants, and the transaction was not payment to McLendon & Co. There was therefore no error in the charge given by the court in this connection. Curtis and Wright, upon the other hand, did have the right, of course, to accept the duebill of Curtis, Wright, and Payne in payment of the \$200 which defendants owed, not McLendon & Co., but themselves.—Curtis and Wright. Having the right to do this, and no right to apply the duebill to the debt of McLendon & Co., the presumption of law is, nothing appearing to the contrary, that they did what they had a right to do, and applied the duebill to the extent of their separate liability, to the payment of that liability,—the debt they (Curtis and Wright) owed defendants,—and, of consequence, that the money paid by Brunson & Co. on the settlement was applied to, and went as a payment pro tanto upon, their liability to McLendon & Co. We understand the instruction requested by the defendants to assert this proposition. It should have been given. For the error in refusing it, the judgment must be reversed.

The cause is remanded.

(98 Ala. 490)

BALKUM et al. v. REEVES et al.

(Supreme Court of Alabama. June 14, 1893.)

GARNISHMENT—BOND FOR DISSOLUTION—CONSTRUCTION OF ACT.

1. Act Feb. 12, 1891, providing that the principal defendant may dissolve a garnishment, and have the same dismissed, upon filing in the clerk's office of the court where the suit is pending or judgment was obtained a bond with sufficient security, payable to plaintiff, applies to suits pending before judgment on which the process of garnishment has issued, as well as to those in which judgment has been obtained.



2. The clerk has no authority to enter an order dissolving or dismissing the garnishment on the execution of the bond.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Action by J. S. Reeves and others against J. A. Balkum. Certain persons were summoned as garnishees, and defendant filed a bond, whereupon the garnishment proceedings were dismissed. From a judgment against defendant and his sureties on the bond they appeal. Affirmed.

A. E. Pace, for appellants. Roberts & Martin, for appellees.

COLEMAN, J. J. S. Reeves & Co. began suit by attachment against J. A. Balkum, returnable to the circuit court of Dale county, Ala. The attachment was levied by summoning certain parties as garnishees, who filed their several answers, admitting indebtedness in certain specified sums. The attachment suit was prosecuted to judgment against the defendant Balkum. Under the act of the legislature approved February 12, 1891, (Acts 1890-91, p. 590,) the defendant Balkum executed his bond, with approved security, as therein provided. Upon the execution of this bond each of the garnishees paid the amount of their respective indebtedness to the defendant in attachment, and the garnishment proceedings were dissolved and dismissed. The court rendered judgment against the defendant and his sureties on the bond given in pursuance of the statute. The rendition of this judgment is assigned as error. Counsel for appellant have filed no brief in the cause.

We will not undertake a judicial interpretation of this statute further than may be necessary to the disposal of the case before us. Reading the statute as a whole, we hold the statute was intended to apply to suits pending before judgment upon which the process of garnishment issued, as well as where judgments have been obtained. We think this construction follows from that part of the statute which provides that "the defendant may dissolve such garnishment, and have the same dismissed, upon filing in the clerk's office of the court where the suit is pending or judgment was obtained, or with the justice of the peace where suit is pending or judgment obtained, a bond with sufficient security, payable to the plaintiff," etc. The clerk has no authority to enter an order dissolving the garnishment, or dismissing the same, after the execution of the bond; but his order to that effect in this case was not an error of which appellants can complain. We observe that the statute makes no provision for contesting the answer of the garnishee, nor does it provide at what stage of the proceedings—whether before or after answer filed by the garnishee—that the defendant may execute such bond, or at what period "the defendant may dissolve such garnishment, or have the same dismissed;" but, as

these questions are not raised by the present record, and their decision at this time not necessary, we express no opinion. There is no error in the judgment rendered, and the case must be affirmed.

(38 Ala. 644)

MONTGOMERY IRON WORKS v. SMITH.  
(Supreme Court of Alabama. June 15, 1893.)  
CONDITIONAL SALES—MORTGAGE TO SECURE PAYMENT—FORECLOSURE—RECOVERY OF PROPERTY SOLD.

On a sale of machinery, notes were given in payment, the title to the property to remain in the vendor until the notes were paid. A mortgage was given on other property to secure the notes. All the notes were payable on default of either. *Held* that, on default in payment of the notes, the fact that the vendor had foreclosed the mortgage is no defense to an action by him to recover the property, the proceeds of the foreclosure being insufficient to pay the notes.

Appeal from circuit court, Coffee county; J. M. Carmichael, Judge.

Detinue by the Montgomery Iron Works against W. H. Smith to recover certain personal property, specifically described in the complaint. The defendant pleaded the general issue, and also set up, by special plea No. 3, the fact of the execution and delivery of a mortgage by the defendant to the plaintiff. The plaintiff demurred to plea No. 3. The court overruled this demurrer, to which ruling of the court the plaintiff excepted. Verdict directed for defendant. Plaintiff appeals. Reversed.

The testimony for the plaintiff tended to show that on October 28, 1890, it entered into an agreement with W. H. Smith for the sale of the property sued for in this action. This agreement of sale contained the following provisions: "The condition of the contract is that the legal title and right of property in and to the above-described property is to remain and be vested in Montgomery Iron Works until said notes, and the interest thereon accrued, are paid off; and in case the said W. H. Smith should fail to pay off the amount due by said notes at maturity, or either of them, then and in that event all of said notes remaining unpaid shall be, and are hereby, considered and agreed to be due. Then it shall be lawful for Montgomery Iron Works to take possession of said property, above described, at any time after the maturity of any of said notes which remain unpaid, or may sue, if they see proper, upon all of said notes, as though they were all due." At the time of the execution of this agreement of sale, when the notes referred to therein were executed, the defendant also executed the mortgage on certain other property to secure the payment of the first three of the purchase-money notes. Upon the defendant offering to introduce this mortgage in evidence the plaintiff objected thereto on the ground of irrelevancy. The court overruled

the objection, and the defendant excepted. The defendant introduced, against the objection and exception of the plaintiff, testimony showing that after the first three of the purchase-money notes had become due, by the terms of the contract, and before the commencement of the suit, the land conveyed in the mortgage was sold at a foreclosure sale by the plaintiff, who bought it in at said sale for the sum of \$100. Upon the introduction of all the evidence the court, at the request of the defendant, in writing, gave the general affirmative charge in his behalf, and refused to give, at the request of the plaintiff, the general affirmative charge in its behalf, and to each one of these rulings the plaintiff excepted.

Arrington & Graham, M. E. Milligan, P. N. Hickman, and G. D. Gardner, for appellant. M. Sollie, for appellee.

HARALSON, J. We have frequently held that, when the vendor of personal property retains the title in himself until the purchase money is paid, no title passes to the purchaser by the delivery of the property to him. *Weinstein v. Freyer*, 93 Ala. 257, 9 South. Rep. 285; *Engine Co. v. Hall*, 89 Ala. 628, 7 South. Rep. 187; *Sumner v. Woods*, 67 Ala. 189; *Fairbanks v. Eureka Co.*, Id. 109; *Heinbockel v. Zugbaum*, (Mont.) 5 Pac. Rep. 897. The transaction between the plaintiff and the defendant, in this case, was a conditional sale,—a fact which is not controverted. The whole purchase price for the machinery sold by plaintiff to defendant was \$1,048.35. Eighty dollars was paid in cash, and notes were given for the balance,—\$120 payable in 10 days, (the date of sale being the 28th October, 1890;) \$200 on the 1st of December, 1890; \$100 on January 1, 1891; and \$548.35 on 1st October, 1891. No other payment was made on the purchase. On the same day the contract of sale was executed, as appears, the defendant executed and delivered to plaintiff a mortgage on a tract of land to secure the payment of the three notes first referred to above; amounting, together, to the sum of \$420. By the terms of the contract all the notes became due and payable on default in the payment of either. The defendant pleaded specially (plea No. 3) the fact of the execution and delivery of this mortgage, and averred that, after all of the notes for the purchase money for the property had matured, the plaintiff, before this suit was instituted, proceeded to foreclose the mortgage, and to apply the proceeds towards the payment of said notes, whereby, as is averred, the title to said property sued for became vested in defendant, and the plaintiff is estopped to prosecute this suit in detinue for the possession of said property. This is the point of contention in the cause. The plaintiff de-

murred to the plea, and the court overruled the demurrer.

It is not averred in the plea that the property sold under the mortgage brought enough to pay the purchase notes, nor is it shown therein what the property did bring at the sale, and this is the point of the demurrer. The contention of defendant cannot be sustained. The title to the property sold was retained in the plaintiff, as a form of security for the payment of the purchase money. Common experience teaches that the liability to wear, tear, and depreciation in value of machinery such as this, while in use, is very great, and the contract entered into bears evidence of an intention on the part of the plaintiff to provide against loss in this direction. It is expressly stipulated that all payments made, before default in the payment of the notes, should be treated as payment for the use of the machinery. It is also provided that, upon default in the payment of any of said notes, plaintiff might take possession of said property, or might sue on all of said notes, if it saw proper; but it is reiterated in the contract that the title should remain in plaintiff, and should not become vested in defendant, until all of said notes were paid. We may reasonably infer, under these circumstances, considering the nature of the property sold, its liability to deterioration from use, and the possibilities of loss on the part of plaintiff in the transaction, that the object it had in taking the mortgage, and in all the other cautionary measures referred to above, so legal and proper to be reserved, was to increase the security for the carrying out of the contract, in the payment of the purchase price for the property sold, and not have it thrown back on plaintiff's hands, worth, perhaps, not half its value when sold to defendant. If the plaintiff had sued on the notes, recovered judgment, and levied execution on and sold this property, as in *Engine Co. v. Hall*, 89 Ala. 630, 7 South. Rep. 187, or, having an election between two inconsistent rights, had pursued one of them in abandonment of the other, in either case the courts would hold the plaintiff to an abandonment of his title, and to have treated the defendant as a common debtor, invested with the title to the property; but the plaintiff has done nothing of the kind, and all it has done is not inconsistent with the conditional sale it made, and the retention of the title in itself. *Miller, Sales*, 62; *Matthews v. Lucia*, 55 Vt. 308. The proof shows that the property sold under the mortgage brought \$100. The demurrer to defendant's third plea should have been sustained. The mortgage offered in evidence against plaintiff's objection was irrelevant. The general charge in favor of defendant should not have been given, and the one asked by plaintiff ought to have been given. Reversed and remanded.

(39 Ala. 138)

**CULVER v. STATE.**

(Supreme Court of Alabama. June 20, 1893.)

**CRIMINAL LAW—DEGREE OF PROOF.**

On a trial for selling liquor without a license, a charge that the jury must acquit unless the evidence "should be such as to exclude to a moral certainty every hypothesis but that of guilt" is properly refused, as calling for too high a degree of proof.

Appeal from criminal court, Pike county; William H. Parks, Judge.

Alfred Culver was convicted of selling liquor without a license, and appeals. Affirmed.

Hubbard, Wilkerson & Hubbard, for appellant. Wm. L. Martin, Atty. Gen., for the State.

MCOLLELLAN, J. Defendant was prosecuted for selling vinous or spirituous liquors without a license. Two witnesses testified to every fact necessary to make out the case as charged. Whatever the evidence to the contrary may have been, clearly this was not a case for the affirmative charge requested by defendant. It was properly refused. The only other exception reserved went to the refusal of the court to give the following charge: "Unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they [the jury] must find him not guilty." This charge exacts too high a degree of conviction. The law does not require that the evidence, to justify a verdict of guilty, shall exclude every other hypothesis but that of guilt, but only every other reasonable hypothesis. *Little v. State*, 89 Ala. 99, 8 South. Rep. 82. The tenth headnote in the case of *Hornsby v. State*, 94 Ala. 55, 10 South. Rep. 522, is not supported on this point by the text of the opinion, and no charge like that involved here was asked in that case. The judgment of the criminal court must be affirmed.

(96 Ala. 949)

**McRAE et al. v. HARMON.**

(Supreme Court of Alabama. June 15, 1893.)

**PRESUMPTIONS ON APPEAL.**

Where the record on appeal shows that judgment was rendered by the court on an agreed statement of facts, which statement does not appear in the record, it will be presumed that it contained everything necessary to sustain a judgment for costs rendered for plaintiffs.

Appeal from circuit court, Bullock county; J. M. Carmichael, Judge.

Action of trespass by John F. Harmon against O. M. McRae and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Norman & Son, for appellants. Watts & Son and Cabanis & Weakley, for appellee.

HARALSON, J. This is an action of trespass for damages for the wrongful taking of

goods and chattels alleged to be the property of the plaintiff below, John Harmon, the appellee here, against appellants, the defendants in the lower court. The defendants filed four pleas, "in short by consent," as was stated in the caption to the pleas: First, the general issue; second, justification under legal process; third and fourth, special pleas drawn out at length. The plaintiff took issue on the first plea, and demurred to the second and third, assigning separate grounds of demurrer to each, which were sustained. So far as is shown, the court made no ruling on the demurrer to the fourth plea. The error assigned is for "the rendition of judgment on the demurrer in favor of appellee." It is made sufficiently to appear that the only amount involved in this litigation is the costs of the suit. After the commencement of the action, and before issue joined, trial, and judgment, the plaintiff was paid a sum of money, which it appears he took in satisfaction of his damages. After a recital of the judgment of the court sustaining the demurrers to said second and third pleas, the judgment entry continues: "And thereupon the said case, by consent of both parties, was submitted to the decision of the court, on an agreed statement of facts, which is filed and made a part of the record; and after argument by each of the parties it is considered and adjudged that the plaintiff is entitled to recover of the defendants, and it is ordered and adjudged that plaintiff recover the costs in this case, for which let execution issue against defendants." As the agreed statement of facts on which the case was tried is not set out in the record, we are to presume it contained everything necessary to sustain the judgment which the court rendered, and it becomes unnecessary, therefore, to consider the questions raised on the ruling of the court on the pleadings. 3 Brick. Dig. p. 403, §§ 40, 43.

Affirmed.

(98 Ala. 451)

**LOWERY v. DANIEL.**

(Supreme Court of Alabama. June 20, 1893.)

**ASSUMPSIT—PLEADING—DEMURRER—JUDGMENT FOR COSTS.**

1. In a suit for money had and received against an administrator individually, but to which he files a plea as administrator, alleging a final settlement of his estate, the fact that his plea does not state that he has filed his account for final settlement does not render the plea defective.

2. Where plaintiff treated the plea by defendant as administrator as responsive to the complaint against him as an individual, and refused to demur further, or to join issue on the plea, judgment was properly rendered against him for costs.

Appeal from circuit court, Crenshaw county; John P. Hubbard, Judge.

Action by Robert Lowery against E. J. Daniel, administrator of W. J. Daniel, deceased, to recover a certain amount of money had and received by the defendant.

There was judgment for the defendant, and plaintiff appeals. Affirmed.

The motion of the plaintiff to amend his complaint is only stated in the judgment entry, and is in the following language: "The plaintiff then moved the court to amend his complaint by adding another count, which is in words and figures as follows: 'The plaintiff further claims of the defendant as such admrs. one hundred and twelve dollars as ascertained balance in the hands of said deft. as such admrs. by a decree of the chancery court of said county of Crenshaw, in the state of Ala., on the 24th day of January, 1890, which amount is still due and unpaid.'" The court refused to allow this amendment, and the plaintiff duly excepted, and, declining to plead further, judgment was rendered for the defendant.

Gamble & Bricken, for appellant. I. H. Parks, for appellee.

HARALSON, J. The summons and complaint in this case each describe the defendant as "E. J. Daniel, Admr. of W. J. Daniel, Dec'd." The complaint is, "Robert Lowery, Plaintiff, v. E. J. Daniel, Admr. of W. J. Daniel, Dec'd." "The plaintiff claims of the defendant the sum of one hundred and twelve 72/100 dollars, money had and received by defendant at divers times, to wit, [specifying the dates when received,] to and for the use of the plaintiff, with interest thereon." The suit, it will be observed, is not against the defendant as administrator, but against him individually; the word "administrator" after his name being merely descriptio personae. *Westmoreland v. Foster*, 60 Ala. 449; *Buckley v. Wilson*, 56 Ala. 395; *Lucas v. Pittman*, 94 Ala. 616, 10 South. Rep. 603. Besides, the complaint is for "money had and received by defendant, to and for the use of plaintiff." This is a complaint against the defendant individually, for such a thing as an administrator receiving money for the use and benefit of another, and being accountable to him for it, in an action at law against him, in his representative capacity, is not known to our law. An administrator, in the discharge of his duties, can receive nothing which did not belong to his intestate, and which does not enter properly into the administration of his estate. He must collect the debts owing to the estate, pay the claims against it, in the order of their preference, and the residue, if any, distribute among the persons entitled thereto according to law. If he goes further, and proceeds out of this order, he does so at his individual risk. 1 Brick. Dig. p. 957, § 609.

The defendant filed a plea which had no relevancy to a suit against him as an individual. But, treating the action as one against him as administrator, he pleaded, in substance, that before the commencement

of this suit, on the 12th of January, 1890, he made a final settlement of his trust as administrator of the estate of W. J. Daniel in the probate court of Crenshaw, by which court he had been appointed administrator on the 19th of January, 1888, and had fully administered said estate; that there were no assets in his hands to be delivered to a successor, and that the court made a final decree discharging him from said administration. The plaintiff, treating the case as one against the defendant as administrator, demurred to this plea, on the ground that "it falls to aver that defendant filed his account as administrator of said estate in the probate court of said county for a final settlement of his administration of said estate, and that said decree of said probate court was rendered on final settlement of said estate in said account filed by defendant as such administrator." There is evidently some mistake about the language of this demurrer as it appears in the record. It is inconsistent with and contradictory of itself, in that it avers no account was filed, and yet states that the decree was rendered "in said account filed by defendant." We take it, the substance of the demurrer is that defendant failed to aver in his plea that he filed an account for final settlement of his administration of said estate. If the plea were one to a suit against an administrator, it would have been well if it had averred either that the defendant had resigned, and made a final settlement of his administration, accounting for the assets coming to his hands, or that the estate was insolvent, and had been settled by him, as such, or, being solvent, the remainder in his hands, after paying all claims presented or filed, had been distributed to those entitled, or—as a part of the plea, and not in a separate plea, as was done here—that the plaintiff had failed to present or file his claim within 18 months, as required by law, and then to have averred further that he had made a final settlement of the estate, and that the court had made a decree discharging him, as administrator, from the further administration of said estate; and that this was before the commencement of the suit against him. See *Norman v. Norman*, 3 Ala. 389; *Thrash v. Sumwalt*, 5 Ala. 15; *Gayle v. Elliott*, 10 Ala. 284; *Simmons v. Price*, 18 Ala. 405; *Chappell v. Williamson*, 49 Ala. 153; *Cogburn v. McQueen*, 46 Ala. 551; *Tarver v. Tankersley*, 51 Ala. 309; *Waring v. Lewis*, 53 Ala. 616; *Ligon v. Ligon*, 84 Ala. 555, 4 South. Rep. 405; *Schouler, Ex'rs*, §§ 526, 528, and note; 2 *Woerner, Adm'n*, § 572. Be that as it may, and still treating the plea as one filed to a suit against an administrator, the demurrer, as for the ground assigned, is bad; for, if the mere allegation of a failure to file an account were all, and the plea were otherwise sufficient, that failure of averment alone would not render it defective. The

amendment proposed by plaintiff to the complaint was properly disallowed. If everything alleged in the count proposed to be added to the complaint were true, it does not appear that the money belonged to the plaintiff, but that it belonged to the estate. It could never be plaintiff's until it reached him through due process of administration. This, then, leaves the case in this condition before us: The complaint is against the defendant as an individual, on a cause of action which is not maintainable against him as an administrator. He interposes pleas such as are applicable to a suit against an administrator, and not to one against an individual. The plaintiff, treating the pleas as responsive to the complaint, but one of them as insufficient, demurs to it, which demurrer is properly overruled. The plaintiff declines to demur further, or to make further response to or join issue on the pleas, and judgment is rendered against him for the costs of the suit. The assignment of errors are for the overruling of said demurrer, and the refusal of the court to allow the amendment to the complaint as proposed. In this rather anomalous condition of affairs, the plaintiff having declined to prosecute his suit further, the judgment was properly rendered against him for costs. Affirmed.

(88 Ala. 590)

#### ALLEN v. DRAPER.

(Supreme Court of Alabama. June 8, 1893.)

EXECUTORS—BOND WAIVED BY WILL—ORDER TO FILE SECURITY.

1. Under Code, § 2025, providing that a testator may exempt his executor from giving bond, but that bond may be required when any person interested makes affidavit that such interest will be endangered unless security is taken, a petition, with the will annexed, showing that petitioner is a legatee, and alleging that her interest will be endangered unless security is taken, is sufficient.

2. An answer of the executor, showing cause, under Code, § 2026, why no security should be required, alleging that the estate would be exhausted in paying the debts, and that, therefore, petitioner has no interest, sets up no defense.

3. A bill of exception assigning errors in the admission and exclusion of evidence will not be considered, when all the evidence is not in the record.

Appeal from probate court, Calhoun county; Emmett F. Crook, Judge.

Petition filed under section 2025 of the Code of 1886 by Mrs. Lula M. Draper, who is one of the legatees under the will of Thomas Allen, deceased, praying that J. Baxter Allen, who was nominated as executor in the will of the testator, be required to give bond. The probate court decided in favor of the petitioner, and ordered the appellant to give bond. The executor appeals. Affirmed.

The executor demurred to the petition on the grounds (1) that it failed to show what interest the petitioner had in said estate, under the will, or the probable value thereof;

(2) that the interest of the petitioner, under the will, is uncertain and indefinite; and (3) no facts are alleged in the petition which would authorize the court to require, or determine the amount of, the bond. The court overruled this demurrer, and the executor thereupon filed his answer. The petitioner demurred to the answer on the ground that it does not show any reason or cause why the executor should not be required to give bond; (2) that the answer shows that the executor should be required to give bond; and (3) that it is not competent, in this form of proceeding, for the executor to set up that the interest of the petitioner will be exhausted or consumed by the payment of the debts of the estate. These demurrers were overruled.

R. H. Hanna and Wm. M. Hames, for appellant. Knox & Bowie, for appellee.

McCLELLAN, J. Section 2025 of the Code provides: "Any testator may, by an express provision in his will to that effect, exempt an executor from giving bond; and when such provision is made such bond must not be required except in the following cases: 1. When any executor, heir, legatee, or other person interested in the estate, makes affidavit, showing his interest, and alleging that such interest is, or will be, endangered for want of security. 2. When in the opinion of the judge of probate, the estate is likely to be wasted to the prejudice of any person interested therein." Section 2026 provides: "In the cases provided for by the preceding section, upon application for the executor to give bond, he may show cause against such application, and must have such notice as the judge may deem reasonable; but if he is out of the state, the application may be heard and determined without notice." The affidavit of Lula M. Draper, presented in the form of a sworn petition to the probate judge in this case, with the exhibition thereto of the will of her ancestor, complies strictly with the first exception in section 2025, *supra*. The petition and the will, made a part of it, show that Allen is executor of the will of affiant's father, E. D. Allen, deceased, without bond; that affiant is a legatee under that will; and the extent, *prima facie*, of her interest in the decedent's estate,—and avers that "the interest of petitioner, as legatee under said will, requires that said J. Baxter Allen be required to give good and sufficient bond in the administration of said estate, and that said interest will be endangered for the want of security." This sworn petition was manifestly sufficient, under the statute, and the court committed no error in overruling the demurrers to it.

Allen, the executor, undertook to show cause against the requisition of bond, as he is permitted to do under section 2026, *supra*. The burden of this effort was upon him. The legatee, by the filing of the affidavit re-

quired by the statute, entitled herself to an order requiring bond to be given, there being no controversy as to the fact that she was a legatee. Section 2026 imposes no further burden on her. Its sole purpose was to let in the executor to show cause, if any he could, why the relief prayed in the petition, and which was grantable, as matter of course, in the absence of an adverse showing, should not be granted. To this end the executor filed an answer, the leading theory of which was that petitioner had no interest in the estate, notwithstanding she was named as a legatee of very considerable property in the will, because, as is alleged, the entire estate would be exhausted in the payment of debts and charges imposed by the will, so that nothing would be left to pass under the bequest and devise to Mrs. Draper. This presented a wholly irrelevant inquiry. The question is not what the affiant will ultimately realize under the will, but solely whether, by the terms of the instrument, she is a legatee under it. In such case it is no more competent to go into an investigation as to whether her legacy would be exhausted in the payment of debts, or in any other manner authorized by the will,—whether, in other words, she would, in any event, ultimately realize anything under the will,—than it would be to inquire, on the petition and affidavit of a creditor, whether defenses existed which would ultimately defeat his claim; and that this cannot be done has been expressly declared by this court. *Smith v. Phillips*, 54 Ala. 8; *Phillips v. Smith*, 62 Ala. 575.

The answer further proceeds on the idea that the property of the estate is of such character as that it could not be wasted by the executor. Whether this could be true in any case, we are not called upon to decide. Conceding that cause might be shown at all in this way against the requisition of security, it has not been shown in this instance. A bill of exceptions is found in this transcript. Its purpose seems to be to present for review certain rulings of the probate court in the admission and exclusion of testimony. It does not purport to set out all the evidence. In such case, though every averment of the answer had presented a material issue, and though the evidence which is set out in the bill of exceptions had tended strongly to support such averments, we should still have to presume that there was other evidence overturning these tendencies, and fully supporting the contrary conclusions of the trial court. Nor will the exceptions reserved on the admission of testimony avail appellant. The objections were to questions. They were overruled. But it does not appear that the questions were answered, and the exceptions reserved are to the overruling of the objections to the interrogatories, and not to the admission of illegal testimony. For aught that appears, even conceding that each of the questions called for incompetent evidence, it may well be that no illegal testimony was

in fact adduced before the court. Moreover, if the proposed testimony was illegal, and was actually received, we should still have to assume that the competent evidence introduced justified the order entered by the probate judge. Affirmed.

(98 Ala. 72)

#### SELLERS et al. v. STATE.

(Supreme Court of Alabama. June 8, 1893.)

INTOXICATING LIQUORS—PROSECUTION FOR UNLAWFUL SALE—EVIDENCE OF PRIOR DELIVERIES.

On a trial of copartners for selling intoxicating liquor, where the prosecution relied on a sale by defendants' clerk, evidence of previous deliveries of liquor by defendants themselves, which they contended were orders which they had had filled for the accommodation of their neighbors, is admissible as tending to show a conspiracy to sell liquor, and consequently an acquiescence in the act of their clerk.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Joseph S. Sellers and Robert Sellers were convicted of violating a local prohibition law by the sale of liquor outside of the police jurisdiction of the city of Montgomery, and they appeal. Affirmed.

The testimony for the state tended to show that Joseph S. Sellers and Robert Sellers were carrying on a general merchandise business a short distance from the corporate limits of the city of Montgomery, and that Cornelius Sellers was their clerk; that on December 25, 1891, the said Cornelius sold to one George Bonham, for Anderson Flinn, 50 cents worth of whisky; that this sale was made "at the dwelling house of defendants." After the state had elected to prosecute for this sale, which was proved by its testimony, it introduced one Barnes as a witness, who testified that about a week or 10 days before said 25th December, he got from Robert Sellers, one of the defendants, a gallon of whisky at said dwelling house, which was drawn from a barrel, "but that Joseph S. Sellers, the other defendant, was not present at the time, and that he [Barnes] had a few days previous to that time requested Robert Sellers to purchase for him in the city of Montgomery a gallon of whisky, for use during the Christmas holidays, and a few days after said order he got the whisky." Each of the defendants moved the court to exclude the testimony of the witness Barnes from the jury on the grounds (1) that the matters so testified to were in respect to a different act, and at a different time from that for which the state had elected to prosecute; and (2) that said matters so testified to were illegal and irrelevant, and did not even tend to show the guilt of defendants, or either of them, of the sale of the whisky on December 25th. The court overruled said motion to exclude, "and permitted the said evidence to go to the jury, to show the scienter with which each prior sale was made," and to this ruling each of

the defendants separately excepted. The defendant Joseph S. Sellers then moved the court to exclude as to him all of the testimony of the witness Barnes, so as to limit this fact to his codefendant, on the ground that there was no evidence even tending to connect him with the commission of said act testified to by said witness. The court refused said motion, and the said Joseph S. Sellers duly excepted. The state then introduced another witness, who testified to substantially the same thing as the witness Barnes had done, and further testified that, while he ordered only one gallon of whisky, the said Robert Sellers had allowed him to have a gallon at one time and a half gallon at another time. The same motions to exclude this witness' testimony and the same rulings thereon were made, and the same exceptions reserved as to this witness Barnes. The defendant Robert Sellers, who was introduced as a witness in behalf of the defendants, testified that he knew nothing whatever of the sale of the bottle of whisky bought by witness Bonham for Flinn; that he did not authorize it, or have anything to do with it; but that he did, a short time before December 25, 1891, purchase, on orders, in the city of Montgomery, a quantity of whisky in bulk, and delivered it at his house, as testified to by the witnesses for the state. This witness further testified that his codefendant, Joseph S. Sellers, knew nothing of said purchase or sale; "that said Joseph S. Sellers was, at the time said whisky was delivered, and at the time said bottle of whisky was sold, at Ramer, about 13 miles distant, where his family resided and his wife was sick." The defendant Joseph S. Sellers testified as a witness, and denied all knowledge of, or participation whatever in, the sale of any whisky, or the delivery thereof; and further testified that at the time testified to by said witness "he was at his home at Ramer, about 13 miles distant, where his family resided and his wife was sick." Upon this evidence the defendant Joseph Sellers requested the court to give the following charge in writing: "If the jury believe the evidence, they will find the defendant Joseph Sellers not guilty." The court refused to give said charge, and the said Joseph S. Sellers duly excepted thereto. The defendant Robert Sellers also requested the general affirmative charge in his behalf, and duly excepted to the court's refusal to give said charge as asked.

John Gindrat Winter, for appellants. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. It is well settled, as a general proposition, that upon the trial of one offense, evidence of another distinct one, though of the same nature, cannot be admitted to show the guilt of the accused. *Ingram v. State*, 89 Ala. 247. But there are well-recognized exceptions to this rule, and

such evidence is receivable when necessary to prove scienter, to establish identity, or to complete a chain of circumstantial evidence of guilt, in respect to the act charged. *Ingram's Case*, supra; *Yarborough v. State*, 41 Ala. 405; *Mason v. State*, 42 Ala. 532; *Gassenheimer v. State*, 52 Ala. 314; *Curtis v. State*, 78 Ala. 12; *McDonald v. State*, 83 Ala. 48, 3 South. Rep. 305; *Stanley v. State*, 88 Ala. 154, 7 South. Rep. 273. The evidence shows, without contradiction, that Joseph S. and his son Robert Sellers, the defendants, were partners, and carried on, in Montgomery county, outside of the city of Montgomery, a general merchandise business, and that Cornelius Sellers, another son of Joseph S., was their clerk and salesman. As touching sales of liquors by a partnership, our former ruling has been that a sale by one of the partners, without a license, in the line of their trade, would be sufficient to fix the guilt of each partner; and, if such a sale was made by the clerk or salesman, with the authority, approbation, or acquiescence of his employers, it would justify a conviction of each employer and clerk. *Segars v. State*, 88 Ala. 146, 7 South. Rep. 46; *Perkins v. State*, 92 Ala. 66, 9 South. Rep. 536.

Applying these principles to the facts of this case, we find that the evidence, taken all together, had tendencies—and it was introduced and admissible for that purpose—to show a conspiracy between the defendants to sell liquor at their dwelling house, near where they kept their store of general merchandise, because, by so doing, fewer suspicions of their guilty conduct would likely be aroused, and the opportunities for detection would thereby be lessened. The number of deliveries of whisky at their dwelling, and the manner of its delivery, justified this theory and suspicion of their guilt. The court confined the state to the sale made by the clerk on Christmas day, having elected that particular sale as the one for which it would prosecute. All the other instances of alleged sales were admitted as tending to show the guilty knowledge or acquiescence or approbation of the defendants of this offense by their clerk. The circumstances tending to establish this theory of a conspiracy to carry on an illicit disposition of liquors at their dwelling by the defendants, and that the particular act complained of was done by their knowledge, consent, or approbation, may be found in the facts that the alleged sales were made just before Christmas; that the clerk was conveniently on hand at the dwelling when the liquor was required, and had access to it, in the absence of his employers, which would not have been likely if it had been procured, as pretended, as a personal and neighborly act by one of the partners; that this pretense of neighborly kindness was probably untrue, since the article was bought, as the evidence showed, not in quantities for which the orders were said to have been given, and in separate

packages, to suit those persons ordering, but in bulk, and kept in a barrel, and drawn therefrom when needed; that they furnished the bottle, as it would seem, for that sold on Christmas day to Bonham for Flinn; that the witness Barnes got his whisky from one of the defendants himself, at the same dwelling house, on an order given several days before Christmas; that a few days before Christmas another party got from the same defendant, at the same place, a gallon at one time, on the same sort of an order, and a half gallon at another time without any order; and that all these deliveries were made at the dwelling, an unusual dispensary of accommodation whisky, and not at the store, where it was more convenient to accommodate customers, and where the deliveries ought to have been made if no criminal intention were involved, and the transactions were honest and open. These were circumstances, more or less strong, which had tendencies to show that defendants were carrying on an illegal traffic in liquor at their dwelling house, under the pretense of accommodating their neighbors or friends. Having such tendencies of proof, these prior transactions to the main one for which defendants were tried, with all the attendant circumstances, were properly allowed in evidence for the consideration of the jury, in determining whether said sale was made in the line of their business, with the guilty connivance of the defendants. This intention on their part was to be inferred or not by the jury from the facts in evidence. The court was requested by the defendants, in the general charge they each asked, to draw this inference for the jury, and to invade their province; a charge, as we have repeatedly held, of doubtful propriety in a criminal case, and should never be given, unless the evidence is conclusive in its character, and there is no fact to be drawn as a matter of inference from the facts proved. *Perkins v. State*, 50 Ala. 158; 3 Brick. Dig. p. 110, § 56.

We find no error in the rulings of the court below, and its judgment and sentence are affirmed.

(99 Ala. 189)

#### ROBERSON v. STATE.

(Supreme Court of Alabama. June 14, 1893.)  
INTOXICATING LIQUORS—PROSECUTION FOR ILLEGAL SALE—INSTRUCTIONS ON EVIDENCE.

1. On a prosecution for the sale of liquor in violation of a local prohibition law, there was evidence that a person walked into defendant's barber shop while defendant was standing at the door, and took a bottle therefrom, marked "Plantation Bitters," which really contained whisky, leaving money on a chair, which defendant afterwards took. *Held*, that an instruction to find defendant not guilty if he did not tell the person to get the bottle, or sell it to him, or see him get it, was rightly refused.

2. An instruction to find defendant not guilty unless the evidence convinces the jury beyond a reasonable doubt, and "a moral certainty," that he committed the alleged offense,

is erroneous, as exacting too high a degree of proof for a conviction.

3. An instruction, based on defendant's evidence, that if the person took the bottle without defendant's knowledge, and left money, the fact that when defendant discovered that the bottle was taken he took the money, and got another bottle, would not make him guilty, was improperly refused.

Appeal from Shelby county court; John S. Leeper, Judge.

Ed. Roberson was convicted of selling, giving away, or otherwise disposing of, intoxicating liquors in violation of law, and appeals. Reversed.

The testimony for the state tended to show that, some time before the commencement of this prosecution, one Crick Baldwin went into the barber shop of the defendant, and took a bottle from a box in the back part of the said shop, and placed a half dollar in the barber chair; that when this was done the defendant was standing in the door of the shop, with his back towards said box, and that he did not look around at all; that when Baldwin passed out of the door the defendant stated to him, "Mr. Baldwin, I don't know what I will do with you." There was testimony for the state tending to show that, while the bottle which was so taken from the box in the defendant's barber shop was marked "Plantation Bitters," it was in fact whisky. The defendant, in his own behalf, testified that he was standing in the door of his shop, facing the street, with his back towards the room, when Mr. Baldwin walked rapidly by him, into the shop, and came out of it again; that he did not look back to see what Baldwin was doing, and did not know what he was doing; that after Baldwin had gone he went to his box, to where he had placed a bottle of "Plantation Bitters," which he had bought from one Mr. McLean, to get a drink of them, and, on finding the bottle gone, he came to the conclusion that Mr. Baldwin had taken them; that he then turned around, and found the half dollar lying in his barber chair, which he took, and went immediately to Mr. McLean's, and got another half dollar's worth of bitters; that he "had never at any time sold, given away, or otherwise disposed of, any spirituous, vinous, or malt liquors to said Baldwin. Defendant requested the following written charges, and duly and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, they must find the defendant not guilty." (2) "The court charges the jury that, no matter how many widows and orphans the illegal sale of whisky makes, and how hellish the traffic is, it is the duty of the jury to find the defendant not guilty, unless the evidence in this case convinces the jury, beyond a reasonable doubt and a moral certainty, that Ed. Roberson sold, gave away, or otherwise disposed of, liquor to Mr. Baldwin." (3) "If the jury believe from the evidence that the



defendant had in a box in his shop a bottle marked 'Plantation Bitters,' which he had obtained from McLean, and if they further believe from the evidence that the bottle contained rye whisky, but that defendant had no knowledge of its being whisky, and bought it for bitters, and that witness Baldwin got same bottle, then they must find the defendant not guilty." (4) "If the jury believe from the evidence that the witness Baldwin went into defendant's barber shop, and went to a box, and got a bottle marked 'Plantation Bitters,' and threw a half dollar in the chair, and if the jury further believe that at that time the defendant was standing in the door, facing the street, and did not see Baldwin get the bottle, then the jury must find the defendant not guilty." (5) "If the jury believe from the evidence that the defendant had a bottle of rye whisky in a box in his shop, that he had gotten for his own use, and that the defendant did not tell Mr. Baldwin to get the bottle of whisky, or sell it to him, but if they further believe from the evidence that the witness Baldwin went into the shop, and took the bottle of whisky, and left a half dollar in the chair, and that at that time defendant did not see Baldwin get the bottle, then they must find the defendant not guilty." (6) "If the jury believe that Mr. Baldwin went into Ed.'s shop, and, without the knowledge of Ed., took a bottle of whisky that belonged to Ed., and left a half a dollar, then, when Ed. discovered that the bottle had been so taken, Ed. had a right to take the half a dollar, and get him another bottle, and this would not make him guilty; and, if this is all the evidence shows, the jury should find him not guilty."

Brown, McMillan & Leeper, for appellant.  
Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. The defendant was prosecuted "for selling, giving away, or otherwise disposing of, spirituous, vinous, or malt liquors, without a license, and contrary to law." The proceeding is under a local prohibition law, (act approved Feb. 28, 1881; *Sess. Acts*, 148.) We cannot say there was no testimony tending to show that defendant sold a bottle of spirituous liquor in the town of Columbiana, Shelby county, within 12 months before the commencement of the present prosecution. Its sufficiency was a question for the jury. The county court did not err in refusing to give the first charge asked by defendant.

There was no error in refusing any of the charges 2, 3, 4, and 5, as the same were asked by defendant. Charge No. 2 is not only argumentative, but it exacts too high a grade of proof as a condition of conviction. It sought to have the jury instructed that they must find the defendant not guilty unless the evidence convinced them "beyond a rea-

sonable doubt, and a moral certainty," of his guilt. To justify conviction of a public offense, whether it be crime or misdemeanor, the testimony must convince beyond a reasonable doubt, but there is no recognized rule that it must be beyond a moral certainty. Possibly, there is an error in transcribing, but we must deal with the language as we find it. A correction of this clause, however, would not put the court in error for refusing to give it. The objection that it is an argument would still remain. *Shepherd v. State*, 94 Ala. 102, 10 South. Rep. 663; *Mitchell v. State*, 94 Ala. 68, 10 South. Rep. 518; *Hornsby v. State*, 94 Ala. 56, 10 South. Rep. 522; *Chatham v. State*, 92 Ala. 47, 9 South. Rep. 607; *Brassell v. State*, 91 Ala. 45, 8 South. Rep. 679; *Brantley v. State*, 91 Ala. 47, 8 South. Rep. 816; *Kirby v. State*, 89 Ala. 71, 8 South. Rep. 110; *Pellum v. State*, 89 Ala. 28, 8 South. Rep. 83.

Charge No. 3 states, as one constituent of its hypothesis, that, though the bottle labeled "Plantation Bitters" may have contained whisky, yet if "defendant had no knowledge of its being whisky, and bought it for bitters," etc. The defendant was examined as a witness, and he testified that he had taken one drink out of the bottle not long before the alleged sale of it. He did not testify to a want of knowledge that it was whisky, nor was there any testimony tending to prove such want of knowledge. The court does not err in refusing a charge, if any part of its hypothesis of facts has no testimony in its support. *Pollak v. Davidson*, 87 Ala. 551, 6 South. Rep. 312; *Kidd v. State*, 83 Ala. 58, 3 South. Rep. 442.

Charge No. 4 claims defendant's acquittal if he "did not see Baldwin get the bottle" out of a box in defendant's shop, although Baldwin, when he went in, and obtained the bottle, "threw a half dollar in the chair." Not seeing Baldwin get the bottle was by no means conclusive that he did not sell—intentionally sell—to him the bottle, with its contents. This charge was rightly refused.

Charge 5. This charge claims an acquittal on the postulates that defendant neither told Baldwin to get the bottle, nor saw him get it. Neither of these was absolutely essential to the making of a valid contract of sale. Conduct is frequently as expressive of the intention of parties as spoken words could be. It was for the jury to determine, under all the evidence, whether the intention of the parties was a parting with the ownership by Roberson, and a purchase and payment by Baldwin. If this was the intention, though only evidenced by their conduct, and not in words, and if the evidence satisfied the jury beyond a reasonable doubt that such was the intended transaction between them, then that constituent element of the offense was made out. The trial court did not err in refusing this charge.

Defendant testified in his own behalf, and gave his version of the transaction. Charge

No. 6 makes the substance of that version its hypothesis, and asks the court to instruct the jury, "If this is all the evidence shows, the jury should find him [defendant] not guilty." It is manifest, if what that charge hypothesizes constitutes all the defendant intentionally did, he was not guilty. It would be for the jury to determine, under all the evidence and circumstances, whether that was all he intentionally did,—in other words, whether, without his knowledge, either expressed or implied, Baldwin took the bottle, and left a half dollar in its stead. If this was the case—the entire case—there was no intentional sale, and no violation of the law. This charge ought to have been given. Reversed and remanded; the defendant to remain in custody until discharged by due course of law.

(100 Ala. 548)

**LOUISVILLE & N. R. CO. v. BARKHOUSE.**  
(Supreme Court of Alabama. June 15, 1893.)

**CARRIERS—DELIVERY OF PROPERTY TO WRONG PERSON—REMEDY—BILL OF LADING—TRANSFER WITHOUT INDORSEMENT.**

1. Possession of a bill of lading by one other than the consignee without indorsement does not justify the delivery of the consignment to such person.

2. A custom on the part of a carrier or of carriers generally at a particular place to deliver goods to one other than the consignee, who merely holds the bill of lading without any indorsement, does not justify such delivery.

3. Trover is the proper remedy in case of delivery of property by a common carrier through mistake to a person not entitled thereto.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Trover by M. W. Barkhouse against the Louisville & Nashville Railroad Company and Chandler Bros. From a judgment for plaintiff against the Louisville & Nashville Railroad, the latter appeals. Affirmed.

The evidence was uncontroverted that the plaintiff delivered to the Louisville & Nashville Railroad Company, at Louisville, certain articles which had been consigned by bill of lading to Chandler Bros. Among the articles so shipped was a bundle of iron piping. After the arrival of these articles in Montgomery, Chandler Bros. indorsed on the bill of lading the following order, addressed to the agent: "Please deliver to Mr. Posey all the goods on this bill of lading except the iron pipe." On the delivery and surrender of this bill of lading thus indorsed the bundle of iron piping was delivered, together with the other goods, to Posey. The other articles, for the wrongful conversion of which this suit was brought, were delivered to said Posey by the railroad company upon the delivery to said company of the bill of lading therefor, which bill of lading had no indorsement thereon, and which recited that Chandler Bros. were the consignees. The court, at the request of the plaintiff, gave the following charge: "If the jury believe the evi-

dence, they must find for the plaintiff as against the railroad company." To the giving of this charge the defendant duly excepted. At the request of Chandler Bros., the court gave the general affirmative charge in their behalf.

Chas. P. Jones, for appellant. Lester C. Smith, for appellee.

**MCLELLAN, J.** A bill of lading does not pass by delivery, and the possession of it by one other than the consignee without indorsement will not authorize or justify the carrier in delivering the consignment to such person. Hutch. Carr. § 344; 2 Amer. & Eng. Enc. Law, pp. 230, 231. The obligation to deliver only to the party having title to the bill of lading is imposed by law on the carrier, and is absolute. Any custom of a particular carrier or of carriers generally at a particular place to make deliveries to persons merely in possession of the bill of lading is a bad custom, and cannot be adduced in evidence to exempt such carrier or carriers from liability for deliveries to wrong persons. Trover is the proper action where there has been a delivery of property by a common carrier to a person not entitled to it by mistake. Such wrongful delivery is a conversion. Bullard v. Young, 3 Stew. (Ala.) 46; Railroad Co. v. Kidd, 35 Ala. 209. The evidence in this case is without conflict to the effect that the defendant company, having in its possession as a common carrier goods consigned to Chandler Bros., delivered them to one Posey, who happened to have the bill of lading therefor in his possession, without indorsement by the consignees, and that the defendant, upon demand made, failed and refused to deliver said goods or to pay the value of the same to the plaintiff, to whom they belonged. This evidence, if believed by the jury, entitled the plaintiff to a verdict, and the court properly gave the affirmative charge with hypothesis in his favor, and its judgment is affirmed.

(98 Ala. 31)

**CARPENTER v. STATE.**

(Supreme Court of Alabama. June 14, 1893.)

**CRIMINAL LAW—INSTRUCTIONS—DEGREE OF PROOF—WITNESS—CROSS-EXAMINATION TO TEST CREDIBILITY.**

1. On a prosecution for a criminal offense, a witness for the state, after testifying that he is not hostile to defendant, cannot be asked, in order to contradict him, whether he did not once, when required to reduce the force working under him, discharge defendant in preference to a colored man also in his employ.

2. A charge that "if, according to the theory of the state, from the evidence, the defendant would be guilty, but according to the theory of the defendant, from the evidence, the defendant would be not guilty, and the jury are unable to say which theory is true, the jury ought to acquit the defendant," was rightly refused, as requiring too high a degree of proof for conviction.

3. A charge that, if the jury believe from the whole evidence that "it is barely probable

the defendant is not guilty, the jury ought to find him not guilty," is erroneous and misleading.

Appeal from circuit court, Baldwin county; James T. Jones, Judge.

Marcy Carpenter was convicted of forgery, and appeals. Affirmed.

The tendency of the state's evidence was to connect the defendant with the forgery alleged to have been committed. There were but three exceptions reserved to the rulings of the court. The first was to the ruling of the court upon the evidence, which is sufficiently stated in the opinion. The other two exceptions were separately reserved to the rulings of the court to the giving of each of the following charges, which were requested by the defendant: (5) "If, according to the theory of the state, from the evidence, the defendant would be guilty, but according to the theory of the defendant, from the evidence, the defendant would be not guilty, and the jury are unable to say which theory is true, the jury ought to acquit the defendant." (8) "If the jury believe from the evidence in the case—the whole evidence—that it is barely probable the defendant is not guilty, the jury ought to find him not guilty."

John R. & Chas. W. Tompkins, for appellant. Wm. L. Martin, Atty. Gen., for the State.

**HARALSON, J.** The state introduced and examined as a witness C. W. F. Price, the party whose name was alleged to have been forged to the written certificate of the killing of the cow, and of the defendant's claim for damages therefor, on which he was paid \$20 by the railroad company. In his cross-examination by the defendant the witness stated that he was not hostile to the defendant, and, in order to contradict that statement, as it would seem, he was asked by the defendant's counsel: "Didn't you, at one time, when you were required to reduce the force of hands working under you, discharge him in preference to a colored man, then also in your employ?" The court sustained an objection to the question, interposed by the solicitor, and the defendant excepted. There was no error here. If the question had been answered in the affirmative, it would not have shown, without more, any hostile feeling on the part of the witness towards defendant. The question assumes that he was required to discharge some of the hands working under him, in order to reduce the force, and bad feeling or prejudice against the defendant could not be implied, in the discharge of that duty, more than against any other employe, who was not retained. Many considerations, such as skill, age, physical conditions, differences in wages to be paid, industry and faithfulness to duty, would control in such a selection, without implying, necessarily, any prejudice against those discharged. If

the question had been allowed, its answer would probably have opened an inquiry into such considerations as we have named, which would have been apart from the issue in the cause. An attempt to discredit a witness, by questions propounded to him on cross-examination, calling for independent facts, intended to show hostility on his part towards the defendant, is not allowable, unless the facts sought to be proved of themselves imply a bad or revengeful feeling. *Moore v. State*, 68 Ala. 360; *Morgan v. State*, 88 Ala. 223, 6 South. Rep. 761.

Charge No. 5, requested by defendant, and refused, was misleading, and invasive of the province of the jury. It was not for the court to tell them which of the two supposed theories they should adopt; nor was it necessary, in order to render a verdict, for them to be able to say which of the two was true, as the charge required them to do. The measure of their satisfaction for such purpose is required to be no more than that they must believe the defendant to be guilty beyond reasonable doubt. The requirement of them, as contained in the charge, was too high. *Fonville v. State*, 91 Ala. 44, 8 South. Rep. 688; *Gibson v. State*, 91 Ala. 64, 9 South. Rep. 171.

The court very properly refused to give the eighth charge requested by defendant. The question, in a case of the kind, is not whether, on all the evidence, if "it is barely probable the defendant is not guilty," or (what is the same thing) it is barely probable the defendant is innocent, he should not be found guilty. For all that, the jury may believe, beyond all reasonable doubt, the defendant to be guilty. The charge asked more than if, from all the evidence, there is a probability of the defendant's innocence, he is entitled to an acquittal, (*Winslow v. State*, 76 Ala. 43,) and was calculated to confuse and mislead. Charges should be "clear, explicit, and of an easy interpretation." *Hughes v. Anderson*, 68 Ala. 280; *Peterson v. State*, 74 Ala. 37. There is no error in the record, and the judgment and sentence of the circuit court are affirmed.

(99 Ala. 207)

#### SALTER v. STATE.

(Supreme Court of Alabama. June 20, 1893.)

#### DISTURBING PUBLIC WORSHIP.

On a trial for disturbing public worship, under 2 Code, § 4033, evidence of any act which is willfully done, and which by its nature disturbs the worship, is sufficient for conviction, though there may have been no intent to disturb the assemblage.

Appeal from circuit court, Crenshaw county; John R. Tyson, Judge.

Mose Salter was indicted, tried, and convicted for disturbing an assemblage of people at their religious worship, and appeals. Affirmed.

The testimony for the state tended to prove that at the church, about the time the congregation was breaking up, the defendant got into a quarrel with his half-brother, creating quite a disturbance. The defendant's testimony was in conflict with the state's evidence. The defendant requested the court to give the following written charges to the jury, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that they must believe to a moral certainty, and beyond a reasonable doubt, that this defendant willfully interrupted or disturbed a congregation of people met together for religious worship; and they must also believe from the evidence beyond a reasonable doubt that such disturbance was caused by noise, profane discourse, rude or indecent behavior at or near the church or place of worship, intentionally performed by the defendant, before they can find him guilty; and if the jury believe from all the evidence that such act or acts were performed heedlessly or recklessly,—that is, carelessly, or without thinking of the probable consequences of such act or acts,—then the jury should find the defendant not guilty." (2) "The court charges the jury that the intent is the very essence of this offense, and for the disturbance to be willful it must be something more than mischievous; it must be in its character vicious and immoral before they can find the defendant guilty." (3) "The court charges the jury that before they can find the defendant guilty they must believe to a moral certainty and beyond a reasonable doubt that there was not only an actual interruption or disturbance of an assemblage of people met for religious worship by noise, profane discourse, rude or indecent behavior at or near the place of worship, but such interruption or disturbance must be willfully made by the defendant, and that such acts did disturb the congregation met for religious worship."

Wm. L. Martin, Atty. Gen., for the State.

MCCLELLAN, J. Each of the several charges refused to the defendant is based on the theory that an essential element in the offense of disturbing religious worship denounced by section 4033 is a purpose and specific intent on the part of the party charged to disturb the assemblage of people met for religious worship. This idea found some support in the case of *Harrison v. State*, 37 Ala. 154, but that case has been limited and explained by later adjudications, which have thoroughly established the doctrine that a purpose and intent to disturb is not a necessary factor in the crime, but, to the contrary, that any act which is within the terms of the statute, the natural consequences of which are to disturb, and which is willfully done, and which in fact does disturb an assemblage of people met for religious worship, comes under the denunciation

of the law, though the actor may have had no intent to disturb the assemblage. *Goulding v. State*, 82 Ala. 48, 2 South. Rep. 478; *Johnson v. State*, 92 Ala. 82, 9 South. Rep. 539; *Lancaster v. State*, 53 Ala. 398. The charges were properly refused, and, no other question being presented by this record, the judgment of the circuit court must be affirmed.

(99 Ala. 154)

#### GILMORE v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

#### BURGLARY—INDICTMENT—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

1. Where an indictment for burglary unnecessarily alleges that there were goods of value in the house, the allegation must be proven.
2. Evidence of a conversation between the accused and the person living in the house before the burglary, tending to show a belief that there was money in the house, is admissible.
3. Evidence as to the measurement of tracks in the accused's yard, and in that of the house where the burglary occurred, are admissible.
4. Where the evidence of guilt is circumstantial, it is proper to charge that the innocence of accused must be presumed until his guilt is established by cogent evidence, beyond a reasonable doubt.
5. An instruction that, before the jury can convict, the hypothesis of his guilt should be consistent with all the circumstances, was proper.
6. An instruction that, to justify conviction, the evidence should be such as to exclude a rational probability of innocence, is misleading.
7. Where the facts, no matter how strong, can be reconciled with the theory that another may have committed the crime, the accused should be acquitted.

Appeal from circuit court, Pike county; J. R. Tyson, Judge.

Lum Gilmore was convicted of burglary, and appeals. Reversed.

The testimony for the state tended to prove that the defendant, Gilmore, had broken into a house of one James E. Moore; that Mrs. Moore, who was awake, discovered the defendant in the room, screamed, and the defendant ran off. The testimony for the state further tended to show that it rained on the night before the burglary was committed, and that tracks which corresponded to tracks made by the defendant on the day after the burglary were found leading to and from the house, in the direction of, and within a very short distance from, the defendant's house. The rulings on the evidence are sufficiently shown in the opinion. The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them, as asked: (1) "The jury in this case have nothing to do with the existence of Jesus Christ, nor the manner in which His existence could be proved, but they must try the case on the facts of case." (2) "There is

no evidence in this case of the existence of Jesus Christ; the jury are not trying any such issue; and the pert allusions of the attorney attempting to prosecute the case are not evidence, and cannot have the slightest weight, in the case." (3) "The evidence against the defendant in this case is partly circumstantial, and his innocence should be presumed by the jury until his guilt is established by evidence, in all the material aspects of the case, beyond a reasonable doubt, and to a moral certainty." (6) "The evidence against the defendant in this case is partly circumstantial, and his innocence must be presumed by the jury until the case is proved against him, in all its material circumstances, beyond a reasonable doubt. That to find him guilty, as charged, the evidence must be strong and cogent; and unless it is so strong and cogent as to show the defendant's guilt to a moral certainty, they must find the defendant not guilty." (8) "The court further charges the jury, as to footprints, that where no peculiar marks are observed, but the correspondence thus proved is merely in point of superficial shape, outline, and dimensions, and those of the ordinary character, it may serve to confirm a conclusion established by independent evidence, but cannot be, in itself, safely relied on, on account of the general resemblance known to exist among the feet and shoes of persons of the same age and sex." (10) "The court further charges the jury that before they should convict the defendant the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with them all." (12) "The court further charges the jury that in criminal prosecutions the evidence should be such as to exclude a rational probability of innocence, to justify conviction." (13) "The humane provision of the law is that upon the evidence there should not be a conviction, unless, to a moral certainty, it excludes every other reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the facts, if they can be reconciled with the theory that some other person may have done the act, then the guilt of the accused is not shown by that full measure of proof the law requires." (14) "The only just foundation for a verdict of guilty in this case is that the entire jury shall believe from the evidence, beyond a reasonable doubt, and to a moral certainty, that the defendant is guilty as charged in this indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt; and if the prosecutor has failed to furnish the aforesaid measure of proof, and to impress the minds of the jury with such belief of the defendant's guilt, the jury should find him not guilty." (15) "The jury are instructed that the evidence in this case is not sufficient for the jury to find that the defendant entered this house

with the intent to commit a rape." (16) "If the jury believe the evidence, they will find the defendant not guilty." (17) "The court further charges the jury that, under the evidence in this case, they should not find that the defendant entered that house with the intent to commit a rape." (20) "The court further charges the jury that there is no evidence before the jury that there were any goods or clothing—things of value—kept for use, sale, or deposit in said house, and unless they are satisfied from the evidence, beyond a reasonable doubt, and to a reasonable certainty, that the defendant entered said house with the intent to commit a rape, they should find the defendant not guilty."

R. L. Williams, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. The indictment, which is for burglary of a dwelling house, contains the unnecessary averment that goods or clothing—things of value—were kept in the house for use, sale, or deposit. This averment is clearly one descriptive of the house, and, though unnecessary to be alleged, yet, being alleged, it became necessary for the state to prove it. There could be no conviction without such proof. Our adjudications are all one way on this point. *Lindsay v. State*, 19 Ala. 560; *Smith v. Causey*, 28 Ala. 655; *Johnson v. State*, 35 Ala. 363; and later cases to same effect. Under the evidence, the jury might have found that there was a bed and bureau in the house, kept for use, but there is no proof that they were of value. There being a total failure of proof of this averment, the defendant was entitled to the general affirmative charge which he requested. The conversation had by defendant with Mrs. Moore about a month before the alleged burglary, in reference to borrowing money, tended to show that defendant knew or believed there was money in the house, and therefore tended to show motive for the alleged burglary. It was properly admitted in evidence.

The statement of the witness Everett that he saw the defendant's track, when made by him in Moore's yard, on the morning after the alleged burglary, and measured it, and also measured the length and breadth of the tracks made the night before in the yard, and that they measured the same, was the statement of a collective fact, under our rulings, and admissible.

The inadmissibility of the fact proposed by defendant to be proved by the witnesses Joe and Laura Baxton, that one Allen Cooper had confessed to the commission of this crime, is so palpable as not to require discussion.

We do not care to comment on charges 1 and 2, requested by defendant. Their subject-matter was not involved in, and had nothing to do with, the cause. The court

was under no duty to instruct the jury on any such subject.

It is a well-settled proposition that the innocence of the accused is presumed until his guilt is established by evidence, in all the material aspects of the case, beyond a reasonable doubt, and to a moral certainty; and it may also be stated that the evidence of guilt must be "strong and cogent," and that unless it is so strong and cogent as to show the defendant's guilt, to a moral certainty, he should be acquitted. These are the propositions of charges 3 and 6, requested by defendant, and they should have been given. *Salm v. State*, 89 Ala. 56, 8 South. Rep. 66. The record shows that the evidence against the accused was partly circumstantial, and these charges were not impaired by the assertion therein of that fact.

The eighth charge requested by defendant was purely an argument, and was properly refused.

The hypothesis of guilt, in order to justify conviction, should flow naturally from, and be consistent with, all the facts proved in the cause; and charge 10, so declaring, ought to have been given. The distinction must be kept in mind, however, between facts proved, and matters given in evidence. There may be many matters testified to in a cause which are not facts proved. The latter are those which the jury find are established as facts upon a consideration and comparison of all the evidence. These are what the charge in question refers to as "facts proved."

Charge 12 is inapt. A probability of the existence of a thing or condition means that there is more evidence in favor of such existence than against it. The term implies consideration of probative facts. In criminal accusations and trials, there are, to start with, no "probabilities" of innocence. There is a presumption of innocence, which is conclusive until it is overthrown by evidence. It is true that, after evidence of guilt has been introduced, a probability of innocence, or an overbalancing weight of evidence in favor of innocence, which is the same thing, may arise by the introduction by defendant of countervailing proof; and before there should be a conviction this probability or weight of evidence should be removed by further evidence of guilt, sufficient, with all the evidence in the case, to satisfy the minds of the jury of such guilt, beyond a reasonable doubt; and it would not be improper to charge that, if such a probability has arisen, it must have been removed before there can be a conviction. Thus, adverting to charge 14, requested by defendant, it is not improper to instruct, as therein is done, that there must be, as essential to conviction, an exclusion of every probability of innocence, and every reasonable doubt of guilt. But formulated as a general proposition, as in charge 12, "that in all criminal prosecutions the evidence must be such as to exclude a rational probability" of innocence, is inapt,

confusing, and misleading. There are many charges of this nature found in the reports of our criminal trials, drawn, as in this case, without due consideration of the meaning and bearing of terms used, which, if sanction is given to them, tend to bring the law into confusion, rather than to make it certain. All such ought to be set aside, though technically they may assert correct legal propositions.

Charge 13, requested by defendant, seems to come squarely up to the principle announced in *Ex parte Acree*, 63 Ala. 234, and should have been given.

Charge 14 ought to have been given. We do not construe it to mean that, if all the evidence in the case is sufficient to convict, there should be no conviction because a sufficiency of it was not introduced by the prosecutor. If the whole evidence establishes the guilt, whether introduced by the state or defendant, then a sufficiency of proof has been furnished by the prosecutor, within the meaning of this charge.

We have carefully read the evidence, and do not think there is any tending to show that the breaking and entering were done with intent to commit rape. We do not know what may appear on another trial on this point, but, in the condition of the present record, charges 15 and 17 ought to have been given.

Charge 20 is disposed of by what we have said in reference to those unnecessary averments of the indictment. For the errors mentioned the judgment is reversed, and the cause remanded.

(39 Ala. 256.)

STATE, to Use of CHEROKEE COUNTY,  
v. KYLE et al.

(Supreme Court of Alabama. June 22, 1893.)

BAIL—DEFENSE TO ACTION—FAILURE OF GRAND JURY TO INDICT.

It is no defense to an action on a bail bond providing that defendant will appear at the next term of the court, and from term to term thereafter, that the grand jury did not indict the defendant.

Appeal from circuit court, Cherokee county; John B. Tally, Judge.

This action was brought in the name of the state of Alabama, for the use of Cherokee county, against the sureties on the appearance bond of J. D. Williamson. There was judgment for the defendants, and plaintiff appeals. Reversed.

This cause was tried upon the following agreed statement of facts: "That some time in August, 1889, an affidavit was made before Gardner Stone, a justice of the peace for Cherokee county, Ala., charging John D. Williamson with the offense of unlawfully, and with malice aforethought, assaulting Patrick Calhoun, with the intent to murder him. That said John D. Williamson was then and is now a citizen of Georgia. That a requi-

sition was made by the governor of Alabama upon the governor of Georgia for the surrender of said Williamson to the authorities of Alabama. That said surrender was made, and on the 30th September, 1889, the said Williamson appeared before said Stone, justice of the peace, aforesaid, and entered into the bond with sureties, as set forth in the complaint, and which bond is to be introduced in evidence. That said Williamson did not and has not appeared before said circuit court, at any term thereof, to answer said criminal prosecution, but has made default thereon. No indictment was found, or has ever been found, by any grand jury of Cherokee county, against said John D. Williamson, for such offense, or any other. That when said Williamson appeared before Gardner Stone, justice of the peace, aforesaid, to answer said offense, he waived all preliminary investigation, and appealed to a grand jury, by entering into the bond with sureties as aforesaid. It is also agreed that the facts are that, while the grand jury has never found any indictment against the said Williamson, still it is a fact that said prosecution and case against said Williamson has been entered upon the trial docket of the circuit court of Cherokee county, and was so entered on said docket at the December term of said court, 1889, and now stands upon said trial docket, and has been regularly continued on said docket." Upon this evidence the court, at the request of the defendants, gave the general affirmative charge in their favor, and refused to give the general affirmative charge for the plaintiff, at its request. To each of these rulings the plaintiff separately excepted.

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. This action was instituted in the name of the state of Alabama, for the use of Cherokee county, and was commenced by regular summons and complaint. The suit was founded upon a bail bond executed by the defendant J. D. Williamson, and sureties, payable to the state of Alabama, "unless the said J. D. Williamson appear at the next term of the circuit court of Cherokee county, and from term to term thereafter, until discharged by law, to answer a criminal prosecution for the offense of unlawfully, and with malice aforethought, assaulting Patrick Calhoun, with the intent to murder him." The bond was approved by the magistrate who required the undertaking. We are unable to detect any defect in the bond, tending to affect its validity. It is in accordance with the form of bail bonds, as prescribed in section 4420 of the Code. The case was tried and submitted to the jury upon an agreed state of facts, which will appear in the statement of the facts of the case. The condition of the bond is that the defendant Williamson

will appear from term to term until discharged by law. By section 4431 of the Code, it is declared that: "The essence of all undertakings of bail, \* \* \* is the appearance of the defendant at court; and the undertaking is forfeited by the failure of the defendant to appear," etc. By the agreed statement of facts, the obligor did not appear at the next term of the court, and from term to term until discharged by law. By the failure to appear according to the undertaking, it was forfeited. The state had the right to pursue the statutory remedy, or bring suit upon the bond, averring the breach of its condition. The latter remedy was adopted. No pleas are set out. The judgment entry states that, "issue being joined, came a jury," etc. We presume only the plea of the general issue was interposed. There are certainly no facts stated in the agreement which present a defense to the complaint. That the grand jury did not prefer an indictment is no answer to the complaint. Possibly, the state was unable to procure the attendance of the witnesses at the next term of the court. Certainly, the state has not abandoned the prosecution. The facts show that the case was regularly docketed and continued. There has been no order discharging the obligors from their undertaking. The sureties had the right to surrender their principal to the custody of the proper officer, and thereby secure their discharge. They might have appeared at court, and upon motion, sustained by proper showing, have obtained an order discharging their principal. They might have shown, if the facts warranted it, providential cause or unavoidable hindrances which prevented the performance of the conditions of the bond. The one fact that the grand jury did not indict does not answer the complaint. This conclusion is sustained by the decisions of this court, as well as those of many other states. 2 Amer. & Eng. Enc. Law, p. 32; *Wheeler v. People*, 39 Ill. 430; *Garrison v. People*, 21 Ill. 535; *State v. Cocke*, 37 Tex. 155; *People v. Stager*, 10 Wend. 431; *Com. v. Teevens*, 143 Mass. 210, 9 N. E. Rep. 524; *State v. Stout*, 11 N. J. Law, 124. It may be that if there had been no order made in reference to the bond, such as calling the principal obligor, and declaring a forfeiture upon his failure to appear, or docketing the case against them, and continuing it for future action, such omission might have worked a discontinuance of the case, which would have authorized the discharge of the obligors. But the action of the court, as shown by the agreed facts, clearly shows that the state had not discontinued the prosecution, and made no order discharging the bail. *Goodwin v. Governor*, 1 Stew. & P. 465; *Rogers v. State*, 79 Ala. 59. The court erred in charging the jury to find for the defendants. Reversed and remanded.

(98 Ala. 19)

**FORNEY v. STATE.**

(Supreme Court of Alabama. June 22, 1893.)

**GRAND JURY—DRAWING—INSTRUCTIONS—REASONABLE DOUBT.**

1. Under Code 1886, pt. 5, tit. 3, c. 4, § 4299 et seq., relative to the drawing of jurors in Marshall county, the separate and successive drawing of grand and petit jurors respectively is unnecessary.

2. On a trial for murder, the refusal to give an instruction that the jury must acquit if they have a reasonable doubt of defendant's guilt is reversible error:

Appeal from circuit court, Marshall county; John B. Tally, Judge.

George Forney was indicted and tried for the murder of one Jerry Jefferson by shooting him with a gun, and was convicted of murder in the second degree, and sentenced to the penitentiary for 10 years, and appeals. Reversed.

On the cause coming on for trial, the defendant moved to quash the indictment on the ground that the grand jury that found the indictment was not drawn by the sheriff, the clerk, and probate judge, in the manner prescribed by law. In support of this motion the defendant introduced evidence tending to show that at the time fixed by law for the drawing of the grand and petit juries for the term of the court at which the indictment was preferred, the probate judge, clerk, and sheriff of said court being present, 116 names were drawn from the box containing the names of the persons who were competent to serve as jurors, and from which the juries for the county were drawn; that 8 of the persons so drawn were thrown out, because they had removed from the county, were dead, or were otherwise disqualified; that the list of the remaining 108 persons so drawn was made out, from which list the officers selected "the names of eighteen persons, who, in their judgment, were competent and suitable to serve as grand jurors from each of the various portions of the county; that after such selection of the grand jury as aforesaid the remaining ninety names were apportioned by said officers among the three weeks of the term to serve as petit jurors." On this evidence the court overruled the defendant's motion to quash the indictment, and the defendant duly excepted. The defendant pleaded in abatement that the grand jury that found the indictment was not drawn as required by law, and set out in such plea a defense adduced from the facts as shown on the motion to quash the indictment. The state demurred to the plea in abatement on the ground that, admitting the facts set forth therein, the grand jury was drawn in the manner and form prescribed by law. The court sustained this demurrer, and the defendant duly excepted.

The evidence for the state tended to show

that on the day of the killing, about the latter part of September, 1892, the defendant armed himself with a double-barreled shotgun, and thereupon repaired to a point on the public road by which he expected the deceased to pass, for the purpose of killing him; that as he was going to such point he saw deceased coming up the lane with one Harris, and, the defendant not being seen by the deceased or Harris, he crept along the fence behind some bushes until he got to a certain point near a cedar bush, behind which he secreted himself; that as the deceased and the said Harris were just about to pass the defendant, the defendant heard the deceased remark to said Harris, "If I could just run across George Forney I would put sixteen balls into him," or words to that effect, whereupon the defendant, who was still across the fence, and near the cedar bush, replied, "Yes, and I will put twelve in you," and "at the same instant fired, just as the deceased was turning his head to look around." Deceased died from the wounds thus inflicted. The testimony for the defendant tended to show that the killing was done in self-defense; that there had been a former difficulty between the deceased and the defendant, about two years before the killing, which resulted in the defendant's shooting the deceased in the neck, for which the defendant was convicted, and had served out his sentence at hard labor; that upon the return of the defendant to Guntersville, near where the shooting occurred, the deceased made several threats about the defendant. These threats were communicated to the defendant, and the deceased went about the community armed with a Winchester rifle, saying at different times "that he had bought the rifle especially for George Forney;" that "he was hunting for George Forney, and was going to kill him on first sight." The testimony for the defendant further tended to show that on the day of the killing the deceased and the said Harris had gone to a house on the plantation upon which the defendant was at work, and asked for the deceased, stating to a woman at the house that he was going to kill him, and at the same time carried with him a Winchester rifle; that, upon this threat being communicated to the defendant, he immediately got a gun, and on returning to his work carried the gun with him; that when so returning to work he met the deceased and the said Harris; that when the deceased discovered him, he "raised his rifle in a manner indicating an intention to fire, and leveled it towards the defendant, who was about 50 yards away, and Harris was near him with a pistol; that the defendant jumped over the fence near the cedar bush, and that, as he got over, the deceased, who had gotten a little past him, said, "I am going to put 16 balls in you, G— d— you," and



"started to draw his gun just as the defendant shot."

Upon the introduction of all the evidence the defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury could give a reasonable explanation under the evidence of their verdict, should they find the defendant not guilty, then they should find him not guilty." (2) "If the jury, upon considering all the evidence, have a reasonable doubt about the defendant's guilt, arising out of any part of the evidence, they should find him not guilty." (3) "Unless the state has shown to the jury beyond all reasonable doubt that the defendant was the one who provoked the difficulty, and the defendant has shown that he fired the fatal shot to repel an aggressive assault by deceased, which was calculated to produce a reasonable belief of damage to life or grievous bodily harm, and that they were in such close proximity that it would have been hazardous for defendant to have attempted flight, the jury must find the defendant not guilty." (5) "The law allows a man two means of protecting himself: First, by a resort to the courts; and, secondly, by self-defense; and a man may kill another in self-defense, even though it may deprive the deceased man of any opportunity to be tried for his life. The law will not require a man to rely alone on his slayer's being afterwards punished for his offense." (6) "The law does not say that the right of defendant to have the deceased man bound over to keep the peace is all the protection he is entitled to, but, in addition to that right, the law gives him the right to kill his adversary in self-defense should the former right for any reason prove insufficient for his protection." (7) "The threats made by the deceased against the defendant, if any were made, when communicated to the defendant, are competent evidence for the defendant as tending to explain the conduct of the deceased at the time of the killing; and such threats which were communicated to the defendant are competent evidence for the defendant as tending to explain his conduct at the time of the difficulty; and if such testimony, after considering all the evidence, creates in the mind of the jury a reasonable doubt as to defendant's guilt, the jury should find the defendant not guilty." (8) "The law does not require any man who is all the time trying to avoid a difficulty to suffer another man to kill him, but he may, in a case of self-defense, anticipate his adversary, and fire first, and, if death results, the jury in such a case should find the defendant not guilty." (10) "The court charges the jury that the burden of proof is upon the state to prove by the evidence beyond all reasonable doubt and to a moral certainty that defendant was the one who provoked the difficulty; and if, after considering all the evidence in

the case, the jury have a reasonable doubt as to whether the defendant was the one who provoked the difficulty, then the jury must give the defendant the benefit of this doubt, and find that the defendant did not provoke this difficulty; and if the jury, after so considering all the evidence, have a reasonable doubt as to whether at the time of the killing the circumstances were such as to indicate to a reasonable mind that the defendant was in danger of losing his life or limb, then you must give the defendant the benefit of this doubt, and find that the circumstances at the time of the killing were so calculated to impress a reasonable mind; and if, after likewise considering all the evidence in the case, the jury have a reasonable doubt as to whether the defendant could have fled from the scene of the difficulty without increasing his danger, then the defendant should be given the benefit of this doubt, and the jury should find that defendant could not have fled from the scene of action without increasing his danger; and if the jury, after considering the evidence in this manner, find that the defendant did not provoke the difficulty, and that at the time of the killing the circumstances which surrounded the parties were such as to impress the mind of a reasonable man with the belief that the defendant was in danger of losing his life or limb, and that he could not have fled without increasing his danger, you should find the defendant not guilty."

O. D. Street, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The act of February 28, 1887, (Acts 1886-87, p. 151,) amended by the act of February 28, 1889, (Acts 1888-89, p. 77,) does not apply to the county of Marshall. The statutory provisions relating to the drawing of grand and petit jurors in that county are those found in the Code of 1886, pt. 5, tit. 3, c. 4, § 4299 et seq., which do not require the separate and successive drawing of grand and petit juries respectively. *Dotson v. State*, 62 Ala. 141. The objections taken by the defendant to the manner of drawing the grand jury which returned the indictment against him, and the petit juries for the week of his trial, which proceeded on the ground that section 4 of the act referred to had not been observed by the jury commissioners, were therefore without merit. Moreover, had the act in question obtained in Marshall county, this objection would not have availed the defendant as to the grand jury, because it is not one which is allowed to be entertained by section 4445 of the Code, (*Murphy v. State*, 86 Ala. 45, 5 South. Rep. 432;) but the objection would be good against the venire of petit jurors under the act of 1887, since section 4445 has no application to petit jurors, (*Wells v. State*, 94 Ala. 1, 10 South. Rep. 656.)

We discover no error in the rulings of the

trial court on the admission of testimony. Had the offer of the defendant in respect of the shooting at Ellis by the deceased been simply to prove the fact that the deceased did shoot at Ellis, the testimony ought to, and we presume would, have been received. Taken with other evidence in this connection, the fact that deceased shot at Ellis tended to throw light on his intentions, which, according to one phase of the evidence, he attempted to execute towards the defendant, and to give a deadlier cast to his threats.

The following written charge was requested by the defendant: "If the jury, upon considering all the evidence, have a reasonable doubt about the defendant's guilt, arising out of any part of the evidence, they should find the defendant not guilty." It was refused. It should have been given, (*Hurd v. State*, 94 Ala. 100, 10 South. Rep. 528,) and this action of the court must work reversal of its judgment.

The remaining charges refused to the defendant were severally either affirmatively unsound or abstract or misleading or argumentative or confusing, and some of them were infected with two or more of these infirmities. We need not discuss them in detail. Each of them was properly refused.

Some other questions arose on the organization of the trial jury. They need not arise on another trial, and we do not consider them. Reversed and remanded.

(100 Ala. 573)

#### Ex parte ASHURST.

(Supreme Court of Alabama. June 22, 1893.)

##### EQUITY—PLEADING—AMENDMENT.

In Acts Ala. 1858-59, p. 130, it is provided that bills and answers may be amended at any time before final decree, to meet the justice of the case, and that all amendments shall be allowed on such terms as the chancellor shall deem just and equitable. Code 1886, § 3449, allows amendments as of absolute right, on terms not beyond the payment of all costs, of answers, "so as to set up any matter of defense," and of bills "by striking out or adding new parties, or to meet any state of evidence which will authorize relief." *Held*, that the right to set up any matter of defense includes the privilege to meet any state of the evidence authorizing relief, and averments of an unsworn answer cannot, even after publication of the evidence and the submission on agreement as to certain facts, be retained against respondent's motion to strike them out, on the ground that complainant will so be deprived of their admissions, since he may try or continue the case and take additional testimony.

The proceeding in this case was commenced by an application addressed to this court, asking for a writ of mandamus, directed to the chancellor, commanding him to set aside, vacate, and annul a former order of his court, allowing an amendment to the answer by the respondents, and to set aside the submission of their cause, and allow further testimony to be introduced by said respondent. Mandamus denied.

The bill in the original cause was filed by James V. Ashurst against Robert T. Ashurst and the American Freehold Land Mortgage Company of London, Limited, and sought to enforce a lien on certain property. The averments of the bill are very full. The American Freehold Land Mortgage Company filed its answer, setting out many facts in conflict with the averments of the bill. This answer contained several paragraphs, the third paragraph of which contained certain admissions of facts. The cause was submitted for final decree on the pleadings and proof after publishing the testimony. After this submission, the respondent, the American Freehold Land Mortgage Company of London, Limited, at the next term moved the court to set aside the order of submission made at the previous term, and asked leave to amend its answer by striking out the paragraph numbered 3, which contained certain admissions of fact. At the same time the same respondent petitioned the court to allow it to introduce other testimony, setting out in the petition that since the submission of the cause the said petitioner had discovered new and additional evidence in said cause, which was relevant thereto, and very important to the defense of the petitioner, and set out in the petition the substance of said newly-discovered evidence. The court granted the petition, set aside the submission of the cause, issued an order allowing the respondent to file an amended answer and to take additional testimony, and ordered that the cause stand for trial at the next term of the court. Upon these facts the complainant petitioned the supreme court for a writ of mandamus, directed to the chancellor, "commanding him to vacate and disallow an order made in the cause of Ashurst v. Ashurst and others, pending in the chancery court of Montgomery at the last term of said court, in so far and to the extent that said court strikes out the admissions of fact stated in the third paragraph of the answer of the American Freehold Land Mortgage Company of London, Limited." The grounds of this application for mandamus, as stated therein, were "that the allowance of said amendment was made after publication of testimony and the submission of the cause; that it interfered with and altered, in effect, the rights of the parties as established and shown by the agreement of counsel in said cause; that it was beyond the power of the court to allow the same, because it did not enlarge the scope of the defense open to the defendant, and was not, so far as objected to, made so as to enable the party making it to set up any defense not open to the defendant on the pleadings before the amendment." The chancellor, as respondent to the petition for mandamus, demurred to the said petition, assigning as grounds thereof the following: "First. That the facts stated therein do not show such facts as entitled petitioner to a writ of mandamus. Second.

That the matter complained of in said petition, to wit, an order made by him, as said chancellor, on the 11th day of April, 1893, allowing the defendant, the American Freehold Land Mortgage Company of London, Limited, to amend its answer by striking out paragraph three thereof, is not a subject-matter for review, either by appeal or mandamus. Third. Because the right to amend an answer at any time before final decree is a right secured to the defendant by the statutes of this state. Fourth. Because the amendment, which was allowed to be made in the answer of said defendants, is one of the rights secured to the defendants by statute, and is not a matter of discretion on the part of the court. Fifth. Because the statute which authorizes amendments to answers prescribes that the only terms which can be imposed by the chancellor shall not extend beyond payment of costs. Sixth. Because the chancellor has not the power or right, under the statutes of this state, granting said amendment, to impose any other terms than payment of cost. Seventh. Petitioner has an adequate legal remedy, by appeal from final decree in said cause, to correct any error that may have intervened in the ruling of said court. Wherefore defendant prays judgment of the court that he may not be further required to answer said petition, and that the same may be quashed."

Brickell, Semple & Gunter, for petitioner.  
James E. Webb and Caldwell Bradshaw, for respondent.

**HARALSON, J.** Formerly the right to amend a bill or answer, whether verified or not, rested within the discretion of the court. As to verified pleadings, there was much indisposition to allow amendments, so as to vary facts already stated, or to let in new facts, "and it was but seldom that an amendment was allowed after the taking of evidence, introducing facts known to the party, or which, with reasonable diligence, he could have discovered at the time of filing the original pleading." *Rapier v. Paper Co.*, 69 Ala. 481; 1 Daniell, Ch. Pr. §§ 778, 779. It is not to be wondered that a power so unlimited, by the improper exercise of which the rights of litigants might be unjustly denied or destroyed, should not be allowed to continue. It is right to get as far away from the discretion of judges as is practicable, and consistent with the due administration of rights in courts of justice. In obedience to this salutary principle, and no doubt influenced thereto by the improper, if conscientious, exercise of judicial discretion in allowing amendments to chancery pleadings by chancellors, we find the legislature taking a long delayed and short step from the unlimited power with which these officers were theretofore clothed in reference to such matters. At the session of 1858-59 they passed a stat-

ute, the third section of which provides "that amendments to bills and answers shall be allowed at any time before final decree, to meet the justice of the case, and amendments to bills shall be allowed by adding or striking out new parties complainant or defendant, and to meet any state of proof that shall authorize relief, and all amendments shall be allowed upon such terms as the chancellor shall deem just and equitable," etc. Acts 1858-59, p. 130. By this statute it will be observed (1) that bills and answers were to be amended at any time before final decree, to meet the justice of the case; (2) that bills, in addition, were to be amended as to parties, and to meet any state of proof that would authorize relief,—a privilege not bestowed on answers; and (3) all amendments, whether of bills or answers, were to be allowed upon such terms as the chancellor should deem just and equitable. The right to amend was absolute, but the power of the chancellor remained almost, if not quite, as unlimited as before, if he should choose arbitrarily to exercise it. The legislature did not long halt here, and, moving still further away from such judicial discretion, in 1860 they amended the foregoing statute, and put it into the form in which it has appeared in the subsequent Codes of this state,—in that of 1886 as section 3449. By this amended statute amendments are to be allowed as before, as a matter of absolute right, not upon such terms as the chancellor may deem just and equitable, but upon terms not extending beyond the payment of all the costs; and it is further provided by this last statute, not that bills and answers shall be allowed to be amended "to meet the justice of the case," as was the provision in the said original statute, but answers are to be allowed to be amended "so as to set up any matter of defense," and bills "by striking out or adding new parties, or to meet any state of evidence which will authorize relief." Bills and answers were thus dissociated in the statutory scheme for amendments to each. The privilege given to bills by the first of said statutes, as contained in the words, "to meet the justice of the case," was taken away by the last, and confined to making parties, and to meet any state of proof that should authorize relief. In other words, there is a clear and distinct right of amendment given to bills and answers, and the amendments which may be made of the one are not the same, in all respects, as those that may be made of the other. The history of this legislation, and the literal interpretation of the present statute, therefore, authorize us to conclude that, in case of amendments to answers, they are to be allowed as a matter of absolute right, "so as to set up any matter of defense," and they are not necessarily confined in their scope "to meet any state of evidence [already taken] which will authorize relief." The chancellor is without power any longer to deny

an amendment of an answer which is proposed at any time before final decree, the purpose and effect of which is "to set up any matter of defense," except to impose all the costs as a condition to its allowance. This right of amendment surely includes the privilege of amending "to meet any state of evidence [already taken] which authorizes relief," as in the case of bills, for that would be matter of defense; but it goes far beyond that, and includes any other matter of defense not already set up to the case as made by the bill, or to change the grounds of defense, if deemed advantageous to do so. The purpose of the legislation is to furnish a rule by which justice may be the more surely done, and not defeated, between the parties. *Rapier v. Paper Co.*, supra; *Pitts v. Powlidge*, 56 Ala. 147.

There are obvious reasons for this difference in the right to amended bills and answers. The complainant inaugurates the litigation upon his own chosen grounds. He may require the answer to be made under oath, so as to make it evidence for him against the defendant, or waive the oath, if it best suits his purposes. He may take and introduce his proof from whatever quarter gathered, and afterwards, before final decree, amend his bill, by adding or striking out averments, so as to make the allegations and proof correspond. From this absolute right to amend, and the favor with which the right is treated, we see in practice that the amendments to bills are vastly more numerous than those to answers. It would seem, therefore, to be equitable, in the scheme for the promotion of what is right and just between the parties, to allow the defendant to meet these attacks upon him from every point, by interposing by amendment, when necessary, any matter of real defense which he may be able to set up. If he has, by mistake, inadvertence, or otherwise, made averments in his answer which he is advised it were better not to have made, and he would change his ground, by striking out and inserting, or by striking out and not inserting, or by inserting, merely, he may do so; and if he strikes out and inserts matter which is inconsistent with, or even contradictory of, what was stricken out, it furnishes no ground for objection by complainant. *Seals v. Pfeiffer*, 81 Ala. 520, 1 South. Rep. 267. And he may also amend, as the complainant may do, to make his proofs and averments correspond.

The contention that the averments of an unsworn answer may not be stricken out by amendments, because complainant would thereby be deprived of them as admissions in his favor, demands of defendant a concession of his right of defense which is not sanctioned by any of the rules of practice of courts of equity which are known to us. Such averments or admissions are mere pleadings of counsel, and may be varied at any time, at the will of the pleader. *Zel-*

*nicker v. Brigham*, 74 Ala. 602; *Watts v. Bank*, 76 Ala. 474.

It has been urged that the allowance of the amendment before final decree, and after publication, was a matter of detriment to the complainant; but it may be properly replied that the statute has compensated, as far as may be, for any such injury, in allowing complainant, as a matter of right, an option to try or to continue the cause, with the privilege of taking additional testimony. No amendment could be allowed which deprived complainant of that right, and, if not debarred that privilege, he was in no worse condition than he would have been in the beginning, if defendant had made no such averments in his answer as those he struck out by amendment. The practice of setting aside a submission on pleadings and proofs, when the cause has been held up for decree in vacation, is one of common indulgence by chancery courts. *Magruder v. Campbell*, 40 Ala. 611.

We fail to see, again, wherein the court or the defendant, in the amendment which was allowed, violated the agreements of counsel, entered into to facilitate the trial and save expense, by agreeing that certain facts should be admitted, as if proved, on the trial. Those agreements may be used on the final submission and trial of the cause, with all they contain, as though the amendment had never been made. It would be extending their terms to what they do not contain to hold that the defendant company precluded itself thereafter from all right to amend its answer, or make any other proper or legal motion in the cause.

From what has been said, it will appear that the amendment of the answer was properly allowed, and petitioner, on that account, is not entitled to maintain this writ; but the order of the court allowing the amendment, if erroneous, was subject to correction on appeal after final judgment. It is everywhere conceded that the writ of mandamus never lies to prevent a failure of justice, except in cases where there is no other specific adequate remedy to enforce a clear legal right. And so, in a case similar to this, where an amendment had been allowed to a complaint at law, it was held by this court that the allowance of the amendment, being revisable on error or appeal, was not a good ground for mandamus. After reviewing the authorities on the question, *Somerville, J.*, speaking for the court, very properly said: "It is proper to add that our past decisions have carried the principle of interference by mandamus with the interlocutory orders and motions of inferior courts quite as far as we are willing to extend it. Our inclination is rather to restrain than enlarge such jurisdiction, as being more in harmony with the weight of authority and sound reasoning. *Ex parte South & North Ala. R. Co.*, 65 Ala. 599; *Ex parte Garland*, 42 Ala. 559; *High, Extr. Leg. Rem.* § 186." If the allowance or

refusal of amendments to pleadings in equity may at any time be controlled by mandamus, as to which we do not decide, the case here presented is not one of them. The mandamus is refused, and the application dismissed, at the cost of the petitioner.

Mandamus denied.

(100 Ala. 553)

COPELAND et al. v. McADORY et al.

(Supreme Court of Alabama. June 22, 1893.)

COVENANTS — ACTION FOR BREACH — PLEADING — EVIDENCE — DAMAGES.

1. A declaration for breach of a covenant of good right to convey or of seisin need not refer to an outstanding title, nor aver an eviction or ouster, but it is sufficient to negative the words of the covenant generally.

2. The existence of a public highway over the land is a breach of the covenant against incumbrances.

3. In an action for breach of a covenant of warranty it is not necessary to show an eviction by legal process, but it is sufficient to show by a preponderance of evidence that plaintiff yielded to a hostile assertion of an irresistible paramount title.

4. Knowledge on the part of the grantee in a deed of an incumbrance on the property or of a paramount title does not impair his right of recovery for breach of the covenant of warranty.

5. Where a covenant of seisin, of good right to convey, or of quiet enjoyment, or a general warranty, is broken by the subjection of the land to a perpetual easement, which may not be removed by the payment of money, the measure of damages is the consequent depreciation of the land.

6. The value of improvements made by the grantee after the purchase is not an element of damage.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by Willis McAdory and wife against W. B. Copeland and wife to recover damages for breach of warranties in a deed. From a judgment for plaintiffs, defendants appeal. Reversed.

The plaintiffs confessed the plea of coverage as to the defendant Mrs. Copeland. The evidence introduced for the plaintiffs tended to show that the defendant W. B. Copeland sold and conveyed to the plaintiffs a certain lot of land near the city of Birmingham, describing it by metes and bounds, which lot, as described in said deed to plaintiffs, comprised a part of one of the streets of Birmingham, and from the possession of which the plaintiffs were evicted by the mayor and aldermen of the city of Birmingham. The defendants derived title to a portion of the property so conveyed by mesne conveyances from the Elyton Land Company, which originally owned all of the property in and around Birmingham, and had laid the same off into lots, streets, and avenues. The Elyton Land Company sold this land originally to one Knauff. The deed to Knauff described the land as abutting Ninth avenue. At the time of the sale to the plaintiffs by the defendants the city of Birmingham had not extended its limits so as to comprise

Ninth avenue, and the said avenue was not open when the land was sold to the plaintiffs, and the said lot was inclosed by a fence which surrounded the house situated on said property. Afterwards the city of Birmingham extended its limits so as to comprise said avenue, and then demanded this property from the plaintiffs, and required them to remove the obstructions off said avenue, thereby depriving plaintiffs of 25 feet of their land, which took the entire front yard; and the avenue, as laid off, would have taken a part of the house. The only thing controverted was the amount of damages sustained by the plaintiffs. The plaintiffs introduced testimony tending to show that there was not enough room on the lot left so that the house could be moved back; while the defendants' testimony was in conflict with this.

The defendants requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them: (1) "The court instructs the jury that the plaintiff is not entitled to recover for the value of improvements placed on the portion of land taken by the city." (2) "The court charges the jury that the plaintiff cannot recover in this action for the value of any improvements which the plaintiff placed upon the lot in question, after he purchased the lot from Copeland." (3) "The court charges the jury that the amount which the plaintiff may have expended on the well cannot be charged to the defendant if such expenditures were made after he went into possession after his purchase from Copeland." (4) "If the plaintiff is entitled to recover in this case, then the measure of his damages would be the difference in value of the lot with the avenue on it and its value without the avenue on it, all considered, at the time the plaintiff purchased the land,—land with the interest on the amount from the time of his eviction by the city." (5) "The plaintiff cannot recover as damages the amount that would be required to move the house." (6) "The court charges the jury that it was the right of Copeland to have notice of the claim of the city before the plaintiffs abandoned the same, that he might, if he chose, defend the title which he had made to plaintiffs; and if the jury believe from the evidence that the plaintiffs gave up any of the lots in question, without notifying Copeland of the city's claim, then plaintiffs assume the burden of showing conclusively an outstanding superior title in the city to said property."

Dickinson & Kerr, for appellants. Lane & White and John Vary, for appellees.

STONE, C. J. The action was commenced against the appellant and his wife to recover damages for alleged breaches of the covenants in a deed of bargain and sale executed by them, conveying to the appellees a

certain lot or parcel of land in the city of Birmingham. There was judgment for the wife on her plea of coverture. The trial was had on an amended complaint having three counts. The first of these alleges a breach of the covenant against incumbrances. The second complains of an alleged breach of the covenant that the grantors had good right to convey. The third alleges a breach of the general covenant to warrant and defend. The defect or insufficiency of the title of the grantors, alleged in each count, is that a part of the premises conveyed, particularly described, formed a part of a public street or avenue of the city of Birmingham, having been, prior to the execution of the conveyance, dedicated to the public for such use by the former owner, the Elyton Land Company, when mapping and laying out the city; and that the mayor and aldermen of the city had entered, taking possession thereof, and disposing the appellees. Demurrers to each count were interposed, assigning causes which are not very clearly expressed. As we interpret them, the defect or insufficiency in each count charged to exist is that the right and title of the mayor and aldermen is not described with sufficient certainty or particularity, and that it is not shown the appellees were ousted or dispossessed by legal process. The demurrers were overruled, and the order overruling them is the matter of the first assignment of error. In considering the sufficiency of the complaint, we are confined to the causes of demurrer assigned. Though either count may be in any respect insufficient, if not subject to the objections stated, the demurrer was properly overruled. Code, § 2690. The second count is founded on an alleged breach of the covenant of good right to convey the equivalent of a covenant of seisin. In declaring for a breach of the covenant, all that is necessary is to negative the words of the covenant generally. No description of or reference to the outstanding or permanent title is necessary; nor is it necessary to aver an eviction or ouster. The covenant is broken, if at all, as soon as it is made, and not by the occurrence of any future event. The grantor is presumed to know the estate of which he was seised; the fact is peculiarly within his knowledge, and he must plead and prove it. Rawle, Cov. (3d Ed.) 53; Rickert v. Snyder, 9 Wend. 421; Anderson v. Knox, 20 Ala. 156. Whether the existence of a highway over a part of the premises conveyed is a breach of this covenant is not a question raised by the demurrer, and, of consequence, is not now before us. There is a marked distinction in pleading a breach of the covenant of seisin, or of good right to convey and of other covenants. It is not sufficient, in declaring for a breach of the other covenants, to negative merely the words of the covenant. The paramount

title or incumbrance, the existence of which is supposed to constitute a breach, must be stated. But it is not necessary nor advisable to enter into any particular description of such incumbrance or title. The statement of it substantially is all that is requisite. Rawle, Cov. 125 et seq. In the notes to 2 Greenl. Ev. §§ 242-244, the form of a count for a breach of the covenant against incumbrances, of quiet enjoyment, and of general warranty will be found. In each count there is no more than the averment that there was at the time of making the deed an outstanding lawful right and title, and in whom it resided. In each of the counts of the complaint in which it was necessary to state the existence of an incumbrance or of a paramount title, that which is relied on as constituting the breach of the covenant is clearly stated; its nature, character, and origin; and in this respect the demurrer was not well taken.

The covenant of freedom from incumbrances, like the covenants of seisin and of good and lawful right to convey, is a covenant in praesenti. It is broken as soon as made if there is an outstanding older and better title, or an incumbrance diminishing the value or enjoyment of the land. Anderson v. Knox, 20 Ala. 156; Andrews v. McCoy, 8 Ala. 920; Clark v. Swift, 3 Metc. (Mass.) 390. An eviction or dispossession of the grantee is not a constituent element of the breach. It is the defect of title or the burden of an incumbrance existing when the conveyance is made which works the breach. It is said by Greenleaf: "The covenant of freedom from incumbrance is proved to have been broken by any evidence showing that a third person had a right to or an interest in the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. Therefore a public highway over the land, a claim of dower, a private right of way, a lien by judgment or by mortgage made by the grantor to the grantee, or any mortgage unless it is one which the covenantee is bound to pay, or any other outstanding older and better title, is a breach of this covenant." 2 Greenl. Ev. § 247. The authorities generally recognize an outstanding easement of any kind as falling within the covenant, operating its breach. Rawle, Cov. 113 et seq.; Tied. Real Prop. § 850; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. Rep. 581. The definition of an incumbrance expressed by Parsons, C. J., in the early case of Prescott v. Trueman, 4 Mass. 630, is that it is "every right to or interest in the land granted to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance," has frequently been cited and approved. An easement conferring upon its owner an interest in the land, the right to some profit, benefit, dominion, or lawful use out of or over the

land, though it may be consistent with the passing of the fee by the conveyance, is a burden upon the estate granted, diminishing the full measure of its enjoyment. There is some conflict in the authorities whether the existence of a public highway over the land is an incumbrance, and a breach of this covenant. In the case of *Kellogg v. Ingersoll*, 2 Mass. 101, an action for a breach of the covenant, the breach assigned was the existence "of a public town road or way, duly laid out by the town of A. for the use of all its inhabitants," and it was held the breach was well assigned; that the existence of the road was an incumbrance. *Parsons, C. J.*, said: "It is a legal obstruction to the purchaser to exercise that dominion over the land to which the owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of the damage is a proper subject for the consideration of the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid." Though the doctrine of this case has been denied in New York, Pennsylvania, and Wisconsin, it has been adopted in all the New England states, and in Indiana, Illinois, Iowa, and Missouri. *Tied. Real Prop. § 853*, and notes. In *Kellogg v. Malin*, 50 Mo. 498, it is said: "All the authorities concur in holding that an easement constitutes an incumbrance. If a person acquires the fee to land free and unincumbered, he obtains the exclusive and absolute dominion over it, and may use, enjoy, and appropriate it to any purpose he may see fit; but if it is subject to an easement or incumbrance it is not free, nor can he enjoy it to the fullest extent. If a public highway or a railroad track run over it, he cannot have its undisturbed enjoyment, for it is used by others in defiance of his will." The vendor of lands frames the covenants of the conveyance into which he enters. He may extend or limit them at pleasure, or he may decline to introduce into the conveyance any covenants whatever, limiting the grant to such estate or interest only as he may have in the land, and leaving the purchaser to take it with all the defects of title, and subject to all the incumbrances which affect or bind the estate. But if he enters into covenants he must respond for all the damages resulting. If the covenants are in legal contemplation and in fact untrue. The existence of a public highway is a burden—an incumbrance—diminishing the enjoyment of the land, subjecting it to the dominion and use of the public. If it were a private right of way, all authorities declare that it would be an incumbrance and a breach of the covenant. That it is public does not change the fact

that there is an outstanding right to the use and to dominion over the land, which may continue forever, interrupting its quiet enjoyment. The covenant of quiet enjoyment and of warranty are practically identical in operation, and whatever constitutes the breach of the one covenant is a breach of the other. Either extends to all lawful outstanding adverse claims upon the premises conveyed. An easement materially affecting the value, interfering with the use and possession, of a part of the premises, is a breach of the covenant. *Scriver v. Smith*, 100 N. Y. 471, 3 N. E. Rep. 675. A right of way, public or private, incumbering a part of the premises, is a breach of the covenant. *Russ v. Steele*, 40 Vt. 310; *Lamb v. Danforth*, 59 Me. 322; *Butt v. Riffe*, 78 Ky. 352. An eviction, actual or constructive, of the whole or a part of the premises, is an essential constituent of the breach. But it is not intended that there must be an eviction by legal process. If there is a hostile assertion of an irresistible, paramount title, the grantee may yield to it, not awaiting suit and judgment. If he yields, it is at his peril, and he takes upon himself, in an action for a breach of the covenant, the burden of proving the title really paramount. *Tied. Real Prop. § 855*. Assuming the truth of the averments in the complaint, as must be done on demurrer, the paramount right and title to the part of the premises conveyed which formed a part of the street or avenue—the paramount right to use and dominion over them—resides in the mayor and aldermen, and they had the right to enter and take possession. It was not only the right, but the duty, of the appellees to surrender the possession. They were under no duty to the appellant to maintain a wrongful possession, subjecting themselves to be treated as trespassers. *McGary v. Hastings*, 39 Cal. 360. The result of the views we have expressed is that the demurrer to the several counts of the complaint for the causes assigned were properly overruled.

The demurrer to the two special pleas filed by the appellant do not appear in the record. When such demurrers are sustained, the presumption on error is that causes of demurrer were specified, and covered whatever of objection or insufficiency may be found in the pleas. The first plea purports to be a plea of recoupment, and the matter of recoupment is expenses incurred by the appellant in the employment of counsel to procure the correction of the misdescription in a deed executed by the appellees conveying to the appellant a lot in exchange or as the consideration for the lot conveyed by him to the appellees. It would scarcely be insisted that in a separate, independent action such a claim or demand is recoverable; and it is now suf-

ficient to say that a claim or demand not recoverable in a separate independent action cannot be made the matter of a plea of recoupment. 3 Sedg. Dam. § 1061. The second plea avers that at the time of the execution of the conveyance the appellees had full knowledge of the claim of the mayor and aldermen of the city of Birmingham, and are therefore estopped from a recovery; but knowledge or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown incumbrances or defects of title. Tied. Real Prop. § 853; Rawle, Cov. 128 et seq.; Dunn v. White, 1 Ala. 645. The measure of damages for a total breach of the covenants of seisin or of good right to convey or of quiet enjoyment or general warranty is the purchase money, or value of the consideration. If the failure of the title is partial, the measure of damages is the value of the parcel lost, measured by the consideration, or the value at the time of the eviction. Kingsbury v. Milner, 69 Ala. 506; Bibb v. Freeman, 59 Ala. 612; 2 Suth. Dam. 288; Mecklem v. Blake, 99 Amer. Dec. 78, note; Brooks v. Black, (Miss.) 8 South. Rep. 332, 24 Amer. St. Rep. 267, note. When, as in this case, there is not a failure of title, the fee remaining in the grantee, but a part of the land is subject to a perpetual easement, which may not be removed by the payment of money, the measure of damage is the depreciation in value of the land by reason of the incumbrance. 3 Sedg. Dam. § 972; Clark v. Zeigler, 78 Ala. 362, 85 Ala. 154, 4 South. Rep. 669. Consequential damages are not recoverable. Nor is the value of improvements the grantee may have made after the purchase an element of damage. If compensation is made for them, as has been properly said, it must be made by the evictor. Mecklem v. Blake, 99 Amer. Dec. 73, note. There was error in the refusal of the first, second, third, and fifth charges requested by the appellant. There was no error in the refusal of the fourth and sixth charges requested. The appellees were under no duty to give notice to the appellant before surrendering possession to the mayor and aldermen, if their right and title was paramount. Having surrendered without suit, as has already been said, in this action, the burden of proving the superiority of the title to which they yielded rests upon the appellees. They are not bound to prove it conclusively, as is asserted in the sixth instruction. In all civil cases the measure of proof is that which produces in the minds of the jury a reasonable conviction. The other matters assigned as error will not arise again, and a consideration of them is unnecessary. Reversed and remanded.

(98 Ala. 511)

## INGRAM v. ILLGES et al.

(Supreme Court of Alabama. June 22, 1893.)

WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES—EVIDENCE—ABSOLUTE DEED AS MORTGAGE.

1. A man and wife executed a mortgage on certain property to secure his debts, and, after their deaths, it was claimed that the property was the wife's, and the mortgage invalid. It appeared that the vendor received the price from the husband; the sale was made to the latter; and he immediately took possession, and made improvements such as to make it his homestead. The employer of the husband testified that he loaned him the money for the purchase and the improvements. It did not appear that the wife had more than \$200 after her marriage, and this she had two years before the purchase, nor did it appear that any part of this had passed into the husband's possession, except that the vendor testified that at the time of the sale, 10 years before, the husband said that the purchase was for his wife, who was furnishing the money. *Held*, that the property was not the separate estate of the wife.

2. When the grantee in a deed absolute on its face applies to a court of equity to have it declared a mortgage, and, as such, to foreclose it, it must appear that the agreement that the deed should operate as a mortgage was contemporaneous with the execution of the instrument, or, if subsequent, was supported by a consideration.

Appeal from chancery court, Russell county; John A. Foster, Chancellor.

Bill by C. E. Ingram against Charles R. Illges, administrator of the estate of Katie M. Heard, deceased, and the minor children of C. L. Heard, deceased, and said Katie M. Heard, and Garrett & Sons, to foreclose a mortgage executed by said decedents. Garrett & Sons filed their answer, setting up the fact that the said C. L. Heard and Katie M. Heard had executed to one J. S. Garrett a deed to the property involved in this suit, bearing date January 2, 1887, but that this deed was really intended to be a mortgage made to secure an existing indebtedness, and that at the time of the filing of the original bill in this suit, and the time of making this answer, there was still a balance due on said indebtedness. The said Garrett & Sons then asked that their answer be taken as a cross bill, and that the deed executed by the said C. L. Heard and Katie M. Heard, intended as a mortgage, be foreclosed. From a decree dismissing the bill and cross bill, complainant and Garrett & Sons appeal. Reversed.

W. J. Samford & Son, for appellant. J. M. Chilton and Thornton & McMichael, for cross appellants.

STONE, C. J. The original and amended bills were filed by the appellant Ingram to foreclose a mortgage on a lot in the village of Hatchachubee, Ala., executed on the 1st day of May, 1888; by C. L. Heard and wife, to secure the payment of their joint and several bill single, for the sum of \$200, payable October 1, 1888, and any advances made them during the current year. The cross



bill was filed by the appellants Garrett & Sons, alleging, in substance, that a conveyance of the lot executed by Heard and wife on the 22d day of January, 1887, to J. S. Garrett, though in form absolute, was intended as a mortgage, but that there was of the debt intended to be secured an unpaid balance, which was due and owing to the partnership of Garrett & Sons, of which the grantee, J. S. Garrett, was a member, and praying a foreclosure. Each of these conveyances was acknowledged by the wife in the form required to convey the homestead. The line of the defense which was interposed is that the lot, the subject of the conveyance and of the mortgage, was the separate estate of the wife; the debts were the debts of the husband; and she had not capacity to mortgage them for the security of the debts of the husband. On the hearing on the pleadings and evidence, the chancellor was of the opinion that the evidence sustained all the defense, and rendered a decree dismissing the bill and cross bill, from which these appeals are taken.

The theory of the defense was that the lot was purchased with the moneys of the wife; or, if not purchased with her moneys, but with the money of the husband, he intended an investment for her, to reimburse money of hers he had invested to his own use. This is matter strictly and purely defensive, the burden of proving which rests upon the party asserting it. The burden of proving a disputed fact in all cases rests upon the party asserting its existence, and claiming to derive right and benefit from it; and, if the evidence in reference to it does not preponderate in favor of its existence, the party must fail for want of proof. *Lehman v. McQueen*, 65 Ala. 570. The legal title to the lot resides in the appellee Margolius, but it is admitted that he sold the lot to the husband, receiving from him full payment of the purchase money. Nor is it matter of dispute that the husband, on the purchase, entered into possession, and made valuable improvements, converting the lot into a homestead for himself and family. It is shown by the evidence of Brinson, in whose service the husband was engaged at the time of the purchase of the lot, that he loaned him the money to pay the purchase money, and that subsequently he and Ingram loaned or advanced him the greater part of the money to pay the improvements. It does not appear that subsequent to the marriage the wife had exceeding \$175 in money, and this was more than two years prior to the purchase of the lot; and it is not shown that any part of this sum ever passed into the possession or under the control of the husband, except as it may be matter of inference from the declarations he is said to have made to the vendor, Margolius, at the time of the purchase of the lot. These declarations, as testified to by Margolius, nearly 10 years after they were made, are that the

husband said he was making the purchase for his wife, and that she was furnishing the money. The testimony of Brinson is direct and positive to the specific facts that he loaned the husband, on his own credit, the money with which the purchase money of the lot was paid, and that he and Ingram loaned or advanced him the greater part of the money used in making the improvements. If the purchase money was loaned by Brinson, it could not have been furnished by the wife, as these verbal declarations import. These declarations are of a species of evidence which, for obvious reasons, in all courts of all times, is received with great caution; and the caution necessarily increases when, as in this case, there is such a lapse of time intervening between the making and the deliverance of the testimony of them, no fact being shown to impress them particularly on the memory of the witness. 1 Greenl. Ev. § 200; *Garrett v. Garrett*, 29 Ala. 439; *Wittick v. Traun*, 31 Ala. 199. We are not of the opinion that the evidence of these declarations should be considered as outweighing the evidence of Brinson, direct and positive to the specific facts that he loaned the husband, on his own credit, the money with which the purchase money of the lot was paid, and that he and Ingram loaned or advanced him the greater part of the money with which the improvements were made. The claim of the personal representative of the wife that the lot was her separate estate fails for the want of evidence to support it.

It is true that the grantee of the deed, which is absolute on its face, may, in a court of equity, have it declared a mortgage, and, as a mortgage, foreclose it. In such case, the same rule applies which is applied when the grantor asserts that such deed is not, as it purports, an absolute conveyance. It must be shown that the agreement that the conveyance should operate as a mortgage was contemporaneous with its execution, or, if subsequent, that it was supported by some new consideration; and the proof of the agreement must be clear and convincing. *Bryan v. Cowart*, 21 Ala. 92. We do not find in the record evidence to support the allegations of the cross bill in this respect. It may be the answer of the personal representative of the wife is susceptible of being construed as admitting the deed was intended as a mortgage. However that may be, the answer is not evidence against the infant defendants, her heirs, and the heirs of her husband. There is, of consequence, no error in the decree of dismissal of the cross bill, and in this respect the decree of the chancellor must be affirmed. The absolute conveyance, though prior in point of time to the mortgage to the appellant, was not interposed as a bar to the relief sought by the original and amended bills. On the contrary, it was agreed between the parties, the appellant and the complainants in

the cross bill, that the mortgage to the appellant was entitled to foreclosure. The debts secured by the mortgage are the debts of the husband, though the wife joined him in the execution of the bill single. The mortgage is properly executed and acknowledged to convey the homestead, and is a valid and operative security for the debts. The result is the decree of the chancellor on the original and amended bills must be reversed, and a decree here rendered granting appropriate relief to the appellant Ingram. It is referred to the register to take the proper account, showing the amount due complainant, including interest until the coming in of the report. All other questions are reserved for decision by the chancellor. Reversed, rendered, and remanded.

(99 Ala. 148)

PIERSON v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

EXCUSING JUROR—CRIMINAL LAW—INSTRUCTIONS.

1. A policeman summoned as a juror may be excused by the court, under Crim. Code, § 4335, allowing the court to excuse a juror for any "reasonable or proper cause."

2. In a trial for murder, an instruction to find the defendant guilty if the jury "believe from the evidence," etc., is erroneous, in omitting the clause, "beyond a reasonable doubt."

3. Where, under the evidence, defendant is guilty of murder, or of no offense, an omission to charge on the constituents of manslaughter is not error.

Appeal from circuit court, Pike county; John R. Tyson, Judge.

The appellant was indicted, together with one Will Jackson, for the murder of Robert Henderson, and convicted of murder in the second degree, and sentenced to the penitentiary for a term of 10 years. Reversed.

The testimony for the state tended to show that at a certain camp ground, in the county of Pike, a quarrel arose between the defendants Oliver Pierson, Will Jackson, and some other negroes from Brundidge, and some negroes from Troy, all of whom were on the camp grounds; that when deceased walked up, to quiet the fuss, the defendant, who had a pistol in his hand, met the deceased, and, cursing him, accused the deceased of having drawn a pistol on him; that the deceased denied this, and, while they were disputing about it, Will Jackson walked up, and tried to take the pistol from the defendant, saying that it was his; that the defendant refused to surrender the pistol at first, but that, after a few words exchanged between him and Will Jackson, he gave Will Jackson the pistol, and took up a baseball bat, and, going towards the deceased, again cursed him for having drawn a pistol on him, and said "that he was a great mind to break deceased's head open," at the same time drawing the bat back as if to strike; that the defendant made a motion as if to strike the deceased, once or twice, and, while in this threatening attitude, Will Jack-

son shot him, after which the defendant and Will Jackson ran off. The testimony for the defendant tended to show that the defendant and Will Jackson did not have any conversation, and that the defendant gave Jackson his pistol on Jackson's demanding it, saying that it was his, and further tended to show that when Jackson did the shooting the defendant did not have a baseball bat in his hand. The written charge given by the court at the request of the state, and to the giving of which the defendant excepted, was in the following language: "The court charges the jury, if several persons conspire to do an unlawful act, as to commit murder, all the members of such illegal combination are responsible for the act of each other, done in prosecution of their common purpose; and in this case, if the jury believe from the evidence that the defendant was acting in concert with Will Jackson, and that it was their common purpose and design to murder Robert Henderson, and that one of them, in pursuance of this common purpose, did murder him, in this county, before the finding of this indictment, then the defendant would be responsible for the act of his accomplice, whether he shot the pistol, or whether Will Jackson shot the pistol, if the evidence shows that it was done by either."

R. L. Williams, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was tried and convicted of murder in the second degree. The first exception is to the action of the court in excusing the juror Cowert, who had been drawn and summoned on the special venire. When his name was called he stated to the court that he was a member of the police of the city of Troy, and on active duty, and asked to be excused from service as a juror. The court excused him, and the defendant excepted. Section 4335 of the Criminal Code is as follows: "The court may excuse from service any person summoned as a juror, if he is disqualified or exempt, or for any other reasonable or proper cause, to be determined by the court." We are of opinion that the excuse given by the juror Cowert, that he was a policeman of the city of Troy, on active duty, was a "reasonable or proper cause," within the meaning of the statute. His duties as a policeman could not be attended to while serving as a juror. The case comes within the rule declared in *Farles v. State*, 85 Ala. 1, 4 South. Rep. 679, and *Maxwell v. State*, 89 Ala. 150, 7 South. Rep. 824. In the case of *Phillips v. State*, 68 Ala. 469, the juror claimed to be exempt from jury duty under the provisions of a special statute, and the trial court so held. This court held that the facts did not show he belonged to the class exempted by the statute. Section 4335 of the Code was not considered in that case,

and the juror was not excused under its provisions.

The second exception is to the giving charge No. 2 for the prosecution. The objection to this charge is that the jury were instructed, "if they believe from the evidence that the defendant was acting in concert with Will Jackson," etc. The precise objection is that the degree of proof required by the charge is too low. Being a criminal trial, the law requires that the proof must satisfy the jury "beyond a reasonable doubt," to authorize a conviction. The proposition is certainly correct. A jury should not convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the defendant's guilt. Section 2756 of the Code declares that "charges moved for by either party \* \* \* must be given or refused in the terms in which they are written \* \* \* and may be taken by the jury with them on retirement." Certainly, the charge, as given, is not the law. It does not appear anywhere in the record that the court instructed the jury as to the measure of proof required, in criminal cases, to authorize a conviction. In the charge given, they are instructed "that, if they believe from the evidence," that is sufficient. The jury had this charge "with them on their retirement." The jury are bound by the instruction of the court. They may have believed the facts predicated in the charge, and yet have not been satisfied of their truth, beyond a reasonable doubt. There is no presumption of error without injury, in a criminal case, in this state. We are aware that it has been held differently in other courts, and that the giving of such a charge merely calls for an explanatory charge, to the effect that "to believe from the evidence" requires the jury "to be satisfied beyond a reasonable doubt." *People v. Sheldon*, 68 Cal. 434, 438, 9 Pac. Rep. 457. We cannot consent to the doctrine. If a court should charge a jury in a civil case that they must be satisfied beyond a reasonable doubt of any fact in dispute, this court would not hesitate to reverse, and we cannot see why, if "to believe from the evidence" is not error, and merely calls for an explanatory charge, why "to believe beyond a reasonable doubt," in a civil case, should be error, and not held to be a mere statement of law, which calls for an explanatory charge. Furthermore, we regard the rule as to giving explanatory charges as applying only when the charge given asserts a correct proposition of law, but from its phraseology, or some other cause, is calculated to mislead the jury, but we cannot sanction the application of the rule in cases where the charge given asserts absolutely an incorrect proposition of law. Under this doctrine, every erroneous charge given must be held to be cured by subsequently giving a correct charge. What is a jury to do, with two charges given for their guidance, which

assert two propositions of law,—the one instructing a conviction if they "believe the evidence," the other instructing them not to convict unless "they are satisfied beyond a reasonable doubt?" We hold the court erred in giving the charge. We are aware that in some cases in our own courts, where the facts were not disputed, and the only question was whether, as a matter of law, upon the undisputed facts, the defendant was guilty, the general charge was given, to convict if the jury "believed the evidence," and no exception was taken to the charge on this account.

The law of conspiracy, as applicable to the facts of this case, has been so fully and clearly stated in the cases of *Martin v. State*, 89 Ala. 115, 8 South. Rep. 23, and *Tanner v. State*, 92 Ala. 1, 9 South. Rep. 618, we content ourselves with one extract from each case. In the first it is said, on page 118, 89 Ala., and page 24, 8 South. Rep.: "Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony. Nor need it be shown that there was prearrangement to do the specific wrong complained of. When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, or encourage each other in whatever may grow out of the enterprise upon which they enter, each is responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators. And it is not necessary to this equal accountability that positive proof be made of the unlawful common purpose with which the enterprise was entered upon. It may be inferred from the conduct of the participants. 'All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable, in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. \* \* \* And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist to the death all opposers, and, in the execution of their design, murder is committed, all of the company are equally principals in the murder.' 1 Whart. Crim. Law, § 220. 'It should be observed, however, that, while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals.' Id. § 397. And this is the general doctrine on the subject. *Smith v. State*, 52 Ala. 407; *Jordan v. State*, 79 Ala. 9; *Williams v. State*, 81 Ala. 1, 1 South. Rep. 179; *Amos v. State*, 83 Ala. 1, 3 South. Rep. 749; 1 Bish. Crim. Law, § 649." And in *Tanner's Case* it is said, on page 6, 92

Ala., and page 615, 9 South. Rep.: "And this criminal accountability extends, not alone to the enterprise, adventure, or encounter in which the conspirators are engaged, but it takes in the proximate, natural, and logical consequences of acts intentionally done; and one who is present, encouraging or ready to aid another in such conditions, must be presumed to be cognizant of that other's intention, to the extent above expressed. If such conspiracy or community of purpose embrace the contingency that a deadly encounter may ensue, with the common intention, express or implied, to encourage, aid, or assist, even to the taking of life, should the exigencies of the encounter lead up that result, then, as a general rule, the act of one becomes the act of all, and the one who encourages, or stands ready to assist, is alike guilty with the one who perpetrates the violence. And such community of purpose or conspiracy need not be proved by positive testimony. It rarely is proved. The jury are to determine whether it exists, and the extent of it, from the conduct of the parties, and all the testimony in the cause. *Williams v. State*, 81 Ala. 4, 1 South. Rep. 179; *Martin v. State*, 89 Ala. 115, 8 South. Rep. 23; *Gibson v. State*, 89 Ala. 121, 8 South. Rep. 98." Keeping these principles in view, the trial court will have but little difficulty in forming its own charge, and in determining the correctness of charges requested by either side.

We do not think the court erred in not charging the jury, of its own motion, as to the constituents of manslaughter. Under the facts as disclosed in the record, the defendant was guilty of murder, or of no offense for which he could be convicted under this indictment. We do not know that the evidence will be the same on another trial, and we state that it is much the safer rule to charge upon all the degrees of homicide included in the indictment, when a party is on trial for murder, unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree.

There was evidence tending to show a preconcert—a community of purpose—on the part of Will Jackson and the defendant to take the life of deceased, and that defendant was present, aiding, encouraging, or abetting Will Jackson, and that defendant himself entertained malice, and had the intent to take life. But it was for the jury to say what credit should be given to this evidence. Under the facts of the case, as disclosed in the record, the law is that if Jackson entertained malice towards deceased, and had the intent to kill him, unless the defendant also, on his part, entertained malice, or unless he knew that Jackson entertained such malice and intent, and, with knowledge or notice of such malice and intent, aided, encouraged, or abetted him, the defendant

ought not to be convicted of murder. *Tanner's Case*, supra; *Jordan v. State*, 79 Ala. 9. There was evidence tending to show these conditions existed, but it was a question for the jury to say what weight should be given to this evidence. The charges requested by the defendant, which referred these questions to the jury, should have been given. We need not specify the charges, and it would not be proper to particularize the facts. Nothing we have said contravenes or limits the rule which holds an accomplice responsible "for acts which are the direct, proximate, natural result of the common purpose or conspiracy," but our purpose is to emphasize the fact that the jury should say, from all the evidence, whether a particular act was within the scope of the common purpose, or grew out of the individual malice of the perpetrator. *Tanner v. State*, supra. What we have said will suffice on another trial.

Reversed and remanded.

(100 Ala. 600)

#### WOOD v. RICHMOND & D. R. CO.

(Supreme Court of Alabama. June 22, 1893.)

CARRIERS — OBSTRUCTED PLATFORM — CONTRIBUTORY NEGLIGENCE OF PASSENGER.

Where a passenger in passing from the station to a train fell over lumber obstructing the platform in part, which he knew was on the platform, but had forgotten at the time he fell, he was guilty of contributory negligence.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

This was an action brought by W. H. Wood against the Richmond & Danville Railroad Company to recover damages for personal injuries, alleged to have been suffered by reason of the defendant's negligence. There was judgment for the defendant, and plaintiff appeals. Affirmed.

John S. Jemison, for appellant. James Weatherly, for appellee.

COLEMAN, J. The plaintiff, Wood, sued to recover damages for personal injuries. There is no substantial conflict in the evidence, and we are of opinion that the defendant was guilty of negligence as averred in the complaint. The main question is as to whether the plaintiff was guilty of contributory negligence. The facts show that about 6 o'clock P. M., October 4, 1890, plaintiff arrived at Pell City, to take passage on defendant's road for Birmingham; that he purchased a first-class ticket; that the train was delayed until about 1 o'clock A. M.; that the route from the station house to the train was over a platform prepared by the defendant for the use of passengers; that there were pieces of lumber and cross-ties on the platform, obstructing in part the passageway; that there was room sufficient for passengers on the platform between the pile of lumber and the edge of the platform;

that it was dark, and defendant had no lights, and that in attempting to reach the train at the place where passengers were accustomed to board the train he stumbled over the obstruction, and was injured. There was other evidence tending to show the same facts. Plaintiff himself testified that he had seen the lumber and obstruction on the platform, and knew its location, but testified that at the time he stumbled upon the obstruction "he did not recollect the fact that he had seen the timbers the evening before." The passenger train had been standing some time on a side track, near the station, and convenient to it, waiting until a freight train moved out from the depot on the main track. There does not appear to have been any emergency for unusual haste. As we have said, the defendant was guilty of negligence in failing to have the passageway cleared of obstructions, or in not having sufficient light to enable the passengers to see the obstructions. It does not appear that there was any difficulty in passing along the platform by one who knew of the obstruction, if he was at all careful. Did inattention, thoughtlessness, forgetfulness, or, in the language of the plaintiff, that at the time "he did not recollect having seen the timbers there the evening before," constitute such contributory negligence per se as to justify the giving of the affirmative charge by the court for the defendant? In the case of *Railroad Co. v. Hall*, 87 Ala. 719, 6 South. Rep. 277, in reference to an employe suing the road, the court uses this language: "On the other hand, if he has been sufficiently warned or notified, and from inattention, indifference, absent-mindedness, or forgetfulness he fails to inform himself, or fails to take the necessary steps to avoid the injury, this is negligence, and he should not recover;" citing many authorities to the proposition. The facts of the case of *Railroad Co. v. Arnold*, 84 Ala. 159, 4 South. Rep. 359, in some respects were similar to the one now under consideration. The station house or ticket office was upon an elevated platform. The descent from the platform was by means of a narrow stairway. Arnold was familiar with the way of descent, and was "cautioned to look out for the steps." It was dark, and there were no lights, and plaintiff did not call for lights. As he attempted to descend to board the train, he deflected too far to the right, missed the steps, and fell and was injured. Arnold's fall was not occasioned by forgetfulness or absent-mindedness. His purpose was to descend the steps, but he missed them. The court held, though not unanimously, that under the circumstances of the case the question of contributory negligence was a fact to be determined by the jury. The difference between the case and the one at bar is this: In the former, the injured party had in mind the difficulty of the descent, and, according to his testimony, was endeavoring to descend by the stepway, but mistook its exact location.

In the case at bar no lights were called for; there was no thought of the obstruction, and heedlessly or from forgetfulness the plaintiff stumbled and fell. We think his own testimony shows that he was guilty of contributory negligence. We cannot foresee the result if it be once admitted that mere forgetfulness or inattention can excuse negligence. We find no error in the record, and the judgment must be affirmed.

(101 Ala. 376)

#### OXFORD LAKE LINE v. STEADHAM.

(Supreme Court of Alabama. June 22, 1893.)

RAILROAD COMPANIES—NEGLIGENCE—FRIGHTENING HORSES—ESCAPE OF STEAM.

1. A complaint against a railroad company for negligence is sufficient which alleges that plaintiff's mule was frightened at the unnecessary noise of defendant's train near a highway, and "owing to the negligence of the defendant's employes running and managing said cars."

2. Where the steam is allowed to escape from an engine in order to slow up, as is necessary, to make a sharp curve in the track, and a mule driven on a road running parallel thereto is frightened thereby, and runs away, the railroad company is not liable.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Action by William Steadham against the Oxford Lake Line to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant's employe. There was judgment for the plaintiff, and defendant appeals. Reversed.

The allegations of negligence, as contained in the first count of the complaint, are as follows: "That on the said — day of August, 1891, plaintiff was riding from Oxford eastward in a buggy, drawn by a mule hitched thereto, along the public highway in the town of Oxford, about one-quarter of a mile east of the business block thereof, where the public highway and the Oxford Lake Line run side by side, when he [the plaintiff] was overtaken by the engine and cars running on said line; and that, just as they were almost even with, or in seven or eight yards of, plaintiff, the engineer thereof, with gross recklessness and negligence, unnecessarily caused the steam to escape from the engine, the sight and noise of which frightened said mule, and caused him to run away with the buggy, and plaintiff was thereby thrown from said buggy and greatly injured; that his collar bone was badly injured, his right arm partly paralyzed, and his spine injured;" for which injuries complainant brings said suit. The allegations of negligence, as contained in the sixth count, after setting up the fact of the defendant's mule becoming frightened and running away, are as follows: "That the mule became frightened and started to run, owing to the negligence of the defendant's employes in running and managing said cars, causing great damage to plaintiff as

aforesaid," etc. The demurrers to this last count of the complaint are substantially as follows: (1) That it does not sufficiently appear that plaintiff was injured by reason of defendant's negligence; (2) that the defendant is not liable for the fright caused plaintiff's mule in the use and running of its cars; (3) that the defendant's negligence, as alleged in the said sixth count, is too remote. These demurrers were overruled.

J. J. Williett, for appellant. Kelly & Methrin, for appellee.

**HARALSON, J.** There were originally five counts in the complaint, to which, by amendment, a sixth was added. The defendant demurred to each count, but before the demurrer was passed on the plaintiff amended his complaint by striking out all the counts except the first and sixth, the demurrers to which were overruled, and defendant took issue on them. In the written agreement of appellant's counsel filed in the cause it is admitted that the first count is a good one, and the assignment of error based on its overruling is waived. The averments of negligence in the sixth count are such as have many times been held to be sufficient. *Railroad Co. v. Thompson*, 62 Ala. 500; *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. Rep. 877; *Railroad Co. v. Watson*, 90 Ala. 41, 7 South. Rep. 813; *Stanton v. Railroad Co.*, 91 Ala. 382, 8 South. Rep. 798; *Railway Co. v. Chewing*, 93 Ala. 24, 9 South. Rep. 458.

The principles upon which this case rests have been well settled. It is laid down by *Pierce* in his work on Railroads that "the authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines, as in the escape of steam and rattling of cars; and also the right to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is therefore not liable, while exercising its right in a lawful and reasonable manner, for injuries occasioned by horses, when being driven upon the highway, taking fright at such noises; but if the injury resulting from the fright would not have happened but for a breach of duty by the company, it will be liable for the injury." *Pierce*, R. R. 348. *Rorer* states the principles to the same effect, and adds: "But if the acts of the servants occasioning the fright are wanton and malicious, and be done in the discharge of their business by using the appliances of the company, such as wanton whistling of the engine, and the reckless discharge of steam, the company will be liable." *Ror. R. R.* 704, (12.) In *Railroad Co. v. Stinger*, 78 Pa. St. 225, in a case similar to this, it is said: "It may be safely assumed that the company are not liable for injuries resulting from the use of their cars, where due care is exercised. The noise

of a rapidly moving train, as well as the sound of the whistle, may alarm a horse, and cause an accident. Whether such accident imposes a liability upon the company to make compensation in damages must depend, to a great extent, upon the fact whether it was the result of a want of proper care on the part of the persons in charge of such train." In that case the fright and running away of the horse, and the consequent injury to the plaintiff, were alleged to have been occasioned by the unnecessary and improper blowing of the whistle of the engine, and it was held that the mere fact of the whistling furnished no presumption of negligence, inasmuch as the whistle was in general use on all roads operated by steam, and was necessary and proper to be used; but whether or not it was used in such an improper, reckless, or wanton manner as to amount to negligence was a subject of legitimate inquiry to be submitted under all the facts of the case to the jury. In *Stanton v. Railroad Co.*, supra, the foregoing principles received approbation at our hands, and it was further held that, "as the railroad corporation has the right to use its track, and make the required signals at a public crossing, and all the usual noises incident to the running and moving of its trains, it was incumbent on the plaintiff to show the blowing off of steam and the making of the noise complained of were unnecessary, and recklessly or wantonly done, or with the intention to frighten the mare." The evidence in this cause showed without contradiction that the plaintiff, at the time he was injured, was riding in a buggy, with another party, drawn by a mule, returning home from the town of Oxford; that the mule was a gentle one, had never run away before, but would sometimes shy or dodge; that the public highway he was traveling ran parallel with a street in said town, along which the defendant's railroad ran, but how far apart is not shown further than that at the point of the accident the track came within about 30 feet of the public road the defendant was traveling, and at that point it turned by a sharp curve to the right, and ran away from said road; that the engine of the defendant's train was under the management of a skillful and competent engineer; that as the train was approaching said curve it was running about six miles an hour, and steam was being blown off under the engine, at which plaintiff's mule took fright, ran off, threw him out of the buggy, and injured him. The evidence on the part of the defendant showed that it was the invariable custom of the engineer, in approaching said curve, to let off steam, to slow up in making the curve; that he did not allow any more steam to escape than was necessary or customary; and the engineer swore he had no idea or thought of frightening plaintiff's mule. There is nothing in the plain-

tiff's evidence to contradict that offered by defendant, or at variance with it, unless it be a statement by one Brown, examined by the plaintiff. He was an engineer, and the statement to which we refer is "that witness had been on the car going to Oxford Lake many times, and did not know any place where it was necessary to let off steam." This statement was, in effect, that the witness did not know of or remember the curve in this railroad at the time he testified. He says nothing about the curve in his testimony, and the other undisputed evidence in the cause shows it was a very sharp one. The engineer states, in reference to it, "that said curve, near which the accident occurred, was and is a very sharp curve, and persons could not be seen on the track ahead until said curve had been entered." It was his duty to slow up, and make that turn in the track with great caution. As we said in a recent case, touching this matter, we may here repeat, that in running a train where a curve is to be turned, and where the view is obstructed, "the sharper the curve the greater the care with which trains, as to their speed, should be operated, to prevent the liability to encounter obstacles hidden by reason of the curve. Where anything suggests care to avoid peril and danger to others, the higher the duty increases to observe it." *Railroad Co. v. Harris*, 13 South. Rep. 377, (at present term.) So there is nothing in the evidence of this witness to dispute or set aside the other undisputed evidence in the cause,—that the train of defendant was being operated at the time by a careful engineer, in a prudent manner, and with no more noise or escape of steam than was usual and necessarily incident to its movement. The plaintiff's injury arose from no negligence of the defendant's employees, and was an accident for which defendant is in no way responsible. The general charge, as requested by defendant, should have been given. Reversed and remanded.

#### SEWELL v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

##### APPEAL—MATTER NOT APPARENT *N* RECORD.

An order overruling a motion to quash a venire on extrinsic facts stated in the motion cannot be reviewed unless the record show that some proof of them was made or offered.

Appeal from Geneva county court; Jere Merritt, Judge.

The appellant in this case was indicted, tried, and convicted for carrying weapons concealed about his person. Affirmed.

The only question reserved on this appeal is the court's overruling the defendant's motion to quash the venire. There were several grounds of this motion, but there was no evidence introduced to support said motion,

and the opinion of this court renders it unnecessary to set out these grounds in detail.

John A. Ragland, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. There is nothing in this case to review. The defendant moved to quash the venire based on certain extrinsic facts stated in the motion. If those facts, or any of them, in law constituted a sufficient ground for the motion, (which we do not, by any means, intimate is true,) the record does not show that any proof of them was made or offered to be made. It simply shows that the motion was made and overruled.

Affirmed.

(99 Ala. 123)

#### SEWELL v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

##### CARRYING CONCEALED WEAPONS—EVIDENCE.

Since an officer, under Code, § 4262, may without a warrant arrest a person for an offense committed in his presence, defendant cannot, in a prosecution for carrying concealed weapons, object to the testimony of a witness that he found such weapon on defendant while assisting in his arrest by a constable without a warrant. He should at least show that the arrest was in fact unlawful.

Appeal from Geneva county court; Jere Merritt, Judge.

The appellant was indicted, tried, and convicted for carrying weapons concealed about his person. The only question which is considered by the court goes to the ruling of the lower court upon certain evidence, and this is sufficiently shown in the opinion.

John A. Ragland, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. State's witness Joe Davis testified that he saw defendant with a pistol concealed about his person; that he discovered it while he was assisting the constable in making an arrest on the defendant's person; that defendant gave one of his pistols to the constable, on demand made by constable; that the constable had no warrant for the arrest of defendant, but arrested him for a violation of section 3775 of the Criminal Code of 1886, and found a pistol in his pocket. We have copied substantially the language of the witness, as disclosed by the bill of exceptions. The defendant moved to exclude all the above testimony on the ground that the pistol was discovered by said witness while making or assisting in making an unlawful arrest, and excepted to the overruling of the motion. The fact that the concealed pistol was discovered by the witness while he was assisting the constable in making an unlawful arrest of the defendant did not necessarily render the testimony of the witness inadmissible. We presume the objection is based upon the proposition that the discovery of the guilt was brought

about by the unlawful exercise of official authority and power on the part of the constable, and that it would be against public policy, if not an invasion of a constitutional immunity of the citizen, to suffer information so obtained to be used against the defendant. This case does not call for any decision on that subject, and we declare no rule touching the admissibility of information so obtained. We refer to *Chastang v. State*, 83 Ala. 29, 3 South. Rep. 304; *Terry v. State*, 90 Ala. 635, 8 South. Rep. 664; and *Scott v. State*, 94 Ala. 80, 10 South. Rep. 505. In the first place, it does not appear that the arrest was unlawful. An officer may arrest a person without warrant for any public offense committed in his presence. Code, § 4262. For ought that appears, this arrest was of that character. In the second place, it may well be inferred from this witness' testimony that the discovery of the concealed pistol by the witness had no relation to any act done by the constable in or about making the arrest. The fact, as shown by at least a distinct part of the testimony objected to, was simply that the discovery occurred while the witness was assisting in making the arrest. The motion to exclude went to the whole testimony. If any part of it was admissible, the motion was properly overruled. Such was the case here. There was also a general motion to exclude all the testimony of the witnesses Ed and Jesse White, and the bill of exceptions shows that the testimony of Ed White is not set out. We cannot, therefore, pass upon its admissibility. The motion was general, including that as well as the testimony of Jesse White. There is no error in the record, and the judgment is affirmed.

(99 Ala. 162)

#### COX v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

##### ADULTERY—EVIDENCE—INSTRUCTIONS.

1. On a prosecution for adultery, there being evidence that the woman with whom defendant was charged to have lived in adultery was a woman of lewd character, a requested charge, that the fact of her having a bad character for virtue would not aid the prosecution, unless defendant's guilt was otherwise proven, was properly denied.

2. A charge that the fact that defendant was in and about the house of the woman was not enough to convict them of adultery was properly denied, there being other testimony which it ignored.

Appeal from circuit court, Barbour county; J. M. Carmichael, Judge.

Richard Cox was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, that Dick Cox, a negro man, and Dura Gratehouse, a white woman, did live together in a state of adultery or fornication, against the peace," etc.—and appeals. Affirmed.

On the trial of the case, as is shown by the bill of exceptions, the state introduced evi-

dence tending to show that Richard Cox, a colored man, and Dura Gratehouse, a white woman, lived in Barbour county, near each other; that Richard Cox was at the time of the finding of the indictment, and of the trial, a married man, and Dura Gratehouse was a woman of lewd character; that the defendant was often seen at and about the house of said Dura Gratehouse; and that within the time covered by the indictment the defendant was seen at the house of said Dura Gratehouse, on the bed with her,—his pants unbuttoned and down, and her clothes up; and that this was in the nighttime. The defendant did not introduce any testimony, and upon the testimony, as introduced, the defendant requested the court to give two charges. The first of these charges is copied in the opinion, and the second is in the following language: "The fact, if it be a fact, that Richard Cox was seen in and about Dura Gratehouse's house, is not enough to convict them of the offense of adultery. The state must go further, and prove the offense of adultery." The exception reserved to the refusal to give these charges is set forth in the opinion.

Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. Two written charges were asked by defendant, and, proceeding, the bill of exceptions employs this language: "Which charges the court refused to give. To the refusing of said charges, the defendant, Richard Cox, severally excepted." Can we safely construe this language as meaning that defendant reserved a separate exception to the refusal of the court to give each of the two charges requested? 3 Brick. Dig. p. 80, §§ 34, 37, 41. But we need not decide this case on this question. Neither of the charges asked should have been given. The first reads thus: "The fact, if it be a fact, that D— G— [the female with whom defendant was charged to have lived in adultery] has a bad character for virtue, does not aid the state, unless it has otherwise proven his guilt as charged in the indictment." One recital in the bill of exceptions is as follows: "The evidence for the state further tended to show that D— G— was a woman of lewd character." This testimony had been introduced without objection, so far as the record informs us. If this charge had been given, it would have been a practical denial of all criminating inference to be drawn from the testimony of her character for lewdness. This because it instructed the jury to ignore that testimony unless the state had otherwise proven defendant's guilt. If his guilt had been otherwise proven with the degree of certainty required in criminal cases, then the testimony of her bad character could have had no field of operation, and no purpose to accomplish. A charge asked, which ignores the probative force of testimony which



is before the jury without objection, is rightly refused. 3 Brick. Dig. p. 111, § 83.

The other charge is equally faulty. It mentions only one of the criminating circumstances testified to, and asks the instruction that that is not enough to justify a conviction. It entirely ignores other testimony, which was much more damaging in its tendencies than that mentioned. It was the duty of the jury to weigh all the testimony pro and con, and from its combined effect to make up their verdict. Such charge tends to mislead, and is to some extent an argument. It was rightly refused. 3 Brick. Dig. p. 111, §§ 73, 75, 79, 83; Id. p. 112, § 87; *Smith v. State*, 88 Ala. 73, 7 South. Rep. 52. Affirmed.

(36 Ala. 621)

BROMBERG et al. v. BATES et al.

(Supreme Court of Alabama. June 22, 1893.)

EXECUTORS AND ADMINISTRATORS—REMOVAL OF PROCEEDINGS INTO CHANCERY—PLEADING.

1. Persons interested as distributees of an estate may have the administration removed from the probate to the chancery court, without showing any special equity.

2. A bill to remove administration to the chancery court is not demurrable for averments that the executor's inventory is not "full and complete," as required by statute, and setting forth the items complainants believe to have been omitted, though a petition to correct the inventory might be made after the removal.

3. Under Code Ala. § 2000, permitting any one interested in a will, who has not contested as therein provided, at any time within five years after probate to contest by bill in chancery, a bill by next of kin to remove administration into chancery, and claiming property as belonging to the estate, which is not mentioned in the will, is not demurrable for uncertainty in "neither affirming nor denying" the validity of the will, such validity being immaterial to the relief prayed.

4. A bill charged that respondent F., executor of the will, was testatrix's attorney, and so had great influence over her, and she had great confidence in him; that F. was the brother-in-law of respondent Z., the latter's wife being F.'s sister; that Mrs. Z. was a legatee under the will; that just before testatrix died she owned a mortgage against Z.; that F. omitted this from his inventory; that it had never been paid, and if it was given away by testatrix it was given to some of respondents, under undue influence exercised by them, and so the gift was invalid against testatrix and complainants, her next of kin. *Held*, that these several averments would be read together, and not deemed impertinent; and that so the bill was demurrable for not charging F. directly with exercising the undue influence.

5. Under Code Ala. § 3424, permitting waiver of sworn answer "when a bill is filed for any other purpose than discovery only," a bill to remove administration to the chancery court, and claiming interests in property alleged to belong to the estate, but not included in the will nor in the executor's inventory, is not demurrable for waiving a sworn answer.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

The bill in this case was filed by

Theodore C. Bates and others against Frederick G. Bromberg and others for the purpose of having the administration and settlement of the estate of Susan F. Rouse, deceased, removed from the probate court of Mobile county into the chancery court. The present appeal is prosecuted from two interlocutory decrees of the chancellor overruling the respondents' demurrer to the original bill, and to the bill as amended. Reversed and remanded.

The complainants, in their bill of complaint, allege that Susan F. Rouse died September 7, 1891, in Mobile, leaving both real and personal property; that she left an instrument that purported to be her last will and testament, which was admitted to probate as such in the probate court of Mobile county. The bill then continued that complainants "did not know if said instrument was a free and voluntary act of said Susan F. Rouse in the distribution of her property or not." The bill shows further that the defendant Frederick G. Bromberg was nominated in said will as executor without bond, and has qualified as such; and further avers that the appellant Bromberg was said Susan F. Rouse's attorney during her life, "and that she had great confidence in the said Frederick G. Bromberg, and he, knowing such confidence, and the relationship of attorney and client existing between them, had great influence over said Susan F. Rouse." The bill further avers that said Bromberg has filed his inventory of the said Susan F. Rouse's estate, and then alleged that said Susan F. Rouse, at her death, had in her possession a family Bible; that she left more than \$8,500 in money, which, at the time of her death, was in said Bromberg's possession as her attorney; that a short time before her death she owned more than \$5,000, face value, of the capital stock of the People's Bank of Mobile; that a short time prior to her death she owned and held a mortgage for some amount unknown to complainants, made to her by E. O. Zadek; that she had an undivided one-third interest in some real property in Mobile and a lot of land in said city, and that none of these items were included in said Bromberg's inventory of Mrs. Rouse's estate made by him as the executor thereof. The bill further states that the said family Bible is in the said Bromberg's possession; that the Zadek mortgage has never been paid or satisfied; that, if said mortgage has been given away, it has been given to some of the defendants, and, if given away, that Mrs. Rouse was induced to give it away by the exercise of undue influence by the parties to whom it was given, or of some parties connected with or interested in them, and that such gift of said mortgage was void as to Mrs. Rouse and her heirs at law and next of kin. The bill

further alleges that the inventory filed by said Frederick G. Bromberg omits any mention of the \$5,000 of the People's Bank stock; that the said stock was owned by Mrs. Rouse at the time of her death; and also that if it was given away, or otherwise disposed of, during her life, it was for no valuable consideration, to some of the defendants, and that she was induced to so give it away and dispose of it by the exercise of undue influence on the part of some person or persons unknown to the complainants. Similar averments are made respecting the real property. The bill further avers that said inventory sets out as a part of the property of said Susan F. Rouse at the time of her death certain Alabama bonds, but that the complainants did not know if said bonds were in fact owned by Mrs. Rouse at the time of her death; that she did not own more than seven of said bonds, and that said Bromberg purchased the remainder after her death, with money left by her. The bill then alleges that they are the said Susan F. Rouse's first cousins and next of kin, but said Bromberg denies the relationship; that said Bible, in his possession, contains valuable information as to the family connections of said Susan F. Rouse, of great importance to the complainants in showing their relationship to her. The bill then contained this averment: "Complainants show unto your honor that their interests in said estate are not safe in the hands of said Frederick G. Bromberg, unless and until he is required to give a good and sufficient bond for the performance of his executorship." The bill further avers that by reason of several controversies that have arisen, or which will probably hereafter arise, in and about said several items omitted, as aforesaid, from said inventory, the administration of said estate will be complicated, and that the equities of the several parties can be more fully and more readily settled in the chancery than in the probate court. The prayer of the bill is that the administration of said estate be removed into the chancery court; that the chancellor "will ascertain and decree said several items of property hereinbefore mentioned, or the proceeds thereof, to belong to the estate of the said Susan F. Rouse, and will cause said executor to amend his inventory so as to set out said property therein, and will cancel and set aside any pretended conveyances or dispositions of said several pieces of property or to the proceeds thereof that may be claimed to have been made during the lifetime of the said Susan F. Rouse;" that said Bromberg, as executor of Mrs. Rouse, will be required to give bond; that the court will ascertain and determine the rights of complainants as next of kin of Mrs. Rouse, and will cause said estate to be settled and distributed at the

present time; and for general relief. Answer under oath was waived as to all the defendants. The defendants interposed demurrers to the bill as originally filed, one of the grounds of which was that the bill was without equity, because it was filed for the purpose of discovery, and waives answer under oath, thereby depriving the answer of all weight as evidence. Each of these grounds of demurrer were overruled, and this is one of the decrees appealed from. Complainants afterwards amended their original bill as to the averments of their relationship to Susan F. Rouse, deceased, as contained in the eighth paragraph, so as to make it read as follows: "Complainants show unto your honor that they are the first cousins of the said Susan F. Rouse, deceased, and, as such, are entitled to such portions of said property as are not specifically disposed of by said will, including said money which was on hand at the time of the death of the said Susan F. Rouse, but which had been invested in Alabama bonds since her death; and this whether said instrument is valid as the said last will and testament of the said Susan F. Rouse, or not. If said instrument so probated as the last will and testament of the said Susan F. Rouse is not valid as her last will and testament, then complainants are entitled to her entire estate, after the payment of the debts of the said Susan F. Rouse, her funeral expenses, and the expenses of administering her estate; but complainants do not know whether said instrument is valid as such last will and testament or not, and, as they are advised that this is immaterial to the relief for which they seek in this bill of complaint, they neither affirm nor deny the same, and seek for no relief predicated upon the validity, or invalidity, of said will." The prayer of the bill was amended so as to limit the court to ascertaining the appellees' rights "in and to the property above set forth as not having been disposed of by said will, including the Alabama bonds, which have been purchased with the money belonging to the estate of the said S. F. Rouse at the time of her death, as above set forth, and will, at a proper time, cause said property and bonds to be distributed as the rights of complainants shall appear." The defendants demurred to the bill as amended, assigning the following grounds: (1) To so much of the same as alleges in the second paragraph that "complainants do not know if said instrument was the free and voluntary act of said Susan F. Rouse in the disposition of her property or not," because the said allegation does not present an issue of fact material to the relief. (2) To so much of the same as alleges in paragraph 4 that "during the lifetime of said Susan F. Rouse the said Frederick G. Bromberg was her attorney,

and that she had great confidence in the said Frederick G. Bromberg, and he, owing to such confidence and the relationship of attorney and client existing between them, had great influence over said Susan F. Rouse," because it does not present an issue material to the relief prayed by the bill. (3) To so much of the same as alleges in paragraph 5 that "she [Susan F. Rouse], also, a short time prior to her death, owned and held a mortgage for some amount unknown to complainants, made to her by said E. O. Zadek, together with the debt secured by said mortgage," because the same does not present an issue material to the relief prayed by the bill. (4) To the eighth paragraph of the same, "because said allegations are a predicate for repugnant claims, and because said allegations make said bill vague and uncertain as to the nature and extent of complainants' claim." (5) To the eighth paragraph, "because it shows that complainants are seeking to split up their causes of action, and to maintain a multiplicity of suits. Said allegations show that complainants are claiming under the will in the present suit, but reserve the right to claim against the will in some subsequent suit, and that said allegations show that complainants do not state their right to relief in a positive and certain manner, so as to relieve respondents from a multiplicity of suits hereafter." (6) To so much of the bill as alleges in the tenth paragraph that complainants "show to your honor that their interests in said estate are not safe in the hands of said Frederick G. Bromberg unless and until he is required to give a good and sufficient bond for the performance of his executorship," because the allegations are conclusions of the pleaders, and no facts are stated to support them. (7) To the whole bill, "because the same is without equity, because the bill is filed for the purpose only of discovery in aid of an administration of an estate, and waives answer under oath, thereby depriving the answer of all weight as evidence." The appellant Frederick G. Bromberg, individually and as executor of said Rouse, demurred to the bill, because "it is uncertain whether the same recognizes the last will and testament of Susan F. Rouse as a valid will, and this respondent the lawful executor thereof, and only seeks an accounting from him as such executor, or whether it is filed only to establish the right of complainants to some of the property in his hands, and seeking to reserve a right to assail the validity of said will hereafter, and this defendant's rights as executor thereof, thereby splitting up their causes of action, and subjecting this respondent to a multiplicity of suits." The chancellor overruled all of said demurrers by decree rendered December 5, 1892, from which also this appeal was taken.

Frederick G. Bromberg, for appellants.  
Thos. H. Smith and Gregory L. & H. T. Smith, for appellees.

COLEMAN, J. The bill was filed in the chancery court by Theodore O. Bates et al. for the purpose of having the administration and settlement of the estate of Susan F. Rouse removed from the probate court to the chancery court. The bill avers that complainants are the heirs at law and next of kin to deceased. It is the settled law of this state that any person entitled to share in the distribution of an estate, whether as devisee, legatee, or as an heir at law, without showing any special equity, has the right to have the administration of such estate settled in a court of equity. The reasons have been so often stated it is unnecessary to repeat them. *Gould v. Hayes*, 19 Ala. 438; *Moore v. Randolph*, 70 Ala. 575; *James v. Faulk*, 54 Ala. 184; *Hill v. Armistead*, 56 Ala. 118; *Teague v. Corbitt*, 57 Ala. 529; *Bragg v. Beers*, 71 Ala. 151; *Otis v. Dargan*, 53 Ala. 178. The demurrer to the bill for want of equity was properly overruled. It is not cause for demurrer to a bill filed to remove an administration from the probate court to the chancery court that the inventory filed by the executor is not a "full and complete" inventory as required by the statute. A petition to this effect might be filed after the chancery court has assumed jurisdiction of the settlement of the estate, but it is quite proper, in the bill itself, if deemed necessary, to furnish a statement of all the effects believed to have been omitted from the inventory, or for which the complainants propose to charge the administrator, or claim as assets belonging to said estate. *Hunley v. Hunley*, 15 Ala. 91. The bill shows that deceased left a last will and testament, which has been duly probated as her last will and testament. There are no devises or bequests by the will to complainants, but the bill shows that a large portion of testatrix's estate was undisposed of by will, and that as to such part she died intestate. It is as to the property of which she died intestate that complainants claim in their bill to be entitled to as her next of kin and lawful heirs. Section 2000 of the Code provides that "any person interested in any will who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this state, contest the validity of the same by bill in chancery," etc. The present bill is not one filed to contest the validity of the will under this section, and its validity cannot become an issue in this case. The bill merely states that the will has been probated, "neither affirming nor denying its validity;" and avers that a large estate, specifying the property, was left undisposed of by will. If the averments of the bill are true, and on demurrer must be taken to be true, as next of kin, complainants are

entitled to the residuum after payment of specific legacies, debts, and cost of administration. They are entitled to this residuum whether the will is valid or invalid. Section 2000, *supra*, never contemplated that persons occupying the relation towards the estate that complainants do should affirm the validity of the will in order to obtain that which is theirs outside of and independent of the will. They claim neither under the will nor against the will, but as heirs at law, as in cases of intestacy. It may be that they are not advised of any facts which would authorize a resort to chancery to contest the will, and it may be that none in fact exist. Complainants are not required to wait until after the expiration of five years before they can proceed to claim that which is theirs, independent of the question of the validity or non of the will. The demurrer directed to this feature of the bill was properly overruled.

Mrs. Zadek is a legatee under the will, and a proper party to a bill filed to remove the administration from the probate to the chancery court. The remaining question for consideration is whether certain statements of the bill are to be regarded as merely impertinent matter, or as an averment presenting an issue of fact which may become material, considered in connection with other facts, in sustaining the ground upon which some relief is sought. It is not always an easy matter to determine whether a fact averred is merely insufficient, and subject to demurrer, or whether the fact averred is simply impertinent, and liable to be stricken out on a reference. Where the facts averred are relied upon as the grounds for relief, and are insufficient in law to authorize the relief, their insufficiency is open to demurrer. If a fact averred is intended to explain or account for some other material fact, or to strengthen or affect some other such fact, or is made to constitute a link in a chain of facts and circumstances, and which are relied upon as ground for relief, there should be sufficient averments to show the connection of the fact with the other facts, and the purpose of the pleader in making the statement. If the opposite party cannot tell from the pleading whether to regard the averment as mere surplusage, and impertinent, or whether to treat it as presenting an issue that may become material in the progress of the trial, then it is open to demurrer. An impertinent fact is one, which, whether proven or not, or whether admitted or denied, can have no influence in leading to a result. A party guilty of pleading impertinent matter can always, even at the final hearing, be punished by the court in the adjustment of cost; and, as injury might result if the matter was wrongfully stricken out, the courts are not quick to consider any averments of facts as impertinent. Such must clearly appear to be its character. Story, Eq. Pl. §§ 267, 270; 6 Amer. & Eng. Enc. Law, 757; Woods v.

Morrell, 1 Johns. Ch. 104, 107. In the fourth paragraph of the bill it is charged that during the lifetime of testatrix, Frederick G. Bromberg, the executor, "was her attorney; that she had great confidence in him, and he, owing to such confidence, and the relationship of attorney and client existing between them, had great influence over said Susan F. Rouse;" "that said Bromberg was the brother-in-law of E. O. Zadek, and that his wife is the sister of the said Bromberg." If these averments stood alone, they might be regarded as impertinent. But, when considered in connection with other averments of the bill, they cannot be regarded as merely impertinent. It is averred that the wife of E. O. Zadek is a legatee under the will; that just prior to the death of testatrix she (testatrix) held and owned a mortgage of Zadek; that the executor, Bromberg, omitted this mortgage and the debt secured from his inventory, "and that the same has never been paid or satisfied; and that, if said mortgage was given away or otherwise disposed of by testatrix, complainants charge that it was so given to some of the defendants to this bill of complaint, and that the said Susan F. Rouse was induced to give or dispose of said mortgage by the exercise over her of undue influence by the parties to whom the same was given, or by some person connected with or interested in them; and that such gift or disposition of said mortgage and the security therefor was null and void as to said Susan F. Rouse, and as to complainants, her heirs at law and next of kin." Mrs. Zadek is a legatee under the will, and a defendant to the bill. The bill does not charge that Bromberg unduly influenced Mrs. Rouse to give away the Zadek mortgage, or other property; but it states his relationship to Mrs. Rouse, his influence over her, and her confidence in him. It then states that Mrs. Zadek is his sister, and then charges that, if the property was given away, it was given to some of the defendants, (Mrs. Zadek is one of them,) and that the gift was induced by undue influence, exercised by the donee, or some person connected with the donee. If, in response to the interrogatories propounded in the bill on proof, it should be developed that the Zadek mortgage or other property was given to Mrs. Zadek or other defendant by Mrs. Rouse in her lifetime, it would be permissible, under the averments of the bill, to introduce evidence that the donor had been unduly influenced by Bromberg, and, in order to procure the gift, he had taken advantage of her confidence in him, and his relation to her as her legal adviser. The statement under consideration, in this aspect of the bill, cannot be regarded as impertinent matter, to be stricken out on motion; and, the pleader having failed to aver definitely that Bromberg exercised undue influence in procuring the gifts, if any were made, the failure to make the charge more specific was subject to de-

murrer. If it was not the purpose of the pleader to make this use of the averment, and if in fact he regards it as merely impertinent, he should, on his own motion, strike it from the bill. Standing in the bill, it is a menace to the defendant, and it is his legal right to clearly understand the purpose for which it is intended. We are of opinion that the cause of demurrer directed to this feature of the bill was well taken, and the court erred in overruling it. This is the only error we find in the record. The affidavit seems to be a substantial compliance with section 2025 of the Code, which provides in what cases an executor may be required to give bond as such, though exempted by the will from giving bond. The bill is not one for discovery only, and the demurrer to the bill, because not sworn to, was properly overruled. Code, § 3424, and authorities cited to the section.

The demurrers filed by the respondent Alexander are not before us for revision, and are not considered. For the error pointed out the case must be reversed.

Reversed and remanded.

(98 Ala. 489)

PINKSTON v. ARRINGTON et al.

(Supreme Court of Alabama. June 22, 1893.)

ABSTRACT OF TITLE—NEGLECTANCE OF ATTORNEY—  
QUESTION FOR JURY.

Where the statute grants registers of court records six months in which to make a final record of causes disposed of, and attorneys who are employed to examine the title to certain land examine all the indexes the law requires the register to keep, and also the trial docket, for causes pending, none of which show the existence of any record affecting such title, and it appears that within less than six months previous to such examination a final decree was rendered, affecting such title, of which the attorneys might have learned by inquiry of the register, or by examination of the trial docket of the previous term of court, the question whether such attorneys used that reasonable care and diligence in such examination which will absolve them from liability to their client for the damages sustained by him by reason of their failure to discover such decree is for the jury.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Action by J. R. Pinkston against Arrington & Graham to recover damages sustained by plaintiff by reason of a false certificate made by defendants as to the title to certain real estate. From a judgment entered on the verdict of a jury in favor of defendants, plaintiff appeals. Reversed.

The court, in its general charge, instructed the jury as follows: "That if the defendants examined, in December, 1887, the indexes of records of the causes in said city court, required to be made under section 743 of the Code, prior to, and for the purpose of, reporting on the title of said lot to plaintiff, and were not informed that the said indexes and records had not been made and kept as required by law, and had no notice or in-

formation of the decree in the cause of Williams v. Williams, rendered in July, 1887, and overlooked the said decree, by reason of the omission of the officer to make the record and indexes, then it would not be negligence on their part not to have discovered and reported the proceedings and decree in said case of Williams v. Williams, although said case was indexed directly, but not reversely, on the trial docket index of said court for 1887, and might have been found, had said index been examined; that it was not incumbent on the defendants, without notice of any omission of the officer to discharge his duties, to examine the direct index of the trial docket for causes disposed of, and that they might well satisfy themselves with reference to pending causes without any examination of the index of the trial docket, and if there were no pending causes, and they were satisfied of the fact, it would not be negligence on their part not to have examined the index of the trial docket, though, if they had done so, they might have discovered the decree and proceedings in said cause of Williams v. Williams." The plaintiff excepted to the giving of this portion of the general charge, and also separately excepted to the court's giving, at the instance of the defendants, the following instructions to the jury: (1) "That an attorney employed to investigate titles is only liable when he has not exercised reasonable skill and diligence in the discharge of his duty, and that such persons, investigating titles, when they have no notice that records and indexes to records have not been made as required by law, have a right to rely upon the presumption that the keeper of the records has discharged his duty, and has made the indexes of the records, and that if a title is certified, under such circumstances, as being good, when in fact it was not, by reason of a judgment or other legal proceedings which is not indexed as required by law, and which was overlooked in the investigation, by reason of not being indexed, the attorney would not be liable on the ground of not having exercised reasonable skill and diligence." (7) "If there was not in December, 1887, any pending cause affecting the title of W. T. Williams, no negligence can be imputed to defendant for not looking at the index of the trial docket, though on such index there was entered the case of R. S. Williams v. W. T. Williams, disposed of at a previous term. Parties investigating for pending cases might be held liable for not looking at such indexes, if any pending cause had been overlooked; but if there was no pending cause, as there was not in this case, in December, 1887, negligence in looking for cases disposed of cannot be imputed from the mere omission to look at the index to the trial docket. Without notice of some irregularity, parties, in looking for the record of cases disposed of, would have a right to suppose that the indexes of the final record contained appro-

priate reference to all that the record contained." The plaintiff requested the general affirmative charge in his behalf, and duly excepted to the court's refusal to give the same.

Stallings & Wilkerson, for appellant. Brickell, Semple & Gunter and Tompkins & Troy, for appellees.

COLEMAN, J. The plaintiff, wishing to purchase a lot of land, employed, for a valuable consideration, the defendants, attorneys at law, to investigate the title of one W. T. Williams, who claimed to own the lot, and had offered it for sale. Upon the written statement and certificate of the said attorneys that the title of W. T. Williams was good, and that he had the right to convey, plaintiff purchased and paid for the lot. The evidence, for the most part, is without conflict, and shows the certificate of the defendants was dated December 1, 1887. At the July term, 1887, by a decree of the city court of Montgomery, sitting in equity, W. T. Williams had been deprived of all control over his property, and the right to dispose of it, and one Robert S. Williams appointed trustee, with the authority to manage and control the same for the benefit of W. T. Williams. This suit was styled "Robert S. Williams v. William T. Williams," and the bill filed June 24, 1887; the answer, admitting the allegations of the bill, on the same day; and final decree rendered July 13, 1887, and the cause dropped from the trial docket.

By section 736, subd. 2, of the Code, it is made the duty of the register "to keep a docket in which must be entered the names of the plaintiffs and defendants," etc. Subdivision 7: "To record in well-bound books within six months after the final determination of any cause, all the proceedings in relation to the same, except those previously recorded under section 653, and except as otherwise directed in this article." Section 653: "The original proceedings in civil suits at law or in equity, the original process issuing thereon, all affidavits and bonds taken in the course thereof, must be recorded immediately on the filing thereof or on the return of such process," etc. Section 743 is as follows: "Registers in chancery must keep general direct and reverse indexes of all record books in their offices," etc. The law does not require the register to keep an index to the trial docket. The trial docket of the city equity court was introduced in evidence by plaintiff, and it appears that there was a direct index to this docket; and under the letter "W" the following entry was made: "Williams, R. S. vs. Williams, W. T.," and referred to the case of R. S. Williams v. William T. Williams, regularly docketed on the trial docket, giving date when bill and answer were filed, when cause was submitted for decree, and date of final decree. The evidence showed that the defendants examined and prepared an abstract of the title to

the lands, from the government, through intermediate purchasers, to William T. Williams, and the tax books, showing that the taxes were all paid, and that there were no recorded incumbrances on the land. The evidence further showed that they examined the dockets of the various courts as to pending causes against William T. Williams, and the record entries of final decrees and judgments, and there were no pending cases against William T. Williams, or final judgments or decrees recorded, affecting his title to the lands in question. The register had made no final record of the case of Robert S. Williams v. William T. Williams. Six months—the time within which registers are required to make a final record of causes disposed of—had not elapsed.

In the case of Goodman v. Walker, 30 Ala. 495, it was declared that lawyers "stipulate that they will bring to the service of their clients ordinary and reasonable skill and diligence, and if they violate this implied stipulation they are accountable to their clients for all injury traceable to such want of skill and diligence; \* \* \* that they are bound to use reasonable care and skill." And in Burkham v. Daniel, 56 Ala. 610, it is quoted, with approbation, that "whenever there is a contract to perform any work, or to transact any business, the law implies an engagement on the part of the person undertaking to do the work that it shall be performed with due care, diligence, and skill, according to the order given and assented to." And in Teague v. Corbitt, 57 Ala. 543, it is said that every attorney owes his client reasonable skill and diligence, and is responsible for all injuries clients sustain, which are traceable to a want of them. The whole duty and responsibility of an attorney to his client are clearly embraced and defined in these principles. Having ascertained, by an examination of the trial docket, that there was no lis pendens involving the title to this property, and that no record of any cause finally disposed of by the courts, affecting the title of William T. Williams, had been recorded by the register, and knowing, as they must have known, the statute granted to the register six months within which to make a final record of causes disposed of, did that "reasonable care and diligence" which attorneys owe their clients require that they examine the trial dockets as to causes disposed of by the court within a less time than six months, and of which no final record had been made, or, at least, inquire of the register if there were any such cases? We do not think it can be said, as a matter of law, that an attorney has exercised "reasonable care and skill," without having carried his investigation this far, at least, in the county where the lands lie, and the claimant lives, without giving some satisfactory reason for the omission. The register testified that "he had direct, but no reverse, indexes to his record, as required by section 743 of the Code, but that said

case of Williams had never been entered in said direct index." The evidence for the defendants is "that he went into the register's office, where the files, dockets, and other records of such court are kept,—also, the trial docket of cases then pending,—and found nothing affecting said property, after making an examination of them," but made no inquiry of the register. There is no evidence that he investigated the trial docket of the previous term, though less than six months had elapsed, for causes disposed of at that term. It is evident that an ordinary examination of this docket for the previous term, either by reference to the index, under Exhibit W, or of the cases then pending, or inquiry of the register, would have discovered to him that, by a decree of that court, W. T. Williams had been deprived of all power to dispose of the land by sale or otherwise. Have the defendants given any satisfactory or reasonable excuse for this omission of duty? We think this question of fact should be left to the jury. The rulings of the trial court, in some respects, conflict with the law, as herein declared, and the case must be reversed and remanded.

(36 Ala. 252)

**WOOTEN v. STEELE et al.**

(Supreme Court of Alabama. June 22, 1893.)

**ASSUMPSIT — STATUTE OF LIMITATIONS — MONEY HAD AND RECEIVED—ACTION BY HEIRS—WRIT MAINTAINED.**

1. Where a vendee of land gives the vendor a written promise to pay him "one-half for which the above lands may sell for," the three-years statute of limitations has no application to an action of assumpsit on such promise by the heirs of the vendor to recover of the vendee one-half the amount for which he sold the lands.

2. Where such vendor held the lands in trust, with general power of sale, for the purpose of applying the proceeds to the payment of debts due creditors of his grantor, it is not necessary that such action of assumpsit be brought by the successor of deceased, as trustee, but it may be maintained by his heirs.

3. Where there are no debts against the estate of a deceased person, and administration has been finally closed, his heirs and distributees may maintain an action on a written obligation payable to deceased, or for money had and received to his use.

Appeal from circuit court, Marengo county; James B. Head, Judge.

Action of assumpsit by James A. Steele and others against Council B. Wooten for money had and received. From a judgment for plaintiffs, defendant appeals. Affirmed.

John C. Anderson, for appellant. Geo. W. Taylor, for appellees.

COLEMAN, J. The action is in assumpsit, upon the common count, for money had and received. The defendant pleaded the general issue, and statute of limitation of three years. At the close of the evidence,

the court, upon their request, gave the general charge for the plaintiffs. There is no conflict in the evidence. In January, 1877, Thomas S. Fry conveyed to Robert L. Steele certain tracts of land, in trust, with general power of sale, the proceeds to be applied by him to the payment of debts due and owing to certain named creditors. Included in the debts to be paid was one due the grantee and trustee, Robert L. Steele, for \$3,489.74, and one due the defendant, Wooten, for \$2,500. One of the tracts of land, designated as the "Odom Place," was sold by Robert Steele to the defendant, C. B. Wooten, in consideration of which Wooten executed to him his written obligation "to pay said Steele one-half of the amount the above-mentioned lands may sell for. It is agreed that I am not to be responsible to the said Steele for any amount except it accrues from the sale or other disposition that may be made of the Odom lands. Said land contains about 2,520 acres, and is situated in Wilcox Co., Ala. This the 23rd day of May, 1882. [Signed] C. B. Wooten." Robert L. Steele died in the year 1883. His estate was duly administered upon, and the administration finally settled in the year 1886. It was then proven that Wooten sold the Odom place in January, 1888, for \$3,000. It was further proven that there were no debts against the estate of Robert L. Steele. This suit was instituted by the heirs of Robert L. Steele, after demand, in February, 1891, to recover the one-half of the purchase money for which Wooten had sold the land. The written obligation of Wooten was to pay to Steele "one-half for which the above lands may sell for." The lands were sold in 1888 for \$3,000. The statute of limitation of three years has no application where the assumption is evidenced by an express obligation to pay a fixed amount.

It is contended that plaintiffs could not maintain the action in their own names, but that the suit should have been in the name of the successor of Robert L. Steele, as trustee. As to the Odom place, the trust was entirely executed by the sale of the land to Wooten. The obligation of the purchaser was to pay Steele. He could have maintained an action in his individual name against Wooten for the purchase money. The rule is that the legal title of a decedent to personal property vests in the administrator, and the administrator alone can sue. This rule prevails for the purposes of administration. When there is no necessity for an administration, or where there has been a complete administration and final settlement, the rule does not apply. In such cases the distributees may maintain an action on a promissory note, payable to decedent, or to recover for money had and received. The undisputed facts of this case bring it within the exception to the general rule. *Cooper v. Davison*, 86 Ala. 367, 5

South. Rep. 650; Wood v. Cosby, 76 Ala. 557; Carter v. Owen, 41 Ala. 217. There is no error in the record. Affirmed.

(101 Ala. 429)

**Ex parte JENKS.**

(Supreme Court of Alabama. June 8, 1893.)

**DEPOSITIONS—WOMEN—COMPELLING ATTENDANCE IN PERSON.**

Code, § 2813, providing that when the deposition of a witness has been taken, if affidavit be made that the personal attendance of the witness, residing in the county, is necessary, then such attendance shall be required, applies to women, whose evidence, by the provision of section 2801, may be taken by deposition.

Application by Harriet Jenks for mandamus. Denied.

In this cause, J. E. Loxley & Son recovered a judgment in the city court of Mobile against W. Turner and others, and garnished C. W. Stanton, as a debtor of said defendants. Stanton answered, admitting indebtedness, but suggesting that the money was claimed by the petitioner. The petitioner, being summoned, propounded her sworn claim, and was examined as a witness in her own behalf, by written interrogatories, of which plaintiffs had notice, and her deposition was returned into the court on the first day of the term. One of the plaintiffs' attorneys made affidavit that the personal attendance of the witness at the trial of the cause was necessary, and the court made an order requiring Mrs. Jenks to attend the trial of the right of property in person, April 10, 1893. Petitioner immediately moved the court to discharge the order so made, which motion was refused, and the petitioner excepted, and filed this petition for the writ of mandamus.

Fredk. G. Bromberg, for petitioner. Gregory L. & H. T. Smith, for respondent.

**HEAD, J.** We have no doubt that section 2813 of the Code means to include females residing in the county, whose depositions have been taken, as authorized by section 2801, in the class of witnesses whose personal attendance the court is authorized to require, upon the prescribed affidavit being made that such personal attendance is necessary. It is true that the depositions of persons residing in the county, other than females, taken in pursuance of said section 2801, are, by force of section 2812, rendered de bene esse only, and cannot be used if the statutory causes for which they were taken do not exist at the time of the trial, unless the witness be then dead, of unsound mind, or resides more than 100 miles from the place of trial, while, so far as that section (2812) provides, the deposition of a female, though residing in the county, and able to attend the trial, may be used. So far, it is the declared policy of the law that females shall not be required to attend the trial, but shall

give their testimony by deposition. But section 2813 takes a step beyond, and ingrafts an exception upon this general policy, which is that if affidavit be made that the personal attendance of the witness, residing in the county, is necessary, then such attendance shall be required. In this provision there is no exception of females expressly made, and no good reason for holding that one was implied. The law considers the prescribed affidavit sufficient evidence that the personal attendance of the witness is necessary to the ends of justice, and that necessity may as well exist in case of a female as a male witness. Application for mandamus denied.

(101 Ala. 363)

**ROSS v. NEW ENGLAND MORTGAGE SECURITY CO.**

(Supreme Court of Alabama. June 20, 1893.)

**STATUTES—WHEN ACT TAKES EFFECT—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—CANCELLATION OF MORTGAGE—OFFER TO DO EQUITY.**

1. Act Feb. 28, 1887, gives effect to Const. art. 14, § 4, forbidding foreign corporations to do business in the state "without having at least one known place of business and an authorized agent therein," and provides that a corporation violating the act, and any person acting as its agent in such violation, shall forfeit to the state fixed sums, to be recovered in an action, and for imprisonment of the offending person. *Held*, that the act being penal in its nature, and being silent as to when it should go into effect, it did not go into effect until 30 days after approval, that being the provision of Crim. Code, § 3705.

2. In an action to cancel a mortgage, on the ground that the mortgagee was a foreign corporation, and took the same without being entitled to do business in the state, plaintiff stated in his bill that "if said interest notes, past due, are held valid, in any event, complainant hereby offers, and is able and willing and ready, to pay the same." *Held*, that the bill was bad on demurrer, as it did not offer to repay all plaintiff had received on the mortgage.

3. In an action to restrain the foreclosure of a mortgage, on the ground that it is void, plaintiff offered in his amended bill, that "if, on a final hearing of this cause, the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from complainant to respondent, he is ready and willing and able to pay the same." *Held*, that the offer was not a sufficient submission to the jurisdiction of the court to authorize a decree of foreclosure on finding the mortgage to be valid, in the absence of a cross bill praying for such relief.

Appeal from chancery court, Pike county; John A. Foster, Chancellor.

Bill by C. E. Ross against the New England Mortgage Security Company to restrain the foreclosure of a mortgage, and for other relief. Defendant had a decree, and plaintiff appeals. Reversed, and bill dismissed.

Defendant demurred to the bill upon the following grounds: (1) That there was no equity in the said bill. (2) That the bill fails to allege that the respondent had a known place of business in the state, and an agent or agents thereat, at the time of the execution of said mortgage. (3) Because the act of



the legislature of Alabama approved February 28, 1887, entitled "An act to give force and effect to section 4 of article 14 of the constitution of the state of Alabama," is a penal statute, and did not, therefore, go into effect until after the lapse of 30 days from its passage, and was not in force at the date of the execution of the mortgage involved in this suit. (4) Because the act of February 28, 1887, above referred to, is a penal statute, and prescribes a penalty for the violation thereof, other than the forfeiture of the debt secured by said mortgage. (5) Because the complainant does not offer to do equity, in that he does not offer to pay back the money he received from respondent under said mortgage.

The chancellor overruled the 1st and 2d grounds of demurrer to the bill, and sustained the 3d, 4th, and 5th; and on final submission of the cause, as is stated in the opinion, he refused the relief prayed for by the complainant, but ordered the foreclosure of the mortgage for the payment of the respondent's debt.

M. N. Carlisle, for appellant. Caldwell Bradshaw and Jas. E. Webb, for appellee.

**HARALSON, J.** 1. The bill alleges that complainant, Ross, on the 1st day of March, 1887, jointly with his wife, executed and delivered a mortgage to the defendant, the appellee, on certain lands therein described, which mortgage is attached to the bill, and made part thereof. It was given to secure a loan by defendant to complainant of \$7,200, that day made, for which complainants executed their note to the defendant, payable on the 1st of March, 1892, at the office of the Corbin Banking Company of New York, to which note were attached five coupon notes, for the accruing annual interest on said principal sum loaned, payable on the 1st day of December of each year, except the last, which was payable on the 1st day of March, 1892, and, like the principal, were payable at said banking house, in New York. By the terms of the mortgage, if default should be made in the payment of either of these notes, at the option of the holder, the whole sum of money received became due and payable 20 days after such default, and the mortgage foreclosable. Two of the interest coupon notes—the ones falling due on the 1st of December, 1889, and on the 1st of December, 1890—were not paid. More than 20 days after default in the payment of the last of said notes the defendant was proceeding to foreclose said mortgage, according to its terms, by advertisement for a public sale of the lands therein described, when the complainant filed this bill to enjoin that sale, alleging that the mortgage was void because it was made in violation of the act of the legislature of this state, passed on the 28th of February, 1887, entitled "An act to give force and effect to section 4, art. 14, of the constitution of the

state," forbidding foreign corporations to do business in this state except on compliance with conditions prescribed in said act. The prayer was that the mortgage be declared to be void, and given up and canceled, and for general relief. The offer in the bill to do equity is: "But if said interest notes, past due, are held valid, in any event, complainant hereby offers, and is able and willing and ready, to pay the same." A demurrer was interposed to the bill, which was sustained, on some of its grounds, when complainant amended the bill, offering to do equity, as follows: "Complainant avers that if, upon the final hearing of this cause, [the court should ascertain] that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from complainant to respondent, he is ready and willing and able to pay the same." On a submission of the cause the chancellor, by a reference, ascertained the debt, and rendered a decree of foreclosure of said mortgage, to reverse which this appeal is prosecuted.

2. Penal laws are defined to be those which prohibit an act, and impose a penalty for the commission of it. 2 Rap. Law Dict. 945; 2 Abb. Law Dict. 231; 18 Amer. & Eng. Enc. Law, 270. The statute of 1886-87 (acts of those years, p. 102) was intended, as declared in its caption, to give force and effect to section 4, art. 14, of the constitution of the state. It was unlawful, before that act was passed, for a foreign corporation to engage in business in this state "without having at least one known place of business, and an authorized agent or agents, therein." That clause of the constitution was prohibitory, and it required no legislation to carry the mere prohibition into effect, or to give it force. American Union Tel. Co. v. W. U. Tel. Co., 67 Ala. 30; Nelms v. Mortgage Co., 92 Ala. 159, 9 South. Rep. 141. And section 1 of the act of 1886-87 merely gives regulation as to the manner of conducting business in the state by foreign corporations, and did not make it any more unlawful to do business here without complying with the requirements of the constitution than before its enactment. The constitution did not prescribe any penalty for its own violation; but the statute comes along, and, in order to secure more certain compliance with the fundamental law, prescribes penalties for its violation. The second section provides that whoever shall act as agent, or transact any business for any such corporation, without having first complied with the provisions of the act, shall forfeit and pay to the state, for each offense, the sum of \$500; and section 4 provides a penalty of \$1,000, against the corporation, for doing business in the state without having complied with the terms of the act. It is further prescribed that these penalties shall be sued for and recovered in the name of the state, by the solicitor of the circuit in which the offense was committed, and, when collected, the

money is to be paid into the treasury of the state, less the solicitor's fee; and, in case of the nonpayment of such penalty, the party offending shall, on conviction, be imprisoned in the county (jail,) or sentenced to hard labor for the county, for a period not exceeding six months. It thus appears that said enactment is essentially a penal statute. *Dudley v. Collier*, 87 Ala. 431, 6 South. Rep. 304. In that case, which sustains the view of this statute we now take, it is singular enough that the contract executed on the 8th of March, 1887, succeeding the 28th February, the date the legislature adjourned, was declared illegal, although the 30 days within which the statute, being penal, had to go into effect, had not elapsed. Section 3705 of the Criminal Code evidently escaped the attention of the attorneys engaged in the cause, and it did not occur to the learned judge delivering the opinion.

3. Section 3705 of the Criminal Code provides that "no penal act shall take effect until thirty days after the adjournment of the general assembly at which such act was passed, unless otherwise specially provided in the act." There was nothing in the act we are considering, directing when it should go into effect. The legislature adjourned on the 28th February, 1887, the day of the approval of said act. It follows, therefore, that it did not go into effect until 30 days after that date. *Armstrong v. Bufford*, 51 Ala. 410; *Olmstead v. Crook*, 89 Ala. 228, 7 South. Rep. 776. And inasmuch as this mortgage was executed on the 1st day of March, 1887, within 30 days from the date of said enactment, and as it was not, so far as appears, in violation of that or any other statute, it must be held to be a valid and binding contract between the parties; and there was no error in sustaining the third and fourth grounds of demurrer to the bill. *Mortgage Co. v. Sewell*, 92 Ala. 170, 9 South. Rep. 143.

4. The fifth ground was also properly sustained. There was no offer to do equity, by refunding the money which the complainant had received under the mortgage. He had no right to have a cancellation of this mortgage—as he sought, on the grounds of alleged illegality, in its having violated the provisions of said act—without restoring or repaying all that he had received under the mortgage, principal and interest. His offer was less than this, and was not an offer to do equity. *Mortgage Co. v. Sewell*, 92 Ala. 170, 9 South. Rep. 143; *Security Co. v. Powell*, 12 South. Rep. 55, (at the present term); *Pom. Eq. Jur.* § 391; 2 *Story, Eq. Jur.* §§ 693, 694.

5. The fourth and fifth assignments of error question the decree of foreclosure rendered in the cause by the chancellor. Whether or not the court could have proceeded to a foreclosure of the mortgage, under this bill, filed by the mortgagor, depends upon the offer of complainant, in his bill, to do equity. The original bill, as we have seen, contained no

sufficient offer, and the demurrer was properly sustained on that account. In the amendment to meet this defect no better offer was made. It is conditioned upon the court finding the mortgage to be void, (in which event there could not possibly be a foreclosure,) makes no offer to pay, nor does the complainant submit himself to the authority and jurisdiction of the court. There was, however, no demurrer to the bill, as thus amended. Yet in a bill filed by a mortgagor there can be no decree of foreclosure of the mortgage—in the absence of a cross bill by the mortgagee, praying a foreclosure—unless the complainant makes an offer in the bill to submit himself to the authority and jurisdiction of the court, so that the court, without more, may compel him to do equity. *Bank v. Strother*, 15 Ala. 60; *Rogers v. Torbut*, 58 Ala. 525; *Malaya v. Crampton*, 61 Ala. 514; *Garland v. Watson*, 74 Ala. 323. A decree of foreclosure should not have been rendered in the cause, even if it was agreeable to the defendant for it to have been done. The bill was without any equity, and should have been dismissed. The proof showed that the defendant had complied with the requirements of the constitution, in having a known place of business, and an authorized agent therein, in this state, before and at the time of the loan of the money, and taking the mortgage to secure it. *Mortgage Co. v. Sewell*, supra.

Let a decree be here entered, reversing the decree of the chancery court, dissolving the injunction, and dismissing the cause, at the cost of the appellant, both in the lower court and in this court. Reversed and dismissed.

(92 Ala. 143)

#### BAILEY v. STATE.

(Supreme Court of Alabama. June 15, 1893.)

##### LARCENY—PLEADING AND PROOF—VARIANCE.

Where the Code originally defined the crime of larceny "in" a storehouse, and prescribed a form for indictments which described the larceny as "from" a storehouse, and subsequently the definition of the crime was amended by making it read "from or in" a storehouse, but the form was not changed, an indictment for stealing property "from" a storehouse is supported by proof that defendant stole property in a warehouse, and was detected and arrested before leaving.

Appeal from city court of Gadsden; John H. Disque, Judge.

Sam Bailey was convicted of larceny, and appeals. Affirmed.

On hearing all the evidence, the court, at the request of the solicitor, gave the general affirmative charge in behalf of the state, to the giving of which defendant duly excepted.

W. H. Standifur, for appellant. Wm. L. Martin, Atty. Gen., for the State.

STONE, C. J. The defendant was indicted for larceny from a storehouse, under section 3789 of the Code of 1886. The indictment pursues the form No. 51, example 3, of that

Code, and is in the following language: "The grand jury charges that before the finding of this indictment Sam Bailey, whose true Christian name is to the grand jury unknown otherwise than as stated, feloniously took and carried away from a storehouse one shirt, of the value of seventy-five cents, the personal property of Max Long, against the peace," etc. The testimony tends to prove and does prove that the defendant feloniously stole the property described "in" a storehouse; but before he escaped from the house he was detected, the goods taken from him, and he was arrested. The only question presented by this record is whether the proof corresponds with the allegations of the indictment, and justifies a conviction. This statutory crime is found in the Code of 1852, (section 3170.) Its language, as then expressed, was that "any person who commits the crime of larceny in any \* \* \* storehouse \* \* \* on conviction must be imprisoned in the penitentiary," etc. That statutory description of the offense was retained in the Code of 1867, (section 3707,) and in the Code of 1876, (section 4359,) without change, except as to the manner of punishment. In each of the Codes a form of indictment for this offense was furnished, which had never been changed. See Code of 1852, form 45; Code of 1867, form 42; Code of 1876, form 39. This offense was made grand larceny by statute. During all these years the indictments framed for this offense have pursued the language of said form, and charged the larceny to have been committed from the storehouse, etc. Many convictions have been had under indictments thus framed, and have received the sanction of this court. In the Criminal Code of 1886 (section 3789) the language of the statute was changed. It was there enacted that "any person, who steals \* \* \* any personal property of any value \* \* \* from or in any storehouse, \* \* \* is guilty of grand larceny, and on conviction," etc. The form, as originally framed and stated above, was retained in this Code without change. Form 51, example 3. It will be observed that in that form it was charged that the offense consisted in stealing "from" a storehouse, and not "in" a storehouse. One of the first cases that arose under this statute was *Point v. State*, 37 Ala. 143, in which the defendant was convicted of a felony. On review before this court the question of variance between the allegations of the indictment and the proof was neither raised nor considered. The judgment of conviction was affirmed. We have made very many rulings on the sufficiency of the forms of indictments furnished in the several Codes. "When the legislature, either in the body of the statute or in a prescribed form, declares what shall be a sufficient indictment, such legislative direction is pronounced controlling, and an indictment pursuing such form will be pronounced good." *Smith v. State*, 63 Ala. 55; *McCullough v. State*, Id. 75; *Wil-*

*son v. State*, 61 Ala. 151. "An indictment conforming to the form prescribed by the Code is sufficient, though matters of substance are omitted." *Weed v. State*, 55 Ala. 13. See, also, 3 Brick. Dig. p. 280, § 459, where it is affirmed that indictments in the form prescribed by the Code are sufficient, whether charging a felony or misdemeanor. Code 1886, § 4366. In the Code of 1886, although the language of the statute was changed, and, instead of denouncing the crime as a felony if committed "in" a storehouse, it substituted the words "in or from a storehouse," yet the language of the form underwent no change. It still retained only the word "from." This, under the authorities cited above, was a legislative recognition and declaration that the form was sufficient under the amended statute. If, under the old statute, the larceny in a storehouse could be proven and a conviction had under an indictment which charged the offense was committed from a storehouse, what argument can be made that the substitution of the words "in or from" in the later statute calls for a different interpretation? If the offense committed in a storehouse was embraced and punishable under a charge that it was committed from a storehouse, how can the fact that, under the amended statute, it might have been committed from a storehouse, as the indictment charges, make it less punishable under the indictment? Is the variance between the allegations and proof any greater under the new statute than it was under the old? Under our statute (Code 1886, § 4366) the forms furnished are "sufficient in all cases in which the forms there given are applicable." The form employed in this case is expressly made applicable to the crime with which the defendant was charged. The legislature expressly re-enacted the form, and made it applicable to the statute as amended. We hold that that body thereby declared it was sufficient for the new enactment, as it had previously declared it was sufficient for the older statute; and in declaring its sufficiency we only reaffirm our uniform rulings. In thus announcing, we are not unmindful that we run counter to some expressions found in *Moore v. State*, 40 Ala. 49, but those expressions were neither necessary nor made a point in the decision of the case. Affirmed.

(101 Ala. 162)

HAUERWAS et al. v. GOODLOE.

(Supreme Court of Alabama. June 15, 1893.)

NOTE DATED ON SUNDAY — ACTION — BURDEN OF SHOWING TRUE DATE—EVIDENCE.

1. In an action on a note dated on Sunday, the burden is on plaintiff to show that it was in fact executed on a day which was not Sunday.

2. In an action by a bank on a note dated on Sunday, its "discount register" is not admissible in evidence to show that the note in suit was a renewal of a note which matured on Sunday, and that the renewal note was made

on a certain week day after its date, and dated back to the date of the maturity of the first note, according to the custom of the bank.

3. In such case it is not error to admit evidence that the note is in the handwriting of the bank's cashier, and that he was not in the employ of the bank until after the date of the note.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Action by J. C. Goodloe, as receiver of the Florence National Bank, against J. A. H. Hauerwas, Louis Levin, and Osworth Breuss, on a promissory note. From a judgment for plaintiff, defendants appeal. Reversed.

Defendants pleaded as a defense that the note sued on was made on Sunday, on which plea plaintiff joined issue. The plaintiff introduced the note in evidence, and, in connection therewith, a book regularly used by the bank in its business, and known as the "discount register," in which the number, name of maker, date, amount, and maturity of all the notes discounted by the bank were entered. This book showed that the note in suit was a renewal of the note which matured on March 15, 1891, (Sunday,) and was renewed on March 27, 1891. S. D. Tice was introduced as a witness, who testified that he was in the employ of the bank at the time the note was renewed; that the book was correctly kept; and that it was the custom of the bank in renewing notes, if the renewal was not made on the same day the old note matured, to date the new note back to the date of the maturity of the old note. The defendants objected to the introduction in evidence of the discount register, on the ground that it failed to show any connection between the note in suit and said book. The court overruled this objection, and the defendants excepted. It was further proved that the body of the note was in the handwriting of Mr. Tice, who was the cashier of the plaintiff, and that on March 15, 1891, said Tice was not in the employ of the bank, and did not come to the bank until the 19th of March, and that the note in suit was not made until March 27, 1891. The defendants introduced no testimony, and, after the introduction of all the testimony of the plaintiff, they asked the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, they must find for the defendants." (2) "If the jury believe that the note sued on was made on Sunday, then they must find for the defendants." (3) "If the plaintiff has failed to prove to you that the note in suit was not delivered on the day it bears date, then your verdict must be for the defendants." (4) "Unless you believe from the testimony that the note in suit was made and delivered to plaintiff on the 27th day of March, 1891, then your verdict must be for the defendants."

Nathan Parkins, for appellants. C. E. Jordan, for appellee.

STONE, C. J. The note sued on is copied in the bill of exceptions. It is dated March 15, 1891, which was a Sunday. The presumption is that it bears its true date, and the burden of overcoming that presumption rests on him who asserts the contrary. In other words, it was on the plaintiff to prove that it was executed on a day which was not Sunday. *Dodson v. Harris*, 10 Ala. 566; *Aldridge v. Bank*, 17 Ala. 45; *Burns v. Moore*, 76 Ala. 339. If executed on Sunday, it could not be the subject of a recovery. As a general rule, witnesses can only testify to facts within their knowledge. They cannot testify to their belief that a fact exists. This rule has exceptions, but there was no question in this case which brought it within any of the exceptions. There was no error in receiving testimony that the body of the note sued on was in Tice's handwriting, and that he (Tice) did not become an employee of the bank until after March 15, 1891. This tended to prove the note did not bear its true date. There was no authority for introducing the bank book in evidence. All contracts hostile to, or violative of, the constitution or laws, or offensive to the public policy of the United States, are invalid, and a recovery cannot be had upon them. 3 Brick Dig. p. 145, § 61. There were several errors committed in the trial of this case. We need not specify them. The principles declared above will be a sufficient guide for another trial.

Reversed and remanded.

(101 Ala. 373)

SMITH et al. v. BOUTWELL et al.

(Supreme Court of Alabama. June 14, 1893.)  
HOMESTEAD—TITLE OF WIDOW—PROCEEDINGS TO SET APART EXEMPTION—COLLATERAL ATTACK.

1. Under Acts 1884-85, p. 114, § 2, providing that upon the confirmation by the probate judge of the report of the commissioners appointed to set apart the homestead exemption of a widow all the title and immunities of the homestead, if it does not exceed 160 acres and \$2,000 in value, shall vest in the widow, the widow takes an absolute estate in the homestead so set apart to her.

2. An objection that the record in proceedings to set apart the homestead exemption of a widow did not show affirmatively that the commissioners appointed were "citizens of good standing," as required by the statute, cannot be raised in an action involving the widow's title to the homestead.

Appeal from circuit court, Coffee county; J. M. Carmichael, Judge.

Effectment by Calvin Boutwell and others against Jesse Smith and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Roberts & Martin, for appellants. J. D. Gardner, for appellees.

COLEMAN, J. Plaintiffs, heirs of John Boutwell, deceased; instituted the statutory action of ejectment against defendants, grantees and heirs of Martha Boutwell, who was the widow of John Boutwell. The suit

was commenced after the death of Martha Boutwell. There is but one material question in the case. The lands in question were the homestead of John Boutwell at the time of his death, who died February 15, 1887, leaving no minor children, and the entire tract did not exceed in area 160 acres, and was of less value than \$2,000. There was no administration upon his estate. Under the statute in force at the time of his death (Acts 1884-85, p. 114) the widow, Martha Boutwell, filed her application to have her exemption set apart. The petition for this purpose seems to be regular, and the proceedings conformed to the statute. The lands in question were regularly set apart to her, and the allotment confirmed and approved by the court. The simple question is whether the widow took a fee in the land. It will be noticed that the right of the widow to the exemption vested, under the Acts of 1884-85, before the adoption of the Code of 1886. Section 2543, Code. Under the law as it was in force under the Code of 1876, (sections 2827, 2841,) and as now in force under section 2543 of the Code of 1886, an exemption of homestead set apart to the widow and minor child or either did not vest the fee in the widow or minor child unless the estate was insolvent; and we held it required a judicial ascertainment and declaration of insolvency before the fee passed. Acts 1884-85, p. 114, under which the widow took her estate, in section 2 has this provision: "Upon the confirmation and approval of such report [that of the commissioners] by the probate judge, all the title, rights, privileges, and immunities to such property shall vest in such widow, or such widow and minor child or children, or minor child or children, as completely and fully as if said estate had been regularly administered upon and declared insolvent." This act of the legislature was intended to and did materially alter the law and enlarge the estate of the widow and minor child or minor children. Prior to its enactment it was necessary that the estate be judicially declared insolvent, before an absolute estate passed to the widow or minor child. Under the act of 1884-85, if the homestead did not exceed 160 acres and \$2,000 in value, by proper proceedings the estate vested absolutely, whether solvent or insolvent. The statute is without doubt constitutional, as "each state has the right to enact laws for the regulation of descents and succession to property within its limits." *Etridge v. Malempre*, 18 Ala. 565. It is contended that the statute requires that the commissioners "shall be citizens of good standing," and the record proceedings fail to show affirmatively that the commissioners selected possessed these statutory qualifications. If the point possessed merit, this question could not be raised on collateral attack. The court had jurisdiction by virtue of the widow's

application, in which every jurisdictional fact is set out. The appointment of the commissioners was regularly made, their report is full and in regular form, and the decree of the court approving and confirming the report is sufficient in all respects. We are of opinion that the widow took an absolute inheritable estate in the lands.

The court erred in giving the affirmative charge for the plaintiffs, and upon the agreed facts the defendants were entitled to the affirmative charge.

Reversed and remanded.

(38 Ala. 649)

SMITH v. PRITCHETT et al.

(Supreme Court of Alabama. June 15, 1893.)

STATUTE OF FRAUDS—PLEADINGS—LANDLORD AND TENANT—ACTION FOR RENT—VOIDABLE LEASE—EVIDENCE.

1. The statute of frauds is not available as a defense under a plea of the general issue.

2. In an action for rent, defendant, under a plea of the general issue, introduced evidence that the alleged lease of plaintiff was not made, and that he leased the premises of C., who was in possession, claiming to be owner. Held that, though defendant's evidence was not objected to, it was error to allow plaintiff to show in rebuttal that his title was superior to that of C., and that C. was his tenant the previous year.

3. Though a rental contract be voidable under the statute of frauds, where one takes possession under such contract, and holds with the consent of the owner, the relation of landlord and tenant exists; and the landlord may recover in an action for use and occupation, and enforce a landlord's lien.

4. In an action by a landlord for use and occupation, though the contract between the parties may be voidable under the statute of frauds, it is competent evidence as to the character of defendant's possession, and the rental value of the premises.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Action in attachment by J. F. Pritchett and others against Henry Smith to enforce a landlord's lien. Plaintiffs had judgment, and defendant appeals. Reversed.

The plaintiffs, in rebuttal to the testimony of the defendant tending to show that he had rented the premises from one Childers, who had an interest in said place, introduced in evidence a record of an action of ejectment brought by plaintiffs against the said J. H. Childers in the year 1886 for the said land, and which showed that the plaintiffs recovered a judgment in said suit, and were placed in possession by a writ of possession. The defendant objected to each separate portion of this record, and to the whole of the record together, on the ground that it was irrelevant and illegal, and separately excepted to the court's overruling each of his objections.

M. N. Carlisle, for appellant.

COLEMAN, J. Pritchett et al., appellees, began suit by attachment to recover rent upon a rental contract alleged to have

been made with the defendant, Smith. The only plea was that of the general issue. The assignments of error are upon the rulings of the court in regard to the admission and exclusion of evidence, and the refusal of the court to grant a new trial. The evidence tended to show that in the month of December, 1890, plaintiffs rented the lands, by parol agreement, to defendant, Smith, for the year 1891. The defendant objected to this evidence upon the ground that the contract was made in December, 1890, and was void under the statute of frauds. The objection was properly overruled. In order to get the benefit of the statute of frauds as a defense, it must be specially pleaded. Such a defense is not available under the plea of the general issue. *Clark v. Taylor*, 68 Ala. 462; *Patterson v. Ware*, 10 Ala. 444. Could not the ruling of the court be sustained upon other grounds? It devolves upon appellant to show affirmatively that the court erred. The objection is that the evidence showed the contract was made in December, 1890. The 31st day of December would be in December. The rule in this state is "that an agreement for the performance of a year's service means a year to commence on the next day." *Dickson v. Frisbee*, 52 Ala. 166.

There was some evidence on the part of the defendant tending to show that the contract of renting with plaintiffs was not finally concluded. The defendant also offered evidence, without objection, that he found one Childers in possession of the land, claiming it as his own, and that he rented the land from him. In rebuttal, plaintiffs introduced evidence, against the objection of the defendant, tending to show a title superior to Childers', and that Childers was in possession as their tenant for the year 1890. It was competent for defendant to introduce evidence to show, if he could, that he did not rent the land from plaintiffs. The contract that he claims to have made with Childers, in the absence of plaintiffs, was not competent evidence, under the issue, but its admission was not objected to. A tenant cannot deny the title of his landlord, or set up an outstanding superior title in a third person, or defend, when sued for the rent, by proving payment to another. The only exceptions to these general rules are that "the tenant may show that he has been bona fide evicted under a paramount title, or that since the inception of the lease the title of the landlord has been extinguished, or has passed from him, either by his own act or by operation of law." *English v. Key*, 39 Ala. 113; *Crawford v. Jones*, 54 Ala. 459. Under the pleadings, the only question at issue was whether the defendant had made a rental contract for the year 1891. Whether, therefore, defendant made a different rental contract with Childers

for the premises, or whether the possession of Childers was that of a mere tenant of plaintiffs, holding over after the year 1890 in defiance of the title of his landlord, was irrelevant to the issue, it not being pretended that Childers had acquired the title of plaintiffs subsequent to the date of the alleged contract between plaintiffs and defendant. The introduction of the judgment in the ejectment suit, and the note of Childers, showing that he was a tenant of plaintiffs for the year 1890, was erroneous. The instructions of the court to the jury are not set out in the bill of exceptions, and we cannot say the error was without injury.

It is clear, however, that although a rental contract may be voidable under the statute of frauds, at the option of either party, before its execution, yet where one enters into possession under such an agreement, and holds with the consent of the owner, and this relation is recognized by both the owner and occupant, the relation of landlord and tenant exists, so long as the premises are thus occupied; and the landlord is entitled to recover in an action for use and occupation, and may enforce the landlord's lien, to this extent, in such an action. He cannot maintain the action upon the rental contract, for that is voidable, but may sue for use and occupation for the time occupied, and the voidable contract may be looked to, to show the character of the possession of the occupant, and also for the purpose of arriving at a proper valuation of the rent. These principles are declared in, and are deducible from, the following authorities: *Hays v. Gorce*, 4 Stew. & P. 170; *Nelson v. Webb*, 54 Ala. 436; *Crawford v. Jones*, 54 Ala. 459; *Crommelin v. Thless*, 31 Ala. 412.

For the error pointed out, the case must be reversed.

(86 Ala. 479)

#### LEWIS v. WATSON.

(Supreme Court of Alabama. June 13, 1893.)

DEED—SIGNING BY PROXY—DELIVERY—EJECTMENT—ADVERSE POSSESSION—EVIDENCE.

1. Where the signature of the grantor is affixed to the deed by another in the presence, and at the request, of the grantor, the deed is as binding as if he had personally affixed his signature.

2. In the absence of evidence of a contrary intention, the delivery of a sheriff's deed to the recording officer for record constitutes a delivery of the deed to the grantee.

3. The fact that a grantee in a sheriff's deed has possession of both the deed and the land thereby conveyed is presumptive evidence of a due delivery of the deed.

4. In ejectment against one claiming under a sheriff's deed, where plaintiff claims to have been in possession adversely for more than 10 years after the date of defendant's deed, the records of a former action in ejectment between the parties, by which defendant was placed in possession under such deed, are admissible to show the date of his possession.

Appeal from circuit court, Covington county; John P. Hubbard, Judge.

Statutory ejectment by Ezekiel Watson against B. H. Lewis, administrator of the estate of Alfred Holley, deceased. Defendant pleaded the general issue, and adverse possession for 10 years. Plaintiff had judgment, and defendant appeals. Reversed.

The plaintiff bases his right to recover upon a purchase of the lot in controversy from one John B. Dixon in 1866, and contended that he occupied this lot under that purchase, continuously, until 1887 or 1888, when the defendant's intestate took violent possession of the lot. The defendant bases his right and possession under a sheriff's deed executed on May 3, 1875, at which time the lot in controversy was sold under an execution issued on a judgment recovered against Ezekiel Watson. The defendant introduced much testimony tending to show that he had been in possession of said lot from the time of his purchase up to the institution of this suit, on June 9, 1890, with the exception of a short time, when Ezekiel Watson entered upon the lot clandestinely. It was also shown by the testimony for the defendant that he had recovered judgment in an action of ejectment against said Watson during this trespass. Upon the defendant's offering to introduce in evidence a copy of said judgment, the plaintiff objected. The court sustained the objection, and the defendant duly excepted. There were many exceptions reserved to the rulings of the court upon the evidence, and also to the giving and refusal to give certain charges, but the opinion of this court renders it unnecessary to notice them in detail.

John Gamble, for appellant. J. W. Posey, for appellee.

**McCLELLAN, J.** This is a statutory action for the recovery of a certain lot of land in the town of Andalusia. Watson is plaintiff, and Lewis, as administrator of one Holley, deceased, is defendant. Plaintiff derives title from one Dixon by deed appearing to have been executed in 1866. Defendant claims title through Watson, under a sale and conveyance by the sheriff to his intestate in 1875, made in satisfaction of certain judgments against Watson, and also by virtue of an adverse possession on the part of the intestate and himself subsequent to said sale and conveyance.

1. Some rulings were made on the trial in respect of Watson's title to the land prior to the sheriff's sale and conveyance of it, as his property, to Holley, and upon testimony in relation thereto. These are of no importance in the case, and, whether erroneous or not, in the abstract, need not be considered, since the defendant—claiming, as he does, under that title, and having recognized its validity by purchasing at the sheriff's sale, and now further recognizing it by a reliance

upon the acquisition of it through that sale, and upon adverse possession since that time under the color of title, with which, at least, he was invested by the conveyance then made by the sheriff—is not in a position to impeach Watson's original title. *Ware v. Dewberry*, 84 Ala. 568, 4 South. Rep. 404; *Houston v. Farris*, 71 Ala. 570; *Tennessee & O. R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 516, 525.

2. The evidence as to the execution of the deed by the sheriff to Holley was that of the probate judge of the county, and is as follows: "That J. A. Thompson, the sheriff, could not write his name, and that he [the witness] frequently wrote in the sheriff's office for said Thompson; that he indorsed the levies on the execution here in evidence, and wrote the deed of Thompson, as sheriff, to Alfred Holley, dated May 3, 1875; that said deed and indorsements on said levies are in his handwriting; that said J. A. Thompson was present when said deed was written; that it was written in the sheriff's office, at Thompson's instance, and under his direction; that, after the deed was written, Thompson told him to sign his name, as sheriff, to the deed, which he did, and then, as judge of probate, took Thompson's acknowledgment to the deed, and carried it into the probate office, and afterwards recorded it; \* \* \* and that some one came and got the deed from the probate office after it was recorded, but don't now remember who it was." It is not entirely clear, on this testimony, that Thompson was actually and immediately present when his name was subscribed to the deed by Fletcher, by his direction; but, manifestly, there was room for an inference to be drawn to that effect by the jury. If he was so present, as the jury might have found, the subscription to the instrument was as efficacious as if he had been able to write his name, and with his own hand had written it, or, he being unable to write his name, as if he had made his mark, and the words, "his mark," had been written against it, and had the signature thus made attested by two witnesses. This on the principle that where the grantor is present, and authorizes another, either expressly or impliedly, to sign his name to the deed, it then becomes his deed, and is as binding upon him, to all intents and purposes, as if he had personally affixed his signature. The reason for the doctrine is thus stated by Shaw, C. J.: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. To hold otherwise would be to decide that a person having a full mind, and clear capacity, but, through physical inability, in-

capable of making a mark, could never make a conveyance or execute a deed." *Gardner v. Gardner*, 5 Cush. 483; 1 Devl. Deeds, §§ 232, 233; *Kime v. Brooks*, 9 Ired. 218; *Frost v. Deering*, 21 Me. 156; *Videau v. Griffin*, 21 Cal. 390; *Rev. St. Me. 1857*, p. 56; *Lovejoy v. Richardson*, 68 Me. 386; *Bird v. Decker*, 64 Me. 551.

3. And it would seem that if the signing by Fletcher, under the direction, and in the immediate presence, of Thompson, was not in itself efficacious, the subsequent acknowledgment of the latter, as shown on the deed, would be a sufficient recognition and adoption of the signature as his own. *Bartlett v. Drake*, 100 Mass. 174.

4. Certain it is that this acknowledgment relieves the deed from any infirmity which might otherwise have affected it on account of the signature not being attested by witnesses. 1 Brick. Dig. p. 530, § 18 et seq.; 3 Brick. Dig. p. 298, § 18.

5. As we have seen, Fletcher, the probate judge, took the deed, after it was signed and acknowledged, for the purpose of recording it in his office. This, nothing appearing to the contrary, may well be considered as a delivery to him by the grantor for that purpose; and, so considered, "there being no evidence to weaken the force of these facts," this constituted sufficient proof of delivery to the grantee. *Elsberry v. Boykin*, 65 Ala. 336; *Alexander v. Alexander*, 71 Ala. 295; *Coal Co. v. Neill*, 87 Ala. 158, 6 South. Rep. 1.

6. And, moreover, at the time of the trial below, this deed was in the possession of the personal representative of the grantee, who in that capacity had also the possession of the land in controversy, and was defendant to this action for its recovery. The presumption from this fact alone, unexplained, is that the execution of the instrument had been duly perfected by a delivery of it to the grantee. *Cherry v. Herring*, 83 Ala. 458, 3 South. Rep. 667; *Simmons v. Simmons*, 78 Ala. 365. And our conclusion, therefore, is that it is shown by the evidence in this record that there was an efficacious delivery of the deed by the grantor, the sheriff, to the grantee, Alfred Holley.

7. It is stated in the bill of exceptions, immediately following the copy of the deed, that "the Jordan lot, No. 1, in the above deed, was interlined in different handwrite from the body of the deed." This "Jordan lot, No. 1" is the lot involved in this suit. We need only say, in this connection, that this statement is not borne out by a reference to the original deed, which is before us by order of the trial judge. The lot in controversy, leaving out of view the interlineation, is therein described and conveyed as "lot No. 1, east of the public square," and it clearly appears that this lot No. 1, on the east side of the public square, is the Jordan lot. This would have been a sufficient description, in the particular under consideration, had nothing more been said; but it

seems that the grantor did not think so, and, for the purpose of curing what might be supposed to be an insufficient description, he interlined—the interlineation and the body of the deed being clearly in the same handwriting—the words, "the lot known as the 'Jordan Lot.'" Manifestly, the interlineation accorded "with all the purposes and objects of the deed." The fair presumption is that it was made before the acknowledgment of execution, and the burden of repelling the presumption rested on the plaintiff. *Sharpe v. Orme*, 61 Ala. 263.

8. The fact that Fletcher indorsed the levies under which the sale was made on the executions for the sheriff is of no consequence. Even were it essential to the validity of defendant's deed that the return should have been made by the sheriff, the facts here show an adoption and ratification by the latter of the indorsement made by Fletcher so as to make it his own; and it was his own in the first instance, if entered by Fletcher by his direction, and in his presence. But the return of the levy is not essential to the validity of the sheriff's deed to the purchaser at execution sale. 2 Freem. Ex'ns, § 341; *Forrest v. Camp*, 16 Ala. 642; *Love v. Powell*, 5 Ala. 58; *Driver v. Spence*, 1 Ala. 540.

9. It follows from what we have said that if the jury believe that Fletcher signed the sheriff's name to the deed we have been discussing at the instance and in the presence of the latter, as is inferable from the evidence, Holley acquired a perfect title to the land in question on May 3, 1875, when that deed was executed. It is not pretended that there has been any conveyance of this title by Holley, or his privies in estate, since that time, nor is it pretended that Watson has received a conveyance of this land from any source since that time. The legal title to the lot, therefore, was at the time, and for all the purposes of the trial, in the estate of Holley, and represented in this action by the defendant Lewis, as his administrator, unless Watson, for some period of 10 years after May 3, 1875, and prior to the institution of this suit, had been in the open, adverse, uninterrupted possession, under a claim of right; and that is really, we take it, the main question at issue in the case. On that issue it would, we think, be competent for the defendant to show by the records of the circuit court, in a former action of ejectment between these parties, that Holley recovered therein against Watson, and was put into possession of the land, under a writ of assistance in May, 1880, as going, not in bar of this action for a former recovery, but to show that, at the time referred to, Holley, and not Watson, was in possession. It would, in our opinion, also be competent for the defendant to show any admissions or statements, made under oath or otherwise, by the plaintiff, subsequent to 1875, to the effect that the land was another's, and not



his, as going to show that at the time they were made he was not in possession of the lot under a claim of ownership, and as also tending to impeach his evidence in that regard on another trial of this cause, should it then be the same or like that on the trial which we are now reviewing.

Many rulings of the trial court on the admission of evidence, and in respect of charges given and refused, are out of harmony with the foregoing opinion. What we have said will suffice for the circuit court's guidance on another trial, without a specification here of the particulars in which error appears by this record.

Reversed and remanded.

(99 Ala. 616)

**HAMMETT et al. v. STRICKLIN.**

(Supreme Court of Alabama. June 15, 1893.)

**VENDOR'S LIEN—WAIVER.**

The taking of a note with a personal surety for the price of land constitutes a waiver of the vendor's lien thereon, even though the note contained a recital that it was given for part of the price, where such recital was mere inducement for a provision in the note reserving to the maker the right to pay off any lien existing on the land.

Appeal from chancery court, Marshall county; S. K. McSpadden, Chancellor.

Bill by Matilda J. Stricklin against Perry Hammett and others to enforce a vendor's lien. From a decree for plaintiff, entered upon an order overruling a demurrer to the bill, defendants appeal. Reversed.

The bill in this case was filed by Matilda J. Stricklin, the wife of George E. Stricklin, against Perry Hammett, Louis Hammett, and George E. Stricklin, and sought to enforce a vendor's lien on certain property for the unpaid purchase money therefor. The note which evidenced the indebtedness for the unpaid purchase money, one of the recitals of which is copied in the opinion, was signed by Perry Hammett, the purchaser, and Louis Hammett as surety. The bill averred the sale of the property to Perry Hammett, and the execution of the note by him and his surety, Louis Hammett, to the complainant, and asked for the relief by appropriate prayer. The defendants demurred to the bill on the grounds that there was a misjoinder of parties to said bill, in that George E. Stricklin was improperly joined as defendant to said bill, and was not a proper party to the suit; and because it was shown by said bill that the complainant took and relied upon other security than the vendor's lien; and that, therefore, the complainant waived her vendor's lien. The chancellor, in his decree, overruled these demurrers. Defendants appeal, and assign the decree of the chancellor as error.

Brown & Street, for appellants. Lusk & Bell, for appellee.

HEAD, J. Bryant v. Stephens, 58 Ala. 636, declared the rule that a recital in a promissory note that it was given for the purchase money of land therein described created conclusively, by contract, a charge on the land for the purchase money in the nature of an equitable mortgage; but in the subsequent case of Tedder v. Steele, 70 Ala. 347, that doctrine was departed from, and subjected to modification, and the sounder and true principle was held to be that such a recital is merely a cogent fact, indicating an intention not to waive or abandon the vendor's lien, but to retain it; and it was held that the fact was so cogent and the presumption so strong as to overcome and rebut the weaker presumption of waiver arising from the taking of personal security on the note for the purchase money. Grave doubts even of the correctness of the modified view were entertained by all the judges, but nevertheless it was so held, and has been recognized in a later decision of this court. Chapman v. Peebles, 84 Ala. 283, 4 South. Rep. 273. The note upon which the lien of a vendor is sought to be enforced in the present case has upon it a personal surety, which fact evidences a waiver of the lien, unless that result is repelled by the recital found in the note in the following words: "This note is given for part purchase money of land this day purchased from George E. Stricklin and wife, and it is expressly understood that I shall have the right to pay off any lien that may exist on said land which the said Stricklin may have failed to remove, and the amount so paid shall be a good offset against this note." We cannot resist the conclusion that the sole purpose of the insertion of this clause was to provide, by express agreement, for the right of the principal maker to pay off any lien which might exist on the land, and hold the amount so paid as a set-off against the note. The recital that the note was given for the purchase money of land was mere inducement to that agreement. No idea of the creation or retention of a security by way of vendor's lien is involved in such a provision as that contained in the note. Security was otherwise provided, viz. by requiring a personal surety. The clause having on its face so plain a purpose to be accomplished, it cannot be said to have been inserted for any other purpose. We are of opinion the chancellor erred in holding otherwise. There is nothing in the other ground of demurrer insisted on in the argument of appellant. Ware v. Curry, 67 Ala. 274. Reversed and remanded.

(98 Ala. 484)

**HOOD v. ROBBINS et al.**

(Supreme Court of Alabama. June 20, 1893.)

**NOTES—BLANK INDORSEMENT—FILLING BLANK—STATUTE OF FRAUDS.**

1. The holder of a note indorsed in blank has no authority to fill out the blank by writing in a consideration for the indorsement.

2. A blank indorsement of a note by one not a party thereto is, so long as the note remains in the hands of the payee, void under the statute of frauds, as an undertaking to answer for the debt, default, or miscarriage of another, for which no consideration was expressed.

Appeal from city court of Selma; Jonathan Haralson, Judge.

Assumpsit by Robert Hood against Robbins & Smith. Judgment for defendants. Plaintiff appeals. Affirmed.

The complaint as originally filed contained only one count, which recited the execution of a promissory note by H. C. Keeble & Co. and the indorsement thereof by the defendants, and averred the nonpayment of said note, and protest and notice duly given. The defendants pleaded the general issue and several special pleas. By the second and third special pleas, the defendants set up the defense that, after the indorsement of said note by them, the plaintiff demanded and received of H. C. Keeble & Co. a part payment of said note, and yet failed to have said note protested, and neglected to give to the defendants notice of the failure of the said H. C. Keeble & Co. to pay the plaintiff the amount due on the said note. In the fourth plea the defendants pleaded that they were accommodation indorsers, which was well known to the plaintiff when he received said note, and that, after receiving the part payment on said note, the plaintiff extended the time of the payment 30 days without the knowledge or consent of the defendants. By the fifth plea the defendants set up the failure of consideration, and by the sixth, seventh, and eighth pleas the defendants pleaded the statute of frauds. The plaintiff amended his complaint by adding a second count, in which was the following allegation: "Said note, after it had been delivered to the plaintiff, was, on, to wit, the 18th day of December, 1890, indorsed by the defendants in their firm name, in consideration that the plaintiff, who was then and there threatening to demand the payment of said note, would postpone the making of such demand, which said plaintiff then and there agreed to do and did do, in consideration of such indorsement." The defendants demurred to this second count of the complaint, on the ground that said count shows that the note sued on was indorsed by the defendants without any words expressing the consideration, and on the further grounds of the statute of frauds. The court overruled this demurrer, whereupon the defendants interposed the same pleas to the second count as were orig-

inally interposed to the first count. The plaintiff demurred to the pleas, setting up the want of consideration and the statute of frauds, on the grounds, respectively, that the plea was no answer to the complaint, and that the indorsements were governed by the commercial law. These demurrers were overruled. Upon the trial of the cause the plaintiff offered to introduce in evidence the note, which, at the time it was offered in evidence, had written on it, just above the indorsement of Robbins & Smith, the following words: "In consideration of the postponement of demand of payment of the within note, we hereby indorse the same." As is stated in the opinion, these words were written upon the back of the note after suit was commenced thereon. The defendants objected to the introduction in evidence of these words written above the indorsements of Robbins & Smith, on the ground that they were not written by Robbins & Smith, and were written after the commencement of the suit. The court sustained this objection, and refused to allow the plaintiff to read in evidence the indorsement on the back of the note above the names of Robbins & Smith, and to this ruling the plaintiff duly excepted. The cause was tried by the court without the intervention of a jury, and, upon the hearing of all the evidence, the court rendered judgment for the defendants.

Satterfield & Young, for appellant. Pettus & Pettus, for appellees.

COLEMAN, J. It appears to us that a mere statement of the facts of this case is sufficient to justify the ruling of the trial court upon the questions assigned as error. H. C. Keeble & Co., for a past-due indebtedness, executed their negotiable promissory note to plaintiff, Hood, payable on demand, for the amount of said past indebtedness. Some 30 days after the execution of this note, the defendants, Robbins & Smith, indorsed the same in blank, and, when thus indorsed, the note was redelivered to plaintiff. There was no consideration for the indorsement of the note by Robbins & Smith, and none expressed, and the terms of the note remained as when executed by Keeble & Co.—a note payable on demand. The note was never negotiated, but remained in the hands of the payee, who instituted the present action against the indorsers. After the suit was brought, the plaintiff wrote across the back of the note, over the signature of the indorsers, as follows: "In consideration of the postponement of demand of payment of the within note, we hereby indorse the same." It is admitted that the indorsers (the defendants) knew nothing of the writing of this assumption above their names, and that it was made in their absence, and without their knowledge, and was never ratified by them. Appellant contends that, as the indorsement was in blank, the holder was authorized to fill out the blank,

in such manner as he saw proper. This is an entire misapprehension of the rule which permits the holder of indorsed paper to fill blanks in the indorsement. The owner of indorsed paper may write over the name of an indorser who has indorsed a note in blank whatever may be necessary to invest him with the legal title or confirm his ownership, but no rule of law will authorize the holder, by an indorsement on the back of the note, to change the liability of the indorser, or take away any defense which legally pertains to the indorser. With equal propriety, a holder who had neglected to protest, or give notice of protest, might deprive the indorser of such a defense, or he could write any statement to destroy any other legal defense of the indorser. We state it mildly when we say the plaintiff misapprehended the principle of law invoked by him. Principles of law which protect commercial paper apply after it has been negotiated, for the protection of innocent bona fide purchasers. *Gilman v. Railroad Co.*, 72 Ala. 583. *Connelly v. Insurance Co.*, 66 Ala. 432.

As between the original parties to the note, those who are fully advised of all the circumstances attending its making and indorsement are not regarded as innocent bona fide purchasers. The payee of a note made purely for his accommodation cannot maintain an action against the drawer, nor against the indorser who indorses it purely as an accommodation for the drawer, there being no consideration moving to or from the payee. In the present case, the note was given to Hood for a past-due indebtedness to him, and it was made payable on demand. In this condition, and without an extension of time, or any other consideration, some 30 days after its execution by the maker, it was indorsed by the defendants purely as an accommodation to the drawer, all of which was fully known to the plaintiff. The plea of want of consideration, predicated upon these facts, was a full answer to the suit.

We further hold that as to the payee, under the facts, the indorsement was an "irregular indorsement," and was no more than an undertaking "to answer for the debt, default, or miscarriage of another," and is void, under the statute of frauds, in failing to express the consideration. We do not decide that the statute of frauds applies to commercial paper, but we have said no paper is entitled to the protection of the commercial law not held by an innocent bona fide purchaser. In the hands of the payee, who has parted with nothing, who has neither assumed any obligation, nor parted with any right, who received the paper with a full knowledge of all the defenses against its binding force, a paper, however strictly commercial in form, is not entitled to the privileges and protection accorded to such an instrument after it has been negotiated, and thereby made "commercial paper" in its true sense. *Dunbar v. Smith*, 66 Ala. 490. The evidence fully sus-

tains the pleas of the defendants. There is no error in the record, and the judgment must be affirmed.

(89 Ala. 236)

## DOLLAR v. STATE.

(Supreme Court of Alabama. June 15, 1893.)

### CRIMINAL LAW—ARGUMENTS OF COUNSEL.

1. On a trial for selling liquors to a minor it is reversible error to permit counsel for the prosecution to state in argument that Columbiana (the place of the alleged sale) was worse cursed with the illegal sale of whisky than any place he knew; that the town was trying to build up a school; and that no person would send his child to a school in a place having a grog shop on every corner.

2. Where, on a trial for selling liquor to a minor, defendant's counsel, in argument to the jury, refers to the amount of the solicitor's fees for such a prosecution, error cannot be predicated in a remark by the solicitor in his argument that he would give up all his fees if he could put down the accursed traffic.

Appeal from Shelby county court; John S. Leeper, Judge.

Cricket Dollar was convicted of selling liquor to a minor, and appeals. Reversed.

The remarks of the solicitor referred to in the opinion, to which objection was made by the defendant, and to the overruling of which objection defendant duly excepted, are thus detailed in the bill of exceptions: "The defendant's counsel having, in his argument to the jury, stated that they could not convict the defendant for the simple offense of selling liquor without a license, as he was not charged with that offense, but for selling to a minor; that the punishment was different, and the solicitor's fees were different,—\$7.50 in the former, and \$37.50 in the latter,—the solicitor, in his closing argument to the jury, made the following statement, to wit: 'If I could put down the accursed traffic in this place, I would give up all my solicitor's fees in all the whisky cases, if I could enforce the law in all the cases.'"

Brown, McMillan & Leeper, for appellant.  
Wm. L. Martin, Atty. Gen., for the State.

HEAD, J. Appellant was prosecuted and tried for selling liquor to a minor, contrary to the statute. The evidence of the state tended to show that defendant sold the minor a pint of whisky in Columbiana, Shelby county, within 12 months before the beginning of the prosecution. The solicitor, in his closing argument to the jury, used the following language: "I don't know why it is, but Columbiana is worse cursed with the illegal sale of whisky of any place I know of. Columbiana is trying to build up a school here, and who, do you suppose, would send his children to school in a place where there is a grog shop on every corner where they could get whisky?" The defendant objected to these statements, on the grounds that there was no evidence to support them, and that they were calculated to prejudice the minds of the jury against the defendant,

and moved the court to withdraw them from the jury. The court overruled the objection and motion, and the defendant excepted. We do not think a narrow or rigid rule should be laid down in restraint of the argument of counsel. Observation and experience show that jury trials rarely occur wherein counsel, in the zeal of discussion, are not led to indulge impertinent remarks, the expression of personal opinions, and often to draw illogical and improper deductions from the evidence. It often occurs, too, that counsel differ as to the testimony of witnesses, each insisting upon his recollection or version of facts which have been deposed to. In the interest of the ending of litigation a wide range must be given to the arguments of counsel, and much must be left to the good sense and sound judgment of the jury, who will ordinarily be able, under proper instructions from the court, to give proper consideration to what has been said, and not suffer themselves to be influenced by outside and irrelevant matters, and improper opinions and conclusions, drawn into the discussions before them. But there should be a limit placed upon this license. Counsel should not be permitted, by the court, against the objection of the opposite party, to state as fact that of which there is no evidence whatever, and particularly that which is irrelevant to his adversary's cause, and of which no evidence would have been received if offered, if the facts so stated are of such a character as that they are well calculated to impress the minds of the jurors, or some of them, to the injury of the opposite party. In the present case the defendant was on trial for the single act of selling liquor to a minor. The gravity of his offense and the punishment he should suffer were to be determined by a consideration of his act in making this sale, and the circumstances which immediately bore upon that act in view of the evils which the law denouncing the offense intended to remedy. It was improper to be considered, in determining his guilt and punishment, whether Columbiana was worse cursed with the illegal sale of whisky of any place known to the solicitor, or that Columbiana was trying to build up a school, or that there was a grog shop on every corner, where children attending the school could get whisky; yet the solicitor was permitted to state these things, of which there was no evidence, and could have been none, as facts to influence the jury, either in ascertaining the guilt of the defendant or in awarding his punishment. We think they went beyond the domain of legitimate argument, so far as that the defendant was probably prejudiced by them. We do not mean to say that the solicitor may not comment upon the evils generally of the crime which the law he is seeking to enforce intends to prevent, but he goes beyond this when he gratuitously states to the jury as fact the existence of particular evils

in the locality of defendant's offense, and to which that offense is supposed by him to be related. The defendant's guilt must be determined by the facts touching the particular act with which he is charged, and, as we have said, his punishment must be determined by the nature of the act committed, and a consideration of the evils generally resulting from the commission of such acts, within the limits prescribed by law. The other remarks of the solicitor to which objection was made seem to have been called forth by impertinent comments of defendant's counsel in reference to the fees of the solicitor, and do not constitute cause of reversal. For the error mentioned the judgment must be reversed, and the cause remanded.

(101 Ala. 383)

O'NEIL et al. v. BIRMINGHAM BREWING CO. et al.

(Supreme Court of Alabama. June 15, 1893.)

FRAUDULENT CONVEYANCES — CREDITORS' BILL — PLEADINGS—SUBSEQUENT CREDITORS—PARTNERSHIP—MARRIED WOMAN AS MEMBER OF.

1. Since Code, § 1730, provides that all transfers of personal property "made in trust for the use of the person making the same are void against creditors, existing or subsequent, of such person," a bill by creditors to cancel a bill of sale for fraud is not subject to demurrer, though it shows that the debt due one of the complainants was contracted after making the bill of sale.

2. In an action to cancel for fraud a bill of sale made by a firm, and to subject the firm property to the payment of a debt, it is no defense that one member of the firm is a married woman.

3. A bill to cancel for fraud a transfer of property, and to subject the same to the payment of the defendant's debts, is not subject to demurrer because it alleges that a part of the indebtedness was for intoxicating liquors sold to defendant, without also alleging that plaintiff was licensed to make such sale, as it is presumed that plaintiff had complied with the laws.

4. Under Code, § 1730, providing that all transfers of personal property "made in trust for the use of the person making the same are void against creditors," the creditor may pursue the property conveyed by the debtor, though the debtor may have other property which might be subjected to the debt.

Appeal from city court of Birmingham; William W. Wilkinson, Judge.

Bill by the Birmingham Brewing Company and Solomon & Levi against Bridget O'Neil and others to set aside as fraudulent a bill of sale, and for other relief. Plaintiffs had judgment on demurrer to the bill, and defendants appeal. Affirmed.

The bill alleges that the respondent Bridget O'Neil, a married woman, and Patrick A'Hern, her son-in-law, after leasing from the Elyton Land Company a certain lot, erected thereon a two-story frame building, which they occupied as a saloon and boarding house. That said saloon business and said boarding house were run and managed together by the said Patrick A'Hern and Bridget O'Neil as partners under the firm

name of Patrick A'Hern. That said Bridget O'Neil managed the boarding house and Patrick A'Hern the saloon business; and that on April 17, 1891, the respondents J. Fox's Sons induced the Birmingham Brewing Company to extend a certain line of credit to the partnership of Patrick A'Hern, representing that said partnership was entirely worthy of credit; and that the Birmingham Brewing Company, upon the faith of said representations, sold the said respondents, Bridget O'Neil and Patrick A'Hern, a certain bill of goods for which they are still indebted to the complainants. That on June 17, 1891, the respondents Bridget O'Neil and Patrick A'Hern conveyed to J. Fox's Sons, in alleged payment of a debt of \$3,827, (which was partly fictitious,) the property owned by the firm of Patrick A'Hern which was reasonably worth \$6,000. The bill further alleges that after said conveyance to said Fox's Sons the said respondents Bridget O'Neil and Patrick A'Hern were left in possession of the property conveyed, carrying on the business and making sales as if the business was their own until on or about the 13th of July, 1891, when respondent Patrick A'Hern absconded from the state, at which time said J. Fox's Sons, but not until then, took possession of the property conveyed, and were at the time of the filing of the bill in possession of said property. The bill further alleges that the bill of sale from the partnership of Patrick A'Hern to J. Fox's Sons was not what it purported to be on its face, but was only intended as a security. The bill alleges that the indebtedness of Patrick A'Hern and Bridget O'Neil, partners, to Solomon & Levi was contracted prior to said alleged conveyance to J. Fox's Sons; but that the indebtedness to the Birmingham Brewing Company was contracted subsequent to said alleged sale. The bill did not seek any personal decree against Bridget O'Neil.

The respondents demurred to the bill, and assigned, among others, the following grounds of demurrer: (1) That said bill of complaint shows on its face that the said Bridget O'Neil is a married woman, the wife of Thomas O'Neil, and was such married woman at the time of the making of the alleged debt in said bill; and does not show any facts which make the debt binding or obligatory upon the said Bridget O'Neil. (2) Because the said bill does not show that the husband of the said Bridget O'Neil consented for her to contract said debt or create said obligation, and expressed such consent in writing. (3) Because the said bill seeks to subject the property formerly owned by said Bridget O'Neil to the payment of complainants' debts, and does not show any facts which show that the alleged indebtedness of the said Bridget O'Neil was binding on the said Bridget O'Neil, or that her husband had given his consent for the said Bridget O'Neil to cre-

ate said debt or obligation, and expressed his consent in writing; and does not show any other facts which would make the said debt obligatory or binding upon the said Bridget O'Neil. (4) The said Bridget O'Neil comes and demurs specially to that part of said bill of complaint which seeks to hold her liable for the alleged indebtedness, it appearing from said bill that the said Bridget O'Neil is a married woman, and was at the time that the said debt is alleged to have been contracted; and does not show any facts which show that said debt was a valid debt or was binding upon the said Bridget O'Neil; and does not show that the husband of said Bridget O'Neil gave his consent for her to contract the said debt or obligation, and that the same was expressed in writing, signed by her said husband; and does not show any other facts which show that the same was a valid and binding debt against the said Bridget O'Neil. (5) The said Bridget O'Neil is shown to have been a married woman at the time she is charged with entering into the partnership of Patrick A'Hern, and it is further shown that part of the business to be engaged in by said firm of Patrick A'Hern was to retail spirituous and vinous liquors in the city of Birmingham, Ala., when the said O'Neil had no power or capacity to engage in or carry on said business. (6) Said defendants come and demur specially to that part of complainants' bill as amended which seeks to hold the said Bridget O'Neil or the property of said O'Neil or the partnership property of Patrick A'Hern liable to the debt created by the firm of Patrick A'Hern, which was so contracted by said firm while engaged in the business of retailing spirituous or vinous liquors in the city of Birmingham, Ala., because the said Bridget O'Neil had no capacity to enter into or engage in said business. (7) To that part of the bill that seeks to recover on account of the indebtedness to the Birmingham Brewing Company, because said bill shows that the indebtedness was created subsequent to the date of the filing of the conveyance, and there are no facts averred in said bill which show that the said conveyance was fraudulent or void to the Birmingham Brewing Company. (8) Because the bill does not show which part of said alleged indebtedness was contracted for the boarding-house business and which part was contracted for retail liquor business. (9) That the bill does not show that the demands sought to be enforced by the complainants have been reduced to judgment. (10) Because the bill is without equity. (11) Because the bill is multifarious, in that it joins as parties complainant Birmingham Brewing Company and Solomon & Levi, each claiming a separate and distinct cause of action.

Upon the submission of this cause on the demurrers, the chancellor overruled each ground thereof, and his decree in so doing is here assigned as error.

Lane & White and T. B. & R. P. Wetmore, for appellants. Mountjoy & Tomlinson, for appellees.

McCLELLAN, J. "All deeds of gift, all conveyances, transfers, and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person." Code, § 1730. A mortgage of merchandise and the like by a debtor to his creditor to secure the indebtedness, or a formal sale, intended to operate only as a security for the indebtedness, is a transfer for the use of the person executing the mortgage or bill of sale within the section quoted, and void as against both existing and subsequent creditors where the mortgagor or seller is by the terms of the writing or extraneous understanding of the parties, expressed or implied, permitted to remain in possession of the property, and sell the same in the regular course of trade for his own benefit. *Benedict v. Renfro*, 75 Ala. 121; *Murray v. McNealy*, 86 Ala. 234, 5 South. Rep. 565; *McDermott v. Eborn*, 90 Ala. 258, 7 South. Rep. 751. The present bill makes a case within this statute as construed in the cases cited. The transfer of the property being void alike as against antecedent and subsequent creditors, all simple contract creditors, whether prior or subsequent, have equal rights, and the same remedies in respect of subjecting it to the satisfaction of their demands; and upon the same principle that prior creditors may unite in a bill attacking a sale by the debtor, which is fraudulent and void only as against debts existing at the time of the transaction, both classes of creditors may join in an assault upon a transaction of this sort, which is void as against the claims of each.

The bill, as amended, does not seek relief against Bridget O'Neil individually. Its sole purpose, so far as she is concerned, is to subject to the satisfaction of complainants' demands the assets of the partnership doing business under the name of Patrick A'Hern, and composed, as is alleged, of said A'Hern and Mrs. O'Neil. It is no objection to such a bill that one of the partners is a married woman, nor does that fact constitute an infirmity in the binding obligation of the contract by which the firm became indebted to the complainants. *Le Grand v. Bank*, 81 Ala. 123, 1 South. Rep. 460; *Lumber Co. v. Lewis*, 94 Ala. 628, 10 South. Rep. 333.

If the claims of complainants, or any of them, or any part of either of said claims, were without consideration, or based on an illegal consideration, this was matter of defense to be laid before the court by answer. The bill was not bad for that it averred the consideration in part of the debts sought to be enforced was vinous, spirituous, or

malt liquors sold by complainants to the partnership, and failed to aver that the sellers were licensed to make such sales. The prima facie presumption of law is that they had complied with the revenue statutes and taken out the prescribed license.

As the bill avers that the partnership business was carried on in the name of Patrick A'Hern, it is fair to assume that the license under which the partnership sold liquors was made out in his name alone. We conceive of no reason for holding, even conceding that a liquor license cannot be granted to a woman, that a silent partner in the business and assets of the concern, whether man or woman, could in such case claim immunity for his or her interest on the ground that he or she was without a license, or incapacitated to obtain a license in his or her own name. Moreover, we find no warrant in our statutes for the position taken by counsel that a liquor license cannot be issued to a woman, married or single; and certainly no ground can exist for relieving a partnership, one member of which is a married woman, from liability for liquors purchased by the firm, that would not equally apply to all other liabilities, or for exempting such firm from the doctrine established by the cases cited above, which, so far as the partnership assets are concerned, places accountability to creditors on the same footing as that of partnerships composed entirely of persons in all respects sui juris.

The operation of the statute quoted at the outset of this opinion (Code, § 1730) does not depend upon the insolvency of the grantor in trust. Its letter and spirit unite to the negation of such a construction, and it is therefore not necessary to present a case for relief under it for the bill to aver insolvency. The creditor has a right to pursue and subject property conveyed by his debtor to the latter's own use and benefit, notwithstanding the debtor may have other property which might be subjected to the debt. *Dickson v. McLarney*, (Ala.) 12 South. Rep. 398.

The foregoing observations dispose of all the demurrers interposed to the bill adversely to the appellants, and the decree overruling them must therefore be affirmed.

(90 Ala. 205)

PINKUS v. BAMBERGER et al.

(Supreme Court of Alabama. June 20, 1893.)

#### EXEMPTIONS—DEBTOR'S INVENTORY.

1. Under Code, § 2525, requiring, on a contest of a claim of exemption to personal property, that defendant on demand file an inventory with the value and location of each item, where defendant alleges that all his property was in the hands of the sheriff under attachments of plaintiffs, and consisted of goods and merchandise situated in a certain store at the time of the levy, and the levy and return of the sheriff is set out, it is a sufficient inventory.

2. Fraudulent conduct of a debtor does not deprive him of his right to exemptions.

3. Where a debtor, between the time of his filing his claim of exemptions and the filing of his inventory, pays out money, this will be deducted from the amount of his exemption.

4. Where a debtor, prior to the attachments against which he claims exemption, sold book accounts amounting to \$2,100 in payment of a debt of \$1,600, with a provision that, if more was realized, it should be paid the debtor, no deduction should be made from the debtor's exemption on this account, in the absence of anything to show that any sum would accrue to the debtor from this source.

Appeal from city court of Decatur; William H. Simpson, Judge.

Appeal by I. Pinkus from a decree of the chancellor making certain deductions from his claim of exemptions, which was contested by Bamberger, Bloom & Co. and other attaching creditors of I. Pinkus & Co. Reversed and remanded.

In answer to the demands of the attaching creditors that I. Pinkus make a verified inventory, as required under section 2525 of the Code of 1886, the said Pinkus filed a claim in which he stated that, when said claim of exemptions was lodged with the sheriff who levied the attachments, the property levied upon under the plaintiffs' writs of attachment was in the possession and under the control of the sheriff, and was all the property of every description belonging to the defendant, "except wearing apparel, books, and pictures;" that said property thus levied upon consisted of a stock of goods, wares, and merchandise, situated at the time of the levy in the storehouse occupied by I. Pinkus & Co., a complete list of which goods is shown as Exhibit A to the sheriff's return to the attachment of Herbert Cartright, and also a list of the goods, wares, and merchandise over the store occupied by Friedman, which last-mentioned goods were valued at about \$900, and an itemized inventory of said last-mentioned goods was attached to the claim of exemptions previously filed with the sheriff; and that all of the goods owned by the said Pinkus, except those claimed as exempt to him, set out in the inventory lodged with the sheriff, were sold by said sheriff under an order of the city court. In this answer to said demand for the verified inventory, the said Pinkus made the levy and return of the sheriff on the attachment of Bamberger, Bloom & Co. and the exhibits thereto part of said answer, "as a full and complete inventory of all the property of any nature whatsoever (except wearing apparel, books, and pictures especially exempt to him) then and since owned by him."

R. A. McClellan, for appellant. Humes & Sheffey, for appellees.

STONE, C. J. The present suit grew out of the claim by Pinkus of statutory exemption of personal property of the value of \$1,000. Code 1886, § 2511. The personal

property of defendant, consisting of merchandise, was attached by his creditors, commencing on March 8, 1890, and continuing for two or more days. The attachment of Bamberger, Bloom & Co. was levied on March 5th. This was the first levy made on the lot of merchandise which was found in an upper room over Friedman's business house. On March 7th, two days after this levy, Pinkus asserted his claim of exemptions in the attachment suits. The merchandise found over Friedman's store, and attached, was selected by him, and made the subject of his claim of exemptions. For reasons to be presently stated, neither the claim of exemptions, asserted in the attachment suit, nor the attachment suit itself, has ever been brought to trial. As we have said, the first attachment—that of Cartright—was not levied on the goods found over Friedman's business house. Soon after the levy of the attachments, the attaching creditors, except Cartright, who was first in point of time, filed bills against Pinkus and Cartright, charging collusion and fraud in the asserted claim, and in the attachment sued out by the latter, and praying to have said first attachment, and the claim it sought to enforce, displaced, and to have the claims of complainants paid, in preference to the alleged claim of Cartright. Against these suits, which, for the present service were consolidated, Pinkus, in April, 1890, renewed and refiled his claim of exemptions. We say "renewed," for it specifies the same property to which claim had been interposed in the attachment suits on March 7th. This was but a continuation of the original claim first filed, for the several bills filed, against which the claim was set up, were, for all practical purposes, only a continuation of the suit and contention inaugurated by the attachments. This claim of exemptions being refiled in the chancery causes, the complainants gave written notice, demanding a verified inventory, under section 2525 of the Code of 1886. An inventory was filed, the sufficiency of which was excepted to by complainants. The court overruled this exception, and thereupon the complainants filed a sworn contest of the exemption, under section 2520 of the Code. The contest asserted that, in the belief of affiant, the claim was "invalid entirely." We hold that the chancellor did not err in holding the inventory rendered in this case sufficient. The effects of the petitioner had been attached, and were in the hands of the sheriff. In such conditions it cannot be presumed or assumed that he could give a fuller or more particular description than he did give. It results that the question—the only question—left for determination in the lower court was whether petitioner was entitled to exemption of personal property, and the extent of his rightful claim. He made oath that he had no money, and that the property set forth in his inventory embraced his entire personal effects, "except his wearing apparel." There

is testimony in this record bearing on the relations and transactions between Pinkus and Cartright, the first attaching creditor; and it is contended that these transactions are not consistent with fair dealing. We hold, however, that, on the issue presented by this record, such inquiry was wholly immaterial, except to the extent, if any, it showed Pinkus had moneys or other effects which he failed to discover in his inventory. No matter how fraudulent his conduct and intention may have been, if he was a resident of Alabama he was entitled to have set apart to him as exempt from his debts \$1,000 in value of his personal property, to be selected by him. Code 1886, §§ 2515, 2521. But his rightful claim on this account did not and could not extend beyond the \$1,000 in value. There was testimony tending to show that the goods claimed exceeded \$1,000 in value. If such was found to be the case, then the claim should have been disallowed for all in excess of the \$1,000.

The real contest in this case is over certain deductions which the primary court made from the \$1,000 claimed by the petitioner; and, first, on account of certain moneys alleged to have been traced to his possession between the time when he first made his claim and the filing of his inventory. It was shown in the testimony of Pinkus himself that, between the first filing of his claim of exemptions and the filing of his inventory, he received from the insurance companies, as return premiums on the canceled policies he had held on his stock of merchandise, the sum of \$133.87. During the same time he testified he paid out \$238.48,—\$190 to one person, and \$48.48 to another. The payment of these sums shows that during that time he had in his possession at least as much money as the sums he paid out. These belonged to his inventory, and he must not be permitted to wrong his creditors by such payment. He must account for the money he thus held or received as so much of his exemption.

It is claimed, and the primary court so held, that other moneys were traced to the possession of Pinkus. There is no testimony which shows that he did not utilize the money he received in the return premiums in making the payments he admits he made, nor is any other money traced to his possession during that time. We cannot, in the entire absence of testimony on the question, presume that he did not use the return premium money in these payments. We place the reduction of his exemption claim on account of moneys traced to his possession at \$238.48. Another reduction claimed and allowed arose as follows: Pinkus owed Friedman \$1,615. Just preceding the issue and levy of Cartright's attachment, he paid this debt in the following manner: He traded and sold to him (Friedman) his notes and book accounts, amounting to about \$2,100. This was an absolute sale and an absolute payment; but it

was agreed that, if Friedman realized more from the claims than the amount due him, he was to pay the surplus to Pinkus. There was no testimony as to the amount collected on the notes and accounts, or to what extent they were collectible. The court deducted the sum of the excess of these claims over the amount due Friedman from the exemption he allowed to Pinkus. In this the court erred. There was no reliable testimony that any sum ever would accrue to petitioner from that source, and, if anything should accrue, no data were furnished for ascertaining its amount or value. Notwithstanding we decline, for the reasons stated, to charge Pinkus with this balance, as a discount pro tanto, from the amount of his exempt personalty, still we hold that it should have been noticed and embraced in his inventory. It was money to become due to him in the event an excess should be realized; and, whatever the sum might prove to be, his attaching creditors were entitled to it, to be reached per chance by garnishment. It results from what we have said that Pinkus, under his claim, was entitled to personal property of the value of \$1,000, less \$238.48. This leaves for him, and subject to his rightful claim, \$761.52. Reversed and remanded, to be disposed of on the principles we have declared.

(99 Ala. 201)

#### STATE v. WOODSON.

(Supreme Court of Alabama. June 22, 1893.)

##### BASTARDY PROCEEDINGS—JURISDICTION.

In bastardy proceedings authorized by Code 1886, § 4842, "when any single woman, pregnant with, or delivered of, a bastard child, makes complaint, on oath, to any justice of the county where she is so pregnant or delivered," etc., no jurisdiction is given where prosecutrix was delivered of the child in another county than that in which the proceeding is instituted, and prior thereto.

Appeal from circuit court, Crenshaw county; John R. Tyson, Judge.

Bastardy proceedings against Olin Woodson were dismissed, and the state appeals. Affirmed.

Wm. L. Martin, Atty. Gen., for the State.  
L. H. Parks, for appellee.

STONE, C. J. This was a proceeding instituted before a justice of the peace in Crenshaw county, charging the defendant, Woodson, with bastardy, under section 4842 of the Code of 1886. The statute, so far as it sets forth the nature and constituents of the offense, and the jurisdictional venue prescribed for its trial, has remained substantially unchanged ever since its enactment, December 13, 1811. Toulmin, Dig. 64, 66; Clay, Dig. 133. Its present form (section 4842 of the Code of 1886) is as follows: "When any single woman, pregnant with, or delivered of a bastard child, makes complaint on oath to any justice of the county where she is so pregnant or delivered," etc.



The statute permits this proceeding to be instituted pending the pregnancy, or it may be delayed until after the birth of the child, at the option of the party complaining. Many years ago this statute was interpreted by this court, and it was held that, if the complaint was made pending pregnancy, then it must be before a justice of the county in which the complaining prosecutrix, for the time being, is, or has her habitation. On the other hand, if the complaint is not preferred until after the birth of the child, it must be made in the county in which the child was born. *Pruitt v. Judge*, 16 Ala. 705; *Wilson v. Judge*, 18 Ala. 757. In *Williams v. State*, 29 Ala. 9,—a bastardy case,—this court said: "A proceeding in bastardy can be commenced only before a justice. His jurisdiction to proceed in the summary mode provided by the Code depends upon the existence of the following preliminary facts: (1) that a woman should make a complaint on oath to him, accusing a particular person of being the father of a bastard child with which she is pregnant, or of which she has been delivered; (2) that the woman making the complaint is a single woman; that she is so pregnant, or has been so delivered, in the county of which the justice acts as justice." We may add, this is the only interpretation of the statute its language permits us to give to it. The affidavit for the warrant of arrest in this case was made before a justice of the peace of Crenshaw county on March 20, 1891. This was the institution of the proceeding, and the warrant of arrest bears the same date. Prosecutrix made oath "that she is now, and was a single woman on the 5th day of January, 1889, and that she was delivered of a bastard child on the said 5th day of January, 1889, in Macon, Ga., but that she was pregnant with said child in Crenshaw county, Ala., and that conception took place in said county and state." In the circuit court, on motion of defendant, the proceedings were dismissed, by order of the court, because the affidavit of complaint clearly showed that neither the justice of the peace nor that court had jurisdiction of the case. The charge was not made, nor the warrant for the arrest sued out, while the prosecutrix was pregnant. Hence, it was not enough that she was then in Crenshaw county. She had been delivered of the child, and, to give the justice or the circuit court local jurisdiction, it was essential that she should have been "delivered" in that county. There was formerly no statute of limitations to proceedings under this statute. The law is now different. Under the Code of 1886, § 4848, it is declared that "no proceeding shall be instituted under this chapter after the lapse of one year from the birth of the child, unless the defendant has, in meanwhile, acknowledged or supported the child." The affidavit in this case shows that the

proceedings were instituted more than two years after the birth of the child. There is no error in the record, and the judgment of the circuit court is affirmed.

(101 Ala. 189)

**CARMAN et al. v. ALABAMA NAT. BANK OF MOBILE.**

(Supreme Court of Alabama. June 15, 1893.)

**LANDLORD'S LIEN—ENFORCEMENT—EQUITY JURISDICTION.**

Code 1886, § 3069, provides that the landlord of any building "shall have a lien on the goods, furniture and effects belonging to the tenant for his rent, which shall be superior to all other liens, except" taxes. *Held*, that such lien exists independently of the action in attachment provided for its enforcement by section 3070, and, where other creditors of the tenant have attached his goods, the fact that the landlord also attached for rent does not bar an action in equity to enforce such lien against the proceeds of sale under the attachments, as superior to the attachment liens.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Bill by the Alabama National Bank of Mobile against Carman & Begg and others for an injunction and other relief. Complainant had decree, and defendants appeal. Affirmed.

On October 31, 1891, the complainant rented to Carman & Begg, a copartnership, a certain store, to be used as a printing office. At the time of the execution of the lease, Carman & Begg gave their 12 promissory notes, payable the 1st of each month. Shortly after the execution of the said lease and notes, Carman & Begg formed a corporation known as the Commercial Printing Company, to which they transferred all their property. On March 4th and 5th, respectively, one Colburn and the St. Louis Paper Company, who were creditors of the Commercial Printing Company, sued out writs of attachment, which were levied upon the presses and other property of the Commercial Printing Company, on the leased premises. Carman & Begg paid the first installment due December 1, 1891, but made default in the subsequent installments; and on March 15, 1892, the complainant sued out, in the city court of Mobile, an attachment for rent then due, with interest, and on April 16, 1892, the complainant sued out another writ of attachment, for the installment of rent due April 1, 1892, against Carman & Begg; and these attachments were levied upon the same property which was attached at the suit of Colburn and the St. Louis Paper Company. Before another installment of rent fell due, the city court made an order in the case of Colburn against the Commercial Printing Company for the sale of the property upon which the attachments were levied, on the ground that it was perishable; and the bill alleges that the "complainant does not know what has become of the property so

sold, and could not identify or trace more than a small portion of the same." On the ex parte motion of the St. Louis Paper Company, the city court granted an order for the distribution of the funds in the hands of the sheriff, which were the proceeds of his sale. Thereupon the complainant filed this bill to enjoin the distribution of the fund so obtained, alleging "that, if said fund is so distributed without first satisfying the lien thereupon, the complainant will be remediless," and also praying that a lien be declared in favor of complainant on the proceeds in the hands of the sheriff. The court overruled the several demurrers interposed by the defendants, and the defendants' motion to dismiss the bill for the want of equity.

Gregory L. & H. T. Smith, for appellants.  
Fredk. G. Bromberg, for appellee.

STONE, C. J. Section 3069 of the Code of 1886 declares that "the landlord of any storehouse, dwelling house, or other building, shall have a lien on the goods, furniture and effects belonging to the tenant for his rent, which shall be superior to all other liens, except those for taxes." This certainly secures a lien of a very high order; a lien which exists, and can be enforced, independently of the remedy by attachment given in section 3070. *Westmoreland v. Foster*, 60 Ala. 448; *Elevator Co. v. McIntyre*, 84 Ala. 78, 4 South. Rep. 175. See, also, *Espalla v. Touart*, (Ala.) 11 South. Rep. 219. We hold that the remedy by attachment is accumulative, and that a resort to that writ for the enforcement of the matured part of the rent notes is no bar to the present suit. 3 Brick. Dig. p. 804, § 97. The averments of the bill make a case where equity alone can administer the proper relief, and enforce the paramount lien which it asserts.

It is claimed for appellants that because the bill is silent as to the disbursement of the proceeds of the attached property, as ordered by the city court, we cannot know that the indebtedness for rent was not ordered to be first paid, and hence that we cannot know that the complainant was aggrieved or injured by that order. It is contended that for this omission the injunction should be dissolved. This is scarcely a full presentation of the case, as made by the bill. It does appear, by necessary implication, that seven of the rent notes, aggregating \$350, were not in suit, and consequently they were not before the city court, and could not have been considered in the order then made. The bill, in its fourth paragraph, needs amendment. It should have set forth the substance of the order of distribution made by the city court. We will, however, make no order touching this matter. Unless the amendment is seasonably made, the chancery court will make the proper order.

The decree of the chancellor is affirmed.

(101 Ala. 390)

### DYKES v. BOTTOMS.

(Supreme Court of Alabama. June 15, 1893.)

VENDOR'S LIEN—ABATEMENT OF PURCHASE PRICE—USURY—WHAT CONSTITUTES.

1. Though notes given for part of the purchase price of land provided for the payment of interest at 15 per cent. per annum, such fact does not render the transaction a usurious one, where the vendee purchased under a parol agreement for a fixed amount in cash, and after taking possession, and being unable to pay such amount, agreed in writing to pay part in cash and the balance by the notes in question.

2. Defendant, in an action to enforce a vendor's lien on several lots of land, is not entitled to an abatement of the purchase price as to a certain lot described in his deed as "a portion of the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , and a part of the S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of Sec. 28," etc.; he being presumed to know that such a description, through want of definiteness, conveyed him no title to any land in such section.

3. Defendant, in an action to enforce a vendor's lien, is entitled to an abatement of the purchase price as to a portion of the land that had not come into his possession, and to which plaintiff had no title at the time of his conveyance to defendant.

Appeal from chancery court, Dale county; John A. Foster, Chancellor.

Bill by James Bottoms against James E. Dykes to enforce a vendor's lien. From a decree for plaintiff, defendant appeals. Reversed.

The bill in this case was filed by James Bottoms against James E. Dykes, and sought to enforce a vendor's lien. On the submission of the cause for decree, on pleadings and proof, and upon the report of the register, the chancellor granted the relief prayed for, and decreed that the complainant have a vendor's lien, and refused to allow the defendant an abatement for the five acres of land which was shown by the report of the register to have been owned and occupied by some one else at the time of the execution of the deed to the defendant. The defendant prosecutes this appeal, and assigns the decree of the chancellor as error.

H. H. Blackman, for appellant. Borders & Carmichael, for appellee.

COLEMAN, J. James Bottoms, appellee, filed the present bill to enforce a vendor's lien for unpaid purchase money due for land sold to respondent. The bill describes the land sold as being the "S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , and N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , and the S.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , of Sec. 29, T. 7, range 25, containing one hundred and sixty acres, more or less, situated in the county of Dale," etc. This description shows a sale of only 100 acres. Three portions are mentioned, but the last 40 acres, to wit, the S.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , includes 20 acres described in the first 40, to wit, the S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  of section 29. No objection seems to have been taken to this omission, and it may be clerical error in the transcript. The defendant, by his answer, pleads usury, and also a deficiency in the quantity of land sold and purchased and

that conveyed by the deed of conveyance with warranty of title. The answer prays for an abatement of the purchase price, both on account of usury and breach of warranty. The deficiency is claimed to consist of five acres, a part of section 29, conveyed, and six acres in section 28, which latter six acres is omitted entirely from the bill of complaint. The answer set up as a fact that respondent has never been in possession of the eleven acres of land for which an abatement is claimed, and that he has not been able to acquire possession, by reason of the occupation by others, (whose names are given,) of said eleven acres of land, who are in possession, and holding, the answer avers, under a title superior to that acquired by the purchase and deed received from complainant. There was no action by the court upon objections to testimony. The objections in many instances were not sufficiently specific, and might have been disregarded. Section 1798 of the Code declares when conveyances are self-approving, and when a transcript may be admitted in evidence. Copies of conveyances not acknowledged and recorded are not admissible, without the proper predicate, accounting for the absence of the original. After the evidence was closed, the court referred to the register to ascertain and report as to whether there was usury in the transaction, and whether there had been a breach of the warranty in the deed of conveyance to respondent. These were questions under our practice which should have been decided by the chancellor, and should not have been referred to the register. Our conclusion from the evidence is that the transaction was not usurious.

It appears that there was a parol agreement for the sale and purchase of the land, at the purchase price of \$900 or \$950, for cash, and that under this agreement the respondent entered upon the possession. No part of the purchase money was paid. This agreement was void, under the statute of frauds. After having been in possession some months, the respondent informed the complainant that he could not pay for the land in cash. It was then agreed that respondent might purchase the land by paying one part in cash, and by executing his two notes for the unpaid purchase money, at one and two years; and the difference in the value of the land for cash, as was first agreed upon in parol, and when sold on a credit, and which latter agreement was concluded in writing, was 15 per cent. The complainant executed his warranty deed to respondent and the respondent executed his two promissory notes. This was not usury. Respondent owed no debt for the forbearance of which 15 per cent. additional was charged, and the debt thus contracted was not a loan of money. There was a sale of land, the vendor willing to sell for so much at a cash valuation, or for so much on a credit, placing the difference between the cash and credit

price at 15 per cent. There is some difficulty in arriving at a legal conclusion from the facts of the case upon which an abatement of the purchase money for a deficiency in the land sold is claimed. The warranty deed of complainant to respondent describes the land sold as follows: "W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ , of section 29, and a portion of the N. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , and a part of the S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , of Sec. 28, all in township 7, range 25," etc., without specifying any number of acres. Now, it is clear that, as to the lands lying in section 28, the deed is void, for want of definiteness in the description of the land. How much of and in what part of these quarter sections lying in 28 was sold, or intended to be sold, cannot be ascertained. "There is no landmark to enable a surveyor to find the land." It is not within the influence of the maxim "Id certum est quod certum reddi." Black v. Railroad Co., 93 Ala. 109, 9 South. Rep. 537; Wilkinson v. Roper, 74 Ala. 140; Railroad Co. v. Boykin, 76 Ala. 560; Humphries v. Huffman, 33 Ohio St. 395. The respondent does not seek a cancellation of the deeds, and return of the purchase money. His purpose is to hold onto the land for which he has received a valid deed, and his prayer is for an abatement of the purchase money. There is no possible criterion for ascertaining a proper abatement for the lands lying in section 28. Both parties, in law, must be held to know that the deed conveyed no part of the land lying in section 28, and the purchaser must be held to have contracted for and to have executed his notes for the land, properly described, lying in section 29. It would seem that the deed under which the complainant held the land lying in section 28 described his interest in this section precisely as described in the deed by him to respondent. The proof shows that complainant was never in actual possession of any of the land in section 28, and this fact was also known to the respondent. There can be no difficulty in regard to the five acres of land lying in section 29. The complainant sold and by deed conveyed 100 acres in this section to the respondent, and warranted the title to him. The proof shows that five acres of this land was valuable, and belonged to other parties, who were living on it at the time of respondent's purchase, and that respondent had never acquired possession of it. So far as we are able to determine from the evidence in the record, the occupants of the five acres hold by a title superior to that owned by complainant, and which he conveyed to respondent. For the five acres in section 29 the respondent was entitled to an abatement of the purchase price. The case will be reversed and remanded, that it may be referred to the register to restate the account, so as to allow the respondent an abatement, according to the prayer of his bill, from the amount due upon his note, for the fair and reasonable value of the five

acres of land lying in section 29, and which, from the evidence, seems to be the property of Ambrose Pelham.

Reversed and remanded.

(99 Ala. 164)

**WAIT v. STATE.**

(Supreme Court of Alabama. June 15, 1893.)  
BURGLARY OF "SMOKEHOUSE"—SUFFICIENCY OF EVIDENCE—"CURTILAGE" OF DWELLING HOUSE—WHEAT CONSTITUTES.

1. In a trial for burglary there was evidence that the building entered was once used as a "doctor shop," but for the last two or three years the owner had kept her cotton seed, meat, and other things there; that there was a partition in the building, with a door in it; that meat had been smoked in it, and the owner had no other smokehouse; and that the breaking was done at the end where the meat was kept. *Held*, that there was evidence that the building entered was a "smokehouse," as charged in the indictment.

2. Though it appeared that such building was about 40 yards from the owner's dwelling house, and not within the same inclosure, the jury might properly conclude that it was "within the curtilage" of such dwelling house, within the meaning of Code, § 3786, which makes the breaking and entering, with intent to steal, any building within the curtilage of a dwelling house, though not a part thereof, burglary.

Appeal from circuit court, St. Clair county; Le Roy F. Box, Judge.

Ben Wait, alias Ben Waits, was convicted of burglary, and appeals. Affirmed.

All the facts are sufficiently stated in the opinion. Upon the introduction of all the evidence the defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them: (1) "Under the evidence in this case, the jury cannot convict the defendant of breaking into, with intent to steal, a smokehouse, a building within the curtilage of the dwelling house." (2) "The uncontroverted evidence in this case shows that the building alleged to have been broken into was not in the curtilage of the dwelling house, and there can be no conviction of defendant, under the evidence in this case." (3) "If the jury find from the evidence that the building alleged to have been broken and entered by defendant was outside of the inclosure or fence which inclosed the dwelling house of Mrs. Varina Inzer at the time of the alleged breaking, then the jury must find the defendant not guilty." (4) "If the jury believe all the evidence, they must find the defendant not guilty." (5) "If the jury find from the evidence that corn, meat, cotton seed, and other plunder was kept in the building alleged to have been broken and entered, and that such building at the time of the breaking, was used for the deposit of corn, meat, cotton seed, and other plunder, then the fact, if it be a fact, that meat was kept and smoked in said house, would not make such building a smokehouse."

M. M. Smith, for appellant. Wm. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The appellant was indicted, tried, and convicted on a charge of breaking into and entering, with intent to steal, "a smokehouse, a building within the curtilage of the dwelling house of Mrs. Varina Inzer, in which merchandise, meat, provisions, things of value, were kept for use, sale, or deposit," etc.; the indictment being drawn under section 3786 of the Code, which declares the breaking and entering, with intent to steal, any "dwelling house or any building, structure, or inclosure within the curtilage of a dwelling-house, though not forming a part thereof," burglary. The evidence as to the character of the house broken into, and its connection with the dwelling house, was to the effect that it was the smokehouse of Mrs. Inzer. That she had no other smokehouse, and that her supply of meat was in this house when it was broken into, and she kept it there for use. The building was about 40 yards from the dwelling house, and not within the same inclosure as the dwelling house. That it had at one time been used by Mrs. Inzer's husband "as a doctor shop," but that for the last two or three years she had used it for the purpose of keeping her meat, corn, cotton seed, and other plunder stored. There was a partition in the building, and in one end she kept her corn and cotton seed, and in the other end she kept her meat and some plunder, and the end of the building where her meat was kept was where the alleged breaking was done. There was a door in said partition, and meat had been smoked in said building.

The only question presented for our consideration arises on the refusal of the trial court to give five several charges requested by the defendant, each one of which asserts, or proceeds on the theory, that there was no evidence in the case tending to show that the building broken and entered was a smokehouse within the curtilage of Mrs. Inzer's dwelling house. A "smokehouse" is defined to be "a building in which meats or fish are cured by smoking; also, one in which smoked meats are stored." Cent. Dict. 5719. And this definition is aptly illustrated by a quotation from Irving: "I recollected the smokehouse, an outbuilding appended to all Virginian establishments for the smoking of hams and other kinds of meats." The term, in common parlance, we feel safe in saying, embraces any outbuilding appended to a dwelling, in which the family supply of meat is habitually kept and stored for use, and where meat may be smoked when necessary. Certainly, the evidence here tends, at least, to show that the house broken into was of this character. It is equally clear, we think, that the jury had a right to conclude, from the uses of this smokehouse, as an appendage of the dwelling, and its propinquity thereto, that it was within the curtilage thereof, notwithstanding it was not within the same inclosure. *Cook v. State*, 83 Ala. 62, 3 South. Rep. 849. These con-

considerations will suffice to justify the action of the trial court in refusing each of the charges requested by the defendant. We may add that, on the evidence adduced, we should be much inclined to hold, as matter of law,—the facts being undisputed,—that the house broken into was within the curtilage of Mrs. Inzer's dwelling, if the question was presented in that form. Affirmed.

(98 Ala. 580)

**BUCK v. CARLISLE.**

(Supreme Court of Alabama. June 15, 1893.)

**ASSUMPSIT—BY WHOM MAINTAINABLE—CONTRACT IN NAME OF THIRD PERSON — FAILURE OF CONSIDERATION.**

1. Where a person pays a sum of money, and takes an option, in the name of a third person, to enter into a certain contract, the person paying cannot, on the inability of the person receiving the money to make the contract, maintain an action of assumpsit on the theory of a failure of consideration and a rescission, since the third person alone, in whose name the option is taken, has the right to rescind.

2. The person paying the money cannot, as the beneficial owner of the option, maintain the action under Code, § 2594, since the action is not on a contract for the payment of money, and, moreover, proceeds on the theory that the option has been destroyed by rescission.

Appeal from circuit court, Marshall county; John B. Tally, Judge.

Assumpsit by Samuel Buck against Hugh Carlisle. Judgment for defendant, and plaintiff appeals. Affirmed.

Brown & Street, for appellant. Amos E. Goodhue and Watts & Son, for appellee.

MCCLELLAN, J. Samuel Buck, the plaintiff below and appellant here, and Milton Humes, paid Hugh Carlisle \$500 for an option to accept and enter into a certain contract with the Tennessee & Coosa Rivers Railroad Company at any time during a period of 15 days, the period to begin at a specified date in the future. This arrangement was made on the part of Buck and Humes in the name of James F. O'Shaughnessy, and the agreement, in writing, of Carlisle was to hold open and extend to O'Shaughnessy for the period mentioned the privilege of accepting and entering into the contract, all the terms of which are set forth in the writing, with the company; but the evidence adduced on the trial below goes to show that O'Shaughnessy in reality had no interest in the agreement for the option, and was to have none in the contemplated final contract, but that Buck and Humes, with his consent, used his name in the transaction. Two-thirds of the \$500 was paid by Buck, and the remaining one-third by Humes. The agreement for the option was entered into by Buck and Humes, and the consideration therefor was paid by them upon the assumption and representation by Carlisle that he owned a controlling interest in the stock of the railroad company, and

also was fully invested with power and authority to bind the company in the terms which the contemplated contract was to embody. It transpired that all this was otherwise than as so assumed and represented; that, in point of fact, Carlisle did not own a majority of the stock, and was wholly without authority to bind the corporation in the manner proposed; and hence that the obligation nominally made by him to O'Shaughnessy was wholly incapable of performance. Upon the theory that the consideration for which the \$500 were paid had failed, or was utterly wanting, and that he is beneficial owner of the claim of Humes for the one-third of that sum paid by the latter, Buck alone brings this action in assumpsit for the recovery of the whole. On the trial many rulings were made adversely to the plaintiff on the competency of testimony and the sufficiency of two special counts added by amendment to the complaint, which originally contained only the common count for money value received, and on plaintiff's right to file a fourth count, setting up fraud, misrepresentations, etc., on the part of Carlisle as the basis for recovery of the money paid on the contract which by these undue means he was induced to enter into. On the view we take of the case, it will not be necessary to consider these rulings in detail. So far as they were prejudicial to the plaintiff, or rather such of them as were prejudicial, they, as also the court's action in giving the affirmative charge for the defendant, were based on the idea that the contract had been made by plaintiff in the name and as the agent of O'Shaughnessy; that there was no evidence of a transfer of it by the latter to the plaintiff, and none that O'Shaughnessy had ever elected to rescind it; and that, until there was an election to rescind by O'Shaughnessy, neither he nor the plaintiff could maintain assumpsit for the money paid in consideration of Carlisle's undertaking. The record fully supports this position in the matters of fact involved in it. The contract was made, as we have seen, by Buck and Humes, or by Buck, Humes paying a part of the money, in the name of O'Shaughnessy. Certainly, as between them and O'Shaughnessy, on the one hand, and Carlisle, on the other, they were the mere agents of O'Shaughnessy. It does not appear that Carlisle knew aught to the contrary. It is not pretended that O'Shaughnessy has ever transferred the contract to Buck, or that he has rescinded it. If the conclusion drawn by the trial court from these facts is a sound one, Buck cannot recover in this action at all on the case he fully developed in the evidence, and whether the court erred or not in other rulings would be immaterial, since the defendant was, on these assumptions, entitled to the affirmative charge given by the court on the merits of the case. We think the conclusion was

sound. So long as the contract stood in the name of O'Shaughnessy,—that is, until he transferred and assigned it, which he had not done when this suit was brought, nor when the trial was had,—he undoubtedly had the right to maintain an action in his own name against Carlisle for the breach of it shown in the evidence offered by the plaintiff, and to recover in such action damages therefor. In such action one item of damage would be the \$500 paid for the option. Carlisle would be precluded by the writing to say that this sum was received from and belonged to Buck. Whatever transpired meantime between him and Buck in regard to it, this litigation, and all possible results of it included, would be res inter alios acta so far as O'Shaughnessy might be concerned. Full payment of the sum by Carlisle to Buck, upon the coercion of judgment and execution or otherwise, would afford him no defense to O'Shaughnessy's action. If the present suit is maintainable, in other words, Carlisle may be compelled to repay this sum twice over,—once to Buck, because the latter paid it to him in the name of O'Shaughnessy; and again to O'Shaughnessy, because Buck ostensibly, and really so far as Carlisle was concerned, as the agent of O'Shaughnessy, entered into a written contract in the latter's name with Carlisle. This demonstrates what absurd and unconscionable results the maintenance of the present suit would admit of. It is to avoid just such results that the law interdicts suits to recover back money paid on a contract where the consideration has failed until that party to the contract in whom the election rests has determined whether he will rescind the contract, and bring assumpsit for the money paid, or will hold the other party to the contract, and bring an appropriate action, (which assumpsit is not,) sounding in damages for the breach of it. Buck could not rescind this contract. O'Shaughnessy, who could, has not rescinded it. On this state of case, Buck cannot recover, and the court did not err in giving the general affirmative charge for the defendant; and this ruling would have been equally free from error had all the evidence offered by the plaintiff, and at first admitted, been allowed to remain with the jury.

Something is said in briefs of counsel about the beneficial ownership of this contract being in the plaintiff, and to the effect that for that reason he is entitled to maintain this suit, under section 2594 of the Code. There are several reasons for denying all advantage to plaintiff based on this consideration. One is that the contract is not one for the payment of money, and hence is not within that section. Another is that the present action is not based on the contract at all, but proceeds on the assumption that the contract has been destroyed by rescission. And yet another is

that a contract cannot be rescinded efficaciously except by the parties to it,—those bound by its terms, whether original parties or transferees,—not persons having no connection which the law recognizes with the writing, but merely some beneficial interest in its terms.

The judgment must be affirmed.

(39 Miss. 242)

RED v. POWERS et al.

(Supreme Court of Mississippi. Oct. Term, 1891.)

WILLS—DEVISES—REQUEST TO PAY ANOTHER—GARNISHMENT.

1. Where property is devised with a request that the devisee give a person \$200 a year as long as he lives, the devisee, by accepting the provisions of the will, and entering on the enjoyment of the property, becomes the debtor of such person for the money to be paid him annually.

2. Such an indebtedness is garnishable.

3. As to the amount not due, execution will be stayed till its maturity.

Appeal from circuit court, Holmes county; C. H. Campbell, Judge.

Garnishment proceedings by Powers, Rollins & Co. against J. G. Red, as garnishee of J. A. Sample. Judgment for plaintiffs, and the garnishee appeals. Affirmed.

In 1890, Powers, Rollins & Co. obtained in the circuit court of Holmes county a judgment against J. A. Sample and others for about \$1,200. In 1889 one G. I. Sample, a son of J. A. Sample, died, and left a will devising to Dr. J. G. Red his property, "with one request: that he, Dr. Jeff. Red, give to my father, J. A. Sample, two hundred dollars a year as long as he lives." Powers, Rollins & Co. had a garnishment writ issued upon their judgment, and served on Red, to reach this fund of J. A. Sample, in his hands. Red answered, denying that he owed Sample anything, and a traverse was filed by plaintiffs, setting up the annuity that Red was to pay under the will. The case was submitted to the jury, who found that Red was indebted to J. A. Sample in the sum of \$200, and there would be due him a like sum of \$200 for the year 1891, and a like sum for every year that J. A. Sample should live, and judgment was entered accordingly on this verdict. As to amounts not due, execution was ordered stayed. A motion for a new trial by the garnishee was overruled, and he appealed.

Noel & Tackett, for appellant. Hooker & Wilson, for appellees.

CAMPBELL, O. J. By accepting the provisions of the will, and entering upon the enjoyment of the estate given to him by it, the appellant became the debtor of Mr. Sample for the \$200 to be paid to him annually, and might be sued at law for the money. This is affirmed by many cases cited in note k, 3 Williams, Ex'rs, p. 1931.

This being true, the debt was garnishable; and, the issue joined upon the traverse of the answer of the garnishee having been found against him, judgment was properly rendered against him, "as if the facts found had been confessed by the garnishee in his answer." Code, § 2451. If he had answered, admitting an indebtedness not then due, execution would have been stayed until its maturity, (Code, § 2445,) and judgment rendered accordingly. Affirmed.

(59 Miss. 238)

**SHANNON v. RESTER.**

(Supreme Court of Mississippi. Oct. Term, 1891.)

**MISJOINDER OF CAUSES — AMENDMENT OF PLEADING—VOLUNTARY NONSUIT.**

In an action based (1) on an account for articles sold by a firm of which plaintiff was a member, and claimed by plaintiff pursuant to an award of arbitration; (2) on an account assigned to plaintiff; and (3) on the account of plaintiff against defendant,—plaintiff should have been allowed to amend so as to make the claim for the first item appear in the name of the firm, for the use of plaintiff, and to take a voluntary nonsuit as to the last two items.

Appeal from circuit court, Sharkey county; J. D. Gilland, Judge.

Action by H. E. Shannon against J. J. Rester. Judgment for defendant. Plaintiff appeals. Reversed.

This suit was begun before a justice of the peace upon an open account, consisting of (1) an account for cotton seed sold by Pemberton & Shannon, and claimed by Shannon pursuant to an award of arbitration; (2) an account of Shannon & Watts, assigned to Shannon; (3) an account of plaintiff against Rester. Shannon recovered a verdict for \$22.07, and the case was appealed to the circuit court. On the trial, leave was granted the plaintiff to amend so as to make the claim as to the first item appear in the name of Pemberton & Shannon, for the use of plaintiff. Afterwards, on defendant's motion, this order was set aside, and the item for cotton seed was stricken from the account. On the trial of this motion there was evidence tending to show that Pemberton & Shannon had been partners in a planting business, and that there was an arbitration to settle the partnership business, and that this account against Rester was awarded to Shannon, and that the partnership business had been wound up. Plaintiff introduced evidence to show that Rester owed this account for cotton seed, but introduced no evidence as to the other items. The plaintiff then offered to take a nonsuit as to the last two items, and confine his action to the Pemberton & Shannon account, for his use. The court refused to allow the nonsuit to be entered. Plaintiff declined the offer of the court to reopen his case, and introduce evidence as to the smaller items. The court then gave

a peremptory instruction to find for the defendant, and verdict and judgment were entered accordingly, from which plaintiff appealed.

Miller, Smith & Hirsh and W. D. Brown, for appellant. McLaurin & McLaurin, for appellee.

CAMPBELL, C. J. This case may not be presented to us as it appeared to the circuit court, but the result cannot be approved. By it the plaintiff was made to lose a sum which the defendant admitted that he owed, and tendered and brought into court for the plaintiff. The plaintiff should have been allowed to dismiss his action, as to the accounts as to which he offered to dismiss, and to amend, and proceed for the other account. It is not for the defendant, or the court for him, to elect on which of his claims the plaintiff will demand judgment. The court was right in permitting the plaintiff to amend, as he did, and wrong in afterwards changing the order, and compelling him to abandon the claim on which he desired and proposed to demand judgment. Reversed, and leave given the plaintiff to amend by striking out all except the account for cotton seed, and to proceed with the suit thus amended, and cause remanded for further proceedings in the circuit court in accordance with this opinion.

(45 La. Ann. 997)

**YALE et al. v. BOND et al., (GILKERSON-SLOSS COMMISSION CO., Intervener. No. 1,279.)**

(Supreme Court of Louisiana. June 16, 1893.)

**EXECUTION—CLAIMS OF THIRD PERSONS—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.**

1. In case a judgment creditor causes property standing in the name of another to be seized and advertised for sale as that of his judgment debtor, he undertakes the burden of proving the title of such third person to be a simulation; but if such third person's title emanates from the judgment debtor, who is suffered to retain actual possession, under a precarious title, there is reason to presume the sale is simulated, and the burden of proof is on such purchaser to show that the transaction was in good faith, and establish the reality of the sale.

2. In this latter event, the burden of proof is sufficiently discharged by the production of a judicial title, supported by confirmatory and corroborating circumstances of contemporaneous date.

(Syllabus by the Court.)

Appeal from district court, parish of Morehouse; R. W. Richardson, Judge.

Action by Yale & Bowling against Bond & Williams. The Gilkerson-Sloss Commission Company intervened to the seizure of certain property. From a judgment for interveners, plaintiffs appeal. Affirmed.

Ellis & Hall and Newton & Cason, for appellants. S. T. Baird and Boatner & Lamkin, for appellees.

WATKINS, J. This is a third opposition, coupled with an injunction, restraining sale of certain property that was seized by the plaintiffs in execution as that of defendants, as their judgment debtors; third opponents setting up title thereto, and claiming ownership. On the trial there was judgment in favor of third opponents, decreeing them to be the owners of the property seized, and disregarding the other demands, and the seizing creditors have appealed.

The averments of opponents' petition are, in substance, that the creditors of Bond & Williams, under a judgment for about \$2,500, caused a certain stock of goods and merchandise to be seized as their property; that same was situated in the town of Bonita, in a storehouse, wherein the defendants had carried on a general mercantile business during the year 1891, and is well worth the sum of \$4,000; that said stock of goods is their property, and was in their possession as such at date of seizure, to the knowledge of the seizing creditors, they having acquired same at a judicial sale made on the 2d of January, 1892, under an order of court made in sundry attachment suits against the defendants Bond & Williams; that they subsequently engaged Bond & Williams as their agents to take charge of said stock of goods and merchandise, and gave them a special procuration to that effect; that, under said mandate, they went into possession for the plaintiffs after the sale, and continued in the charge and management thereof up to the time of seizure of Yale & Bowling, from time to time replenishing the stock, as occasion required. Further appropriate allegation is made, as justifying the issuance of an injunction, and as entitling them to damages. The answer of the seizing creditors is that the pretended agency of the defendants Bond & Williams is a fraudulent simulation, intended to secure their property from the pursuit of their creditors, they being notoriously insolvent at the date of said alleged procuration, and the real and actual owners of the property seized. In the alternative they allege "that, if at the commencement of the business it was the intention to conduct it as that of third opponents, such intention was abandoned, and was treated by third opponents themselves as the property and business of defendants." Third opponents urge a plea of *res adjudicata* against the charge of simulation in the answer, founded upon the issue raised by Yale & Bowling, in liquidation, in the suit of *Commission Co. v. Bond*, 44 La. Ann. 841, 11 South. Rep. 220, and the judgment therein rendered, wherein the validity of same issues are alleged to have been judicially determined.

It will thus appear that the sole question for our determination is simulation *vel non*, the burden of proof resting on the seizing creditors. There is no force in the plea of *res adjudicata*. The suit and judgment on

which the plea is predicated was an ordinary attachment suit, in which Yale & Bowling, in liquidation, intervened, and resisted the attachment of the property of Bond & Williams, as the common debtors of both parties, on several grounds, and, among the number, that plaintiffs' demand was fictitious, and that the attachment was obtained by consent of the defendants, and that plaintiffs' purchase of the claim of the Monroe banks against the defendants was null and void. It is quite true that in passing upon the issues thus raised in that case we employed the following language, to wit: "From a careful examination of the record, we are of opinion that interveners have failed to prove that plaintiffs and defendants were guilty of fraud and collusion in issuing attachments against the defendants. The plaintiffs purchased the property under seizure, and agreed to cultivate the plantations and conduct the commercial business in their own name, at \$75 per month each. When plaintiffs, from the profits of the business, realized the debt, they agreed to restore the property and business to defendants. The necessities of the creditor and debtor would naturally point to this arrangement." As is justly observed by the counsel of Yale & Bowling, the foregoing are merely the reasons that were assigned by the court for its judgment rejecting their demands as third opponents, and for sustaining the plaintiffs' attachment. The title of the plaintiffs, as purchasers of the defendants' property *pendente lite*, was not at issue therein, though it was undoubtedly a factor in the conclusion reached by the court; and, consequently, same was not directly passed upon, and the judgment thus rendered constitutes no bar to this action, notwithstanding it was this purchase and agency that constituted one of the grounds of attack made upon those proceedings.

In so far as the case of the plaintiffs in injunction is concerned, it is just about as it is stated in their petition, and as announced in the extract we have quoted from 44 La. Ann. and 11 South. Rep., so far as the face of the papers is concerned; for it appears that, upon application of some of the attaching creditors, the stock of goods in dispute, as well as other properties attached, was advertised and sold under an order of court *pendente lite*, to prevent a loss being sustained by deterioration and waste, and at the sale thus made plaintiffs in attachment became the adjudicatees, and the proceeds of sale were distributed ratably, and according to the respective privileges of the attaching creditors. The purchasers, being creditors for a large amount, and entertaining doubt of collecting their claim, employed their debtors, Bond & Williams, as their agents, as alleged in petition, and turned the stock of goods over to them, as stated in the opinion referred to, hoping that by this arrangement they might realize the full amount of their debt. Under this arrangement the de-



fendants conducted the business without interruption or change until the date of Yale & Bowling's seizure, and against which plaintiffs' injunction is directed. The proof furnished by plaintiffs in injunction is to the effect that, subsequent to the foregoing arrangement having been made, the mercantile establishment was constantly supplied from their house in the city of St. Louis, and that the stock of goods that was seized by Yale & Bowling consisted of the old stock that was adjudicated to them, and such additions as had thus been made since the time of adjudication. These facts are attested by sundry invoices and bills of lading, and the testimony of the members of the plaintiffs' corporation, as well as that of the defendants' firm, notwithstanding the defendant Williams stated that he considered that the goods belonged to the defendants, because the plaintiffs had charged the price to their account. But the statement of Williams is completely overborne by the testimony, oral as well as written, including rendered accounts, which are to the effect that the purchase price of the old stock, as well as the price of the new goods, was charged to the account of Bond & Williams, agents. Bond also gave it as his opinion that the goods belonged to the defendants, because the profits of the business were applied to the credit of their indebtedness to Gilkerson-Sloss Commission Company; but he was frank enough to admit that, in his opinion, the ownership of the goods was a mooted question, though it seems quite apparent that his opinion was a non sequitur, as the fact of the profits of the mercantile enterprise being passed to the credit of defendants Gilkerson-Sloss Commission Company, in effect, should clearly indicate that they were owners, instead of the defendants. He also admits that in 1892 Bond & Williams, as agents of Gilkerson-Sloss Commission Company, had possession of the storehouse and stock of goods at Bonita, the property in dispute, and were thus in possession at date of the seizure enjoined; that the stock of goods went in the name of Bond & Williams, agents, but that Bond & Williams got the benefit of the profits of the business; that both of the defendants Bond and Williams were paid salaries. He further states that defendants did "the mercantile and planting business in 1892, under the contract, as agents for Gilkerson-Sloss Commission Company; that that business extended over in 1893, until the seizure in this case. Gilkerson-Sloss Commission Company furnished nearly all the goods, merchandise, etc., for the Bonita store in 1892, and up to the seizure in 1893." He gave it as his opinion that, upon a fair settlement between the defendants and Gilkerson-Sloss Commission Company in 1893, there would be a small balance due the latter. He states that third opponents advanced the defendants money with which to buy cotton, and that a disagreement arose between them in reference

to four \$1,000 drafts that figure on their account, but that subsequently credit was given them for \$4,000, to cover their aggregate amount. He says that defendants' object in conducting the mercantile business at Bonita, under the firm name of Bond & Williams, agents, was to make money enough to pay off Gilkerson-Sloss Commission Company, and save what they could after paying them up. Williams, as a witness, puts the case in this way, viz.: "What property we would have was responsible for the losses of the firm, if there was any; and whatever profits there was in the business was to go to the homologation of what we owed Gilkerson-Sloss Commission Company."

Notwithstanding the foregoing statements of the two defendants, they also state, inferentially, at least, that this agency was a cloak to secure and protect them from other creditors, and that the four \$1,000 drafts were intended to swell the amount of their indebtedness, apparently so as to serve as an additional security for them. But these statements are completely overcome by other testimony and by their own conflicting evidence. The contention of counsel for the seizing creditors is to the effect that Bond & Williams were the equitable owners of the goods, and that the third opponents held the legal title as a quasi pledge, or, in other words, that third opponents were to conduct the business, through the agency of the defendants, until the latter's debts were paid, and then transfer it to them. Pursuing that theory, their argument is that, if at any time the defendants paid their indebtedness, they would, of right, be restored to the full ownership of the property, regardless of the will of their creditors, and it would inure to the benefit of all of their creditors generally. Hence, they insist that, inasmuch as, under the Code, the perfect ownership of a thing is vested in him who has immediate dominion of it, and not in him who has a mere beneficial right in it, (Rev. Civil Code, arts. 489, 490,) Gilkerson-Sloss Commission Company were never owners of the merchandise in dispute, because they only had a beneficial interest in it. But this argument falls, necessarily, because they were not merely conducting the business through defendants, as agents, but were the actual owners of the goods by means of the sheriff's adjudication. The Code provides, also, that in case the thing sold remains in possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume the sale is simulated, and, with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale. *Id.* art. 2480. But assuming that defendants are, in the sense of that article, holding possession by a precarious title, and have the burden of proof put upon the third opponents to make out their good faith

and show the reality of the sale, we are of opinion that, considering the proofs already adverted to, they have discharged that burden, and shown their good faith, as well as the reality of the sale ab initio. Assuming that the defendants' possession was precarious, that fact would justify the direct seizure of the plaintiffs in execution, and nothing more.

But there are several transactions and circumstances that counsel for the seizing creditors cite and rely upon as completely offsetting the proofs of the reality of the transaction that are furnished by the plaintiffs in injunction. Some of them are as follows, viz.: First. That, notwithstanding the contract of mandate from third opponents to the defendants, whereby it is claimed that the relations of principal and agent were established, bears date February 4, 1892, yet the account with Bond & Williams, agents, was opened on January 6th previously, and upon which are entered as debits the following items, to wit: (1) The draft given by Burwell to the sheriff for the stock of goods; (2) the amount of attorneys' fees paid by them in their proceedings against Bond & Williams; (3) sundry drafts of Bond & Williams, given for rent to various persons, and for other purposes,—thus evidencing the continuation of their old account against Bond & Williams, individually. As subsequently explained in the testimony of third opponents' witnesses, these were possibly erroneous entries on the account, but, under the agreement of the parties, that when, "from the profits of the business, [they] had realized their debt," they were "to restore the property and business to the defendants," it was altogether right and proper for the plaintiffs to have kept an exact and faithful account of all their expenses and expenditures, in order that they might know when, "from the profits of the business, they had realized their debt," and were under obligation to restore the property to the defendants. Under their agreement, it could not certainly be expected that third opponents should lose the money they had expended in the purchase of the property, the amount of the attorneys' fees and costs they had expended in the litigation in which they acquired the property, and then surrender the property upon defendants making payment of their judgment debt alone. Surely not. On the contrary, is it not reasonable that, in making a composition with their judgment debtors, third opponents should have required as a condition the full and complete satisfaction of all dues and demands? We think so. It would have been a circumstance to which suspicion might have attached had such an arrangement been made, and no provision incorporated therein looking to the reimbursements of such costs and expenses to Gilkerson-Sloss Commission Company. Second. That, in the course of the correspond-

ence between the plaintiffs in injunction and the defendants, the former wrote a letter to the latter, in which the ownership of the merchandise in question was admitted to be in them. It is as follows, viz.: "St. Louis, Oct. 14, 1892. Messrs. Bond & Williams, Bonita, La.—Dear Sirs: Your letter 14th received, with B | L 17 bales cotton. The cost of carrying, including loss in weight, this early in the season, will soon amount to a sum in excess of any reasonable advances. As regards the cotton you have picked, it ought to be insured. You can't afford to lose 250 to 275 bales cotton. Your merchandise, gin, and store ought to be insured also. It costs something, but pays; in fact, you can't afford to go without. The market continues to decline, although crop reports are favorable. Yours very truly, John M. Gilkerson, President." This isolated letter, that is much relied upon by the seizing creditors, is, to our thinking, explained by the statement of Gilkerson and Burwell; and their testimony is supported, in the main, by the other facts and circumstances of the case. The fact that out of all the letters, contracts, accounts, and bills of lading this is the only one that can be found in which such an admission is made most clearly indicates that it was altogether unintentional. This idea is strengthened when we take into consideration the strenuous effort that is made by counsel of the seizing creditors to impair and destroy the effect of the testimony of these witnesses. On this score their contention is that they were guilty of perpetrating a fraud upon the district court and this court, on the trial of the case of Commission Co. v. Bond, in this, to wit, that in that case the plaintiff company were enabled to defeat the charges of fraud that were made therein by third opponents and interveners, and obtain a final judgment, sustaining their attachment against the property of the defendants, and, among other properties, the stock of merchandise in dispute, and mainly upon the testimony of those two witnesses; that in the recent suit of Williams v. Commission Co., 13 South. Rep. 394, a case just decided by this court, the defendant company defended on the ground that the draft in question for \$5,000, and more, which figures on this account against the defendants, had not been paid or realized, as claimed and averred on the trial of that suit, and that, consequently, they did not owe the plaintiff, as payee, the amount thereof; that their contention to that effect was embodied in their answer in this last-named suit, and constitutes a judicial confession of an unconscionable fraud that the said witnesses enabled the plaintiff company in the first-named suit to perpetrate upon a court of justice. The statement relied upon is as follows, viz.: "The said draft was drawn with the agreement and understanding by and between your defendants' agent, Bur-

well, and plaintiff and plaintiff's husband, John A. Williams, of Bond & Williams, that the same was to be drawn and indorsed by plaintiff, and forwarded to your defendants in St. Louis; that the same was to be charged in account vs. Bond & Williams, and that no part of said draft was to be paid by your defendants until they were paid in full by Bond & Williams all indebtedness of Bond & Williams to your defendants, and then whatever amount they could realize out of claim or judgment against said Bond & Williams, that said draft was to enter into and make up, from the property of said Bond & Williams, was to be paid to plaintiff." Record, p. 416.

The contention of counsel is that this judicial confession is directly at variance with the testimony of the plaintiffs, and that of their agent, Burwell, in the former case, which was to the effect that their entire account against the defendants was just and due, and upon which testimony the court founded its judgment, and that, had the confession that was made in said answer been made known to the court in the former case, a judgment would have been rendered therein dissolving the plaintiffs' attachment. Counsel's theory seems to be that the attachment must necessarily have fallen, because such proof as that which is contained in said answer shows that defendants' indebtedness was contingent, and not absolute. But, without going into any refined discussion of this question, it seems quite sufficient to say that, conceding the prejudicial effect of the former testimony upon the credibility of Gilkerson and Burwell, we are unable to perceive any reason why the same consequences should not attach to the credibility of Bond & Williams, who were evidently cognizant of it, and consenting to it; for, if it impairs the credibility of the former, it certainly does that of the latter, and, disregarding the testimony of Gilkerson, Burwell, Bond, and Williams would strip the case of the seizing creditors of any support. Aside from their testimony, there are sufficient facts and circumstances detailed in the record to sustain the adjudication and defeat the charge of simulation, and, without sanctioning the course pursued by Gilkerson and Burwell, we must say that, even if their testimony in the former case was disingenuous and untrue, yet, as it is supported by other indubitable proof in this case, we cannot pronounce same wholly unworthy of belief.

After a careful examination and study of this case in all of its bearings, our conclusion is that the charge of simulation is not made out, but that the adjudication of the stock of goods and merchandise to the plaintiffs in injunction was a real transaction, and that they are entitled to the affirmance of the judgment pronounced in their favor by the court a qua. Judgment affirmed.

(32 Fla. 62)

BUSHNELL v. KRUM et al.

(Supreme Court of Florida. Aug. 7, 1893.)

ADMINISTRATION—SALE OF LAND TO PAY DEBTS—BOND OF ADMINISTRATOR.

Where lands of a decedent are sold, on the application of an administrator, to pay debts of the estate, under the provisions of section 40, p. 86, McClel. Dig., (sections 1921, 1925, Rev. St.,) it is the duty of the court granting the order of sale to require the administrator to give extra or additional bond conditioned for the proper application of the funds arising from such sale; but such bond should not be made payable to the heirs at law, but to the governor of the state and his successors in office.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

On the application of J. R. Krum and others, heirs at law of Alonzo L. Bushnell, deceased, Augusta C. Bushnell, administratrix, was required by the county court to execute a certain bond, and from a judgment affirming such order the administratrix appeals. Reversed.

A. M. Thrasher, for appellees.

TAYLOR, J. Augusta C. Bushnell and William S. Thayer, as administrators of the estate of Alonzo L. Bushnell, deceased, obtained an order from the county court of Volusia county for the sale of certain lands of the estate for the payment of its debts. The lands were sold by a commissioner appointed by the county court in the order of sale, and the proceeds of the sale were turned over by the commissioner to Augusta C. Bushnell, as administratrix. Upon the application of the heirs at law of the deceased, the county judge, on the 23d of May, 1887, made an order requiring the said administratrix to execute a bond to said heirs at law in the sum of \$1,700, conditioned for the faithful application by her of the residue of the proceeds of such sale of said lands not consumed in the proper payment of debts. From this order the administratrix took an appeal to the circuit court of Volusia county. The circuit judge, to whom, by agreement of the parties, all questions of law and fact were submitted, affirmed the order of the county court, and from such order of affirmance Augusta C. Bushnell appeals to this court.

The appellees have submitted the cause upon brief, but for the appellant there has been no brief filed here, or other submission of the supposed errors appealed from. Because of this failure of the appellant to submit her cause, we might treat the appeal as abandoned, but, having considered the sole question presented by the record, we dispose of the case by saying that under the provisions of section 40, p. 86, McClel. Dig., (sections 1921, 1925, Rev. St.,) under which the said sale of the land was apparently

made, the giving of a bond by the administrator for the faithful application of the proceeds of such sale, whether received in cash or upon an extension of credit, is, in express terms, provided for; and such a bond should have been required of the administrator by the county judge, without any petition on the part of the heirs or any one else praying therefor. The order of the county judge was proper, except wherein it required such bond to be made to the heirs at law. It should have been made to the governor of the state, and his successors in office, as other bonds required to be given by administrators.

The orders appealed from are reversed, with directions to have the bond required thereby made in conformity herewith.

(32 Fla. 56)

### HATHAWAY v. STATE.

(Supreme Court of Florida. August 7, 1893.)

HOMICIDE—JUSTIFICATION—DEFENSE OF SERVANT  
—FILING LIST OF WITNESSES SWORN BY GRAND JURY.

1. An individual indicted by a grand jury has no such personal interest in a compliance by the foreman of such grand jury with the provisions of section 22, p. 624, McClel. Dig., (section 2809, Rev. St.,) requiring such foreman to return to the court a list of all witnesses sworn before such grand jury during the term, as would cause a noncompliance with such statute to affect his rights under such indictment in any way, or that could make such noncompliance a ground for abatement of the prosecution against him, or that could furnish him with any ground of exception upon writ of error after conviction.

2. The same circumstances that will justify or excuse the homicide where the assault is upon one's self will also excuse or justify the slayer if the killing is done in defense of his or her husband, wife, parent, child, master, mistress, or servant.

3. Where the defendant sets up in justification of the homicide that the killing was done in defense of his servant, it is error to charge the jury that, "before they can acquit, the evidence must satisfy them that there was, in fact, imminent danger of the apparent design of the deceased to kill, or inflict great personal injury, being accomplished." All that was necessary to establish such defense was for the defendant to show, from the evidence, that he was surrounded by such a state of affairs as made it reasonable for a cautious and prudent man, thus situated, to believe that his servant was in imminent danger of losing her life, or of receiving great personal injury, at the hands of the deceased, unless he struck the fatal blow. *Smith v. State*, 6 South. Rep. 482, 25 Fla. 517; *Pinder v. State*, 8 South. Rep. 837, 27 Fla. 370,—cited and approved.

(Syllabus by the Court.)

Error to circuit court, Marion county; Jesse J. Finley, Judge.

Jerome A. Hathaway was convicted of manslaughter, and brings error. Reversed.

James H. Curry, for plaintiff in error. W. B. Lamar, Atty. Gen., for the State.

TAYLOR, J. At the spring term, 1890, of the circuit court for Marion county, the

plaintiff in error was indicted for murder in the first degree of one William J. Jerkins. After various continuances, the trial was had at the spring term, 1893, and resulted in a conviction for manslaughter in the second degree. From the sentence pronounced, the defendant seeks reversal here on writ of error.

The first assignment of error insisted upon is the sustaining of the state's demurrer to a plea in abatement interposed by the defendant, which plea claimed an abatement of the prosecution upon the ground that the foreman of the grand jury that found the indictment at the spring term of the court, 1890, had failed to comply with the provisions of section 22, p. 624, McClel. Dig., (section 2809, Rev. St.,) which requires the foreman of every grand jury to return to the court a list, under his hand, of all witnesses who shall have been sworn before the grand jury during the term, to be filed of record by the clerk. There was no error in the ruling complained of. What the purpose or intention of this statutory provision is, it is unnecessary for us now to decide, but we cannot see how a compliance or noncompliance therewith could ever, in any way, affect the validity of any specific indictment that might be regularly found and presented by any such grand jury, nor how the rights of any such indicted individual could be affected, for good or for bad, by either a compliance or noncompliance therewith. The statute seems to contemplate that such list of witnesses shall be made up and returned to the court at the close of the grand jury's labors, as it requires a list of all witnesses sworn and examined during the term. That any individual indicted by such grand jury is not designed to have any personal interest in the compliance with this law becomes evident when it is remembered that many persons indicted during the first day's sittings of grand juries are actually and regularly tried before the same grand jury that indicts have completed their labors, so as to be able to prepare such list for filing. In *State v. Wilkinson*, 76 Me. 317, it was held that a similar statute was not mandatory, but directory, merely, and that an omission of its requirements does not, as a matter of right, furnish ground for exception.

The eighth and ninth charges, given of the court's own motion, are assigned as error, and are as follows: "(8) If you believe from the evidence that Harriet E. Jerkins, the wife of the deceased, was at the time that deceased was killed the hired servant of defendant, and that there was reasonable ground for the defendant to apprehend a design on the part of deceased to commit a felony on her, or do her some great personal injury, and that there was imminent danger of such design being accomplished, then and in that case you will find him not guilty. (9) If you do not find the defendant guilty of

murder in the first degree, and if you should be satisfied from the evidence, beyond a reasonable doubt, that the defendant killed the deceased when the deceased was not engaged in committing a felony, nor attempting some great personal injury to Harriet E. Jenkins, the wife of the deceased, and if you are satisfied from the evidence, beyond a reasonable doubt, that at the time of the killing the said Harriet E. Jenkins was not the hired servant of the defendant, and that there was not at that time imminent danger of the deceased committing a felony, or doing her some great bodily injury, then and in that case you must find the defendant guilty of murder in the first degree." The court, at the defendant's request, also gave the following charge: "If, from the evidence, you find that at the time the defendant struck the fatal blow he was surrounded by such circumstances as made it, from his point of view, as a reasonable man, reasonably appear that such steps were necessary in order to protect the said Harriet E. Jenkins from loss of life or from great personal injury, you must find the defendant not guilty." But before giving it the court added thereto the following proviso: "Provided you are satisfied from the evidence that there was imminent danger to her life, or of great bodily injury." At the defendant's request the court also gave the following charge: "If, from the evidence, you find that at the time the deceased was struck by the defendant the said Jenkins appeared reasonably to defendant to be in the act of killing Mrs. Jenkins, or of doing her great personal injury, you will find him not guilty." But before giving same the court added thereto the following proviso: "Provided the evidence satisfies you that there was imminent danger of it being accomplished." The giving of these two instructions, with the provisos added thereto by the court, are also assigned as error. The eighth instruction above, and the provisos added by the court to the last two, are all subject to the same objection, and, under the proofs in this case, were so erroneous as to necessitate a reversal. The proof shows that the homicide here was committed in the dwelling house of the defendant, and there was proof tending to show that the wife of the deceased was residing at the house of defendant, in the capacity of his servant, and that the defendant struck the fatal blows after the deceased had knocked such servant down with a chair, after declaring, with an oath, that he would kill her, and while he had the chair raised to strike her again; that the defendant came from an adjoining room into the room where the deceased and his wife were, and, finding them in this attitude, at once struck the blows that resulted in death. Under these circumstances, it was of vital importance to the defendant, on his trial, to have the law as to what circumstances would constitute justifiable or excusable homicide accurately

stated to the jury. Under our law the same circumstances that would justify or excuse the killing of an assailant where the assault is upon one's self will also excuse or justify the slayer if the killing is done in defense of his or her husband, wife, parent, child, master, mistress, or servant. In the case of *Smith v. State*, 25 Fla. 517, 6 South. Rep. 482, and in *Pinder v. State*, 27 Fla. 370, 8 South. Rep. 837, the rule of law has been established to be that all that can be required of the prisoner, in such cases, is to show that he was surrounded by such a condition of affairs as made it, from his standpoint, reasonable for a cautious and prudent man to believe that it was necessary to strike the fatal blow in order to save himself from death, or great bodily harm. In this case the defense was that the defendant struck the fatal blow to save, not himself, but his servant, from either death or great bodily harm. All that could have been required of him, to establish such defense, was to show, from the evidence, that he was surrounded by such a state of affairs as made it reasonable for a cautious and prudent man thus situated to believe that his servant was in imminent danger of losing her life, or of receiving great personal injury, unless he struck the fatal blow. So, then, when the court, as in these instructions, charged the jury, in effect, that the evidence must satisfy them that there was in fact imminent danger of the apparent design of the deceased to kill or inflict great personal injury being accomplished, it stated the law erroneously, and required the defendant to bring forward a greater degree of proof to establish justification than the law requires.

The ninth instruction above, given on the court's own motion, is also erroneous, because it is confusing, and might have a tendency to mislead the jury into a belief that the court was convinced of the propriety of a verdict of murder in the first degree. It begins with the hypothesis that, if the jury shall conclude that the defendant is not guilty of murder in the first degree, then, if they find another given state of facts to be true, they must find him guilty of murder in the first degree, even though they may already have concluded that he was not guilty of that degree.

As the errors in the instructions necessitate another trial of the cause, we think it proper, although it is not assigned as error here, and no exception was taken thereto in the court below, to point out another serious error, in the fourteenth charge of the court to the jury, wherein they are instructed as follows: "If you do not find the defendant guilty of either murder in the first degree or third degree, or of manslaughter in the second degree, your verdict will be, 'We, the jury, find the defendant not guilty.'" This charge patently invades the province of the jury, and is tantamount to saying that, from the evidence, the jury must

convict either of murder in the first or third degree, or of manslaughter in the second degree, or of nothing, when there was testimony in the case that would have sustained a conviction of manslaughter in the fourth degree.

The judgment of the court below is reversed, and a new trial ordered.

(98 Ala. 652)

**RUSSELL v. WRIGHT.**

(Supreme Court of Alabama. June 20, 1893.)

APPEAL—RECORD—PLEADING—COMPROMISE—CONSIDERATION

1. Where it appears from the record that the trial was had on a plea of want of consideration, it will, on appeal, be considered as if all formalities in pleading had been observed.

2. A note given by an executor in compromise of the claim of a grandnephew of testatrix against her estate, claiming under a bequest to her "brothers' and sisters' children," is without consideration.

Appeal from circuit court, Macon county; J. R. Dowdell, Judge.

Assumpsit by H. J. Wright against M. S. Russell, as administrator of James M. Tarpley, on a promissory note. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

At the request of the plaintiff, the court gave the following written charges to the jury: (1) "If the jury believe from the evidence that J. M. Tarpley gave his note for the settlement of a claim of Henry J. Wright, in compromise of a claim which said Wright was urging against said estate of Mrs. Ellington, although said claim was doubtful, there was a valid consideration of the note, and the plaintiff can recover." (2) "If the jury believe from the evidence that prior to the execution of the note in evidence the plaintiff was asserting a claim to an interest in the estate of Mrs. Ellington, under the terms of her will, and Mr. Tarpley executed the note in settlement of that claim, then they must find for the plaintiff, notwithstanding the claim was decided by the courts to be doubtful." The defendant separately excepted to the giving of each of these charges to the jury, and also excepted to the court's refusal to give, at his request, the general affirmative charge in his behalf.

S. B. Paine, for appellant. W. F. Foster, for appellee.

**HARALSON, J.** This suit is against the administrator of J. M. Tarpley, on a promissory note executed by said Tarpley to the plaintiff on January 24, 1889, for \$50. The plea was want of consideration, in that Tarpley, being the executor of Mrs. Ellington, executed the note under the mistaken belief and impression that the plaintiff (appellee here) was entitled to the amount of said note, because of his being one of the "heirs" (legatees) of Mrs. Ellington, under

a clause in her will by which she gave certain legacies to her "brothers' and sisters' children," which will was duly probated, and is set out in the record; and defendant denied that plaintiff was one of the testator's brothers' or sisters' children, to whom said bequest was made, and, this being the only consideration upon which said note was executed, he pleaded want of consideration. The only proof of plaintiff's relationship to the testatrix was his admission that said note was executed by Tarpley for plaintiff's interest in the Ellington estate under said will, and that his father was one of the children of a brother of Mrs. Ellington, and died before the testatrix did, leaving him (plaintiff) and a son, brother of plaintiff. It was further shown that \$100 was about what would be coming to plaintiff under said will, if he was entitled to anything thereunder; that his claim had been urged as a proper charge against the Ellington estate, as his legacy under the will, and upon final settlement of the said estate in the probate court it had been rejected by the court. There was also evidence, as the bill of exceptions states, tending to show that there was a compromise of plaintiff's claim against said estate, and said Tarpley bought it from plaintiff, and gave him the note sued on for it. There was a judgment in the court below for the plaintiff, for the note and interest, and the defendant brings this appeal to reverse that judgment.

The plea of want of consideration nowhere appears in the record, otherwise than in the bill of exceptions; and it is insisted by the appellee that it cannot be considered by us as a part of the record, and that, therefore, we will be remitted, in one view of the case, to consider the plea of the general issue alone, as being before us. The record shows two pleas,—one, nonassumpsit; and the other, a special plea of want of consideration,—and both, apparently, pleaded together. They appear together in the record, signed by plaintiff's attorney at the foot of the last one. There is no date of the filing of either. The judgment entry recites that issue was joined. The trial was had on the special plea of want of consideration. We will therefore consider the plea, on this appeal, as if all formalities of pleading it had been fully observed. *Railroad Co. v. Farmer*. (Ala.) 12 South. Rep. 86; *Railroad Co. v. Burton*, Id. 89; *Railroad Co. v. Hayes*, Id. 101.

Let us consider the only question in the case: Was this note supported by any consideration? The general rule is that a promise, verbal or written, to pay the debt of another, must be founded on a precedent liability or a new consideration, or it will not support an action. But if the original debtor is discharged by the agreement of the parties, and the obligation of a third person is substituted for the discharged debtor, and a new debt is created, binding alone on the

promisor, the promise is supported by a valuable consideration, and will be enforced. *Doss v. Peterson*, 82 Ala. 253, 2 South. Rep. 644; *Thornton v. Gulce*, 73 Ala. 322; *Underwood v. Lovelace*, 61 Ala. 157. But these, and many other similar cases which might be cited, all proceed on the predicate of the existence of a valid debt in the first instance, for which the substituted debt is given, and which is discharged by it. If, in fact, no debt existed in the beginning, and there was no element either of benefit to the promisor, or of detriment to the promisee, the promise is inoperative. Approaching this case still closer, we are to consider whether there was any debt or consideration to support the alleged compromise and settlement of the plaintiff's claim to share as a legatee under the will of Mrs. Ellington. This court held in *Bozeman v. Rushing*, 51 Ala. 530, that the giving up of a suit, or any equivalent proceeding, instituted to try a question, the legal result of which is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof, but that there must be an actual controversy, of which the issue may be fairly considered by both parties as doubtful. "The assumption of a supposed liability, which has no foundation in law or fact, is not a sufficient consideration for a promise, upon which an action can be maintained." *Maul v. Vaughn*, 45 Ala. 141. So, in *Prater v. Miller*, 25 Ala. 320, where an heir at law threatened to contest her father's will, and the devisees promised, in consideration that she would not do so, to pay her a certain sum, but it was not shown that there was any ground on which to base a contest, or to raise a doubt as to the validity, of the will, it was held that there was no consideration for the promise. To the same effect is *Stewart v. Bradford*, 26 Ala. 410. As touching the compromise and settlement of claims whose validity is afterwards denied, in a late case, we said: "The question in this class of cases is whether there is a consideration to uphold the release or agreed compromise. The surrender of a mere assertion of claim, or the withdrawal of a threat to sue, when the claim is without legal merit,—whether its legal validity is known or not,—will not uphold a release or agreement of compromise." "When a claim is absolutely and clearly unsustainable at law or in equity, its compromise constitutes no sufficient legal consideration." *Ernst v. Hollis*, 86 Ala. 513, 6 South. Rep. 85. Now, what claim did the plaintiff have of being a legatee under the will of Mrs. Ellington? We have held—and it is universally recognized as correct—that the word "children," in its ordinary and legal signification, does not include grandchildren, unless there is, in the instrument in which the word is used, a clear intention to include them. *Russell v. Russell*, 64 Ala. 500; *Echols v. Jordan*, 39 Ala. 81; 3 Amer. & Eng.

Enc. Law, 231, and note. The language of the will, under which the plaintiff proposed to come as a legatee, twice repeated is, "among" or "between" "my brothers' and sisters' children;" and the proof shows that plaintiff was not a child of a brother or sister of Mrs. Ellington, but the child of a child of a brother, or the grandnephew of testatrix. He did not answer to the description of the persons to whom legacies were given. He was no more one of them than any other stranger. He was an intruder, and his claim a mere pretense. It was clearly and absolutely unsustainable before any court, and therefore furnished no foundation for a compromise or a promise to pay it.

It is contended that this claim might possibly have been sustained by the court under section 1862 of the Code, which provides that when a disposition under an appointment or a power is directed to be made to or among the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren or other descendants of such person, and under it such a doubt, at least, might have been started, respecting the validity of plaintiff's claim, as would make it, under our decisions, a sufficient consideration for a compromise. But it is manifest the statute has no application to this case, for the executor was not clothed with any powers of appointment, but was charged with a duty, and the duty was restricted to particular children. *Collins v. Toomer*, 69 Ala. 14.

Applying the foregoing principles to the charges asked by plaintiff, and it is clear they each, under the evidence, asserted incorrect principles, and ought to have been refused, and the general charge requested by defendant ought to have been given.

Reversed and remanded.

(36 Ala. 310)

DRAPER et al. v. WALKER et al.

(Supreme Court of Alabama. June 20, 1893.)

TROVER—CASE—SECOND MORTGAGEE—PLEADING—COSTS.

1. In trover by a second mortgagee of chattels for the conversion thereof, a plea alleging that after the commencement of the action, but before any order or plea therein, defendants had bought the articles from the first mortgagee, default in whose mortgage had occurred before commencement of the action, is good.

2. Such plea also constitutes a good defense to a count on the case, as, though a second mortgagee may maintain case for the conversion of the chattels, provided it was wrongful, and he has been damaged, it would be necessary for him to show by his reply that the property was more than sufficient to satisfy the first mortgage.

3. Plaintiff is entitled to costs accruing before filing of defendants' plea, showing acquisition of the first mortgagee's rights.

Appeal from city court of Anniston; B. F. Cassady, Judge.

Action by Draper, Mathis & Co. against Walker, Teague & Co. Judgment for defendants. Plaintiffs appeal. Reversed.

Matthews & Whiteside, for appellants. Kelly & Smith, for appellees.

COLEMAN, J. The action was by appellants against the appellees. The complaint contains two counts,—the first in trover, and the second in case. The count in case avers the destruction by defendants of plaintiffs' lien upon certain personal property, created by mortgage to plaintiffs, executed by William Curry April 7, 1887. The count in trover is for the conversion of the same property. The defendants pleaded the general issue, and, by way of further defense, pleaded specially, in pleas Nos. 2, 3, and 4. The court overruled plaintiffs' demurrer to defendants' special plea No. 4. It is from this ruling of the court that the present appeal is prosecuted.

Under the general law, an appeal could not lie from the judgment of the court upon the demurrer to a plea. *Collins v. Railroad Co.*, 70 Ala. 533; *Mabry v. Dickens*, 31 Ala. 243. The act of the legislature, by which the city court of Anniston was created, provided specially for appeals within 30 days from judgments rendered upon the pleadings. Acts 1888-89, p. 564. The fourth plea of the defendants shows that plaintiffs were second mortgagees, and that the mortgagor abandoned the property, and that defendants took possession of, and converted, the property, under the authority acquired by a third mortgage. This plea further shows that after the suit was instituted by plaintiffs, but before any order was made in the case, or plea filed, the defendants bought the property from the first mortgagee, whose mortgage had been regularly recorded, the law day of which had transpired before the commencement of the action, and that plaintiffs never had possession of the property. The plea avers that a large sum was due and unpaid on the first mortgage, but does not state what amount, nor does it aver the value of the property. The question presented is whether the title and interest acquired by the purchase from the first mortgagees, and the facts as averred, present a complete defense to both counts of the complaint. A distinction exists between matter of defense arising after issue joined, and when it arises pending suit, but before issue is joined. The former must be pleaded *puls darrien* continuance. The latter is a plea in bar to the further maintenance of the suit. This is the rule declared in *Dryer v. Lewis*, 57 Ala. 554; *McDougald v. Rutherford*, 30 Ala. 253. The general rule is that, to entitle plaintiff to a recovery in trover, the plaintiff is required to prove property in himself, and the right to possession, at the time of the conversion. *Corbitt v. Reynolds*, 68 Ala. 378. Possession may be sufficient evidence of ownership to

sustain the action against a wrongdoer. In a court of law, after default, the legal title passes to a mortgagee. Nothing remains in the mortgagor except an equity of redemption. Strictly speaking, a mere equity of redemption, unaccompanied by possession, will not sustain an action of trover, and many authorities hold that such an interest will not authorize the action. *Rees v. Coats*, 65 Ala. 258. *Ring v. Neale*, 114 Mass. 112, was the case of a second mortgagee suing a purchaser from the mortgagor, and, in principle, is directly in point. *Colt, J.*: "To maintain the action of trover, the plaintiff must have the legal title to the property in question, and must show possession or the right to immediate possession. It is not enough that he shows an equitable title, such as a right to redeem, or a reversionary interest subject to the present legal title of another. The whole legal title and right of possession passes to the mortgagee by a mortgage of personal property, and is defeated only by the performance of the condition. The plaintiffs' interest in this property is that of second mortgagee. The legal title, and right of immediate possession at the time of the alleged conversion, were in the holder of the first mortgage, to whom, alone, the defendant is liable in this form of action. The defendant cannot be held in two actions for the same tort, in favor of different purposes. Nor can the rights of the holder of the first mortgage be defeated." This decision is cited in the text of *Jones, Chat. Mortg.* § 499. See *Id.* § 448, and note. In this state it has been often declared that a mortgagor, after the law day, owns no interest in the mortgaged property, except the equity of redemption, and that his vendee can acquire no greater interest. *Kelly v. Longshore*, 78 Ala. 204; *Ware v. Shoe Co.*, 92 Ala. 145, 9 South. Rep. 136; *Bingham v. Vandegrift*, 93 Ala. 233, 9 South. Rep. 280. These principles have been declared in cases arising between the mortgagor or his assignee or grantee and the mortgagee. As to all persons except the mortgagee, the mortgagor in possession is regarded as the owner of the legal, as well as equitable, interest, whether there has been a forfeiture or not, and he may convey, by mortgage or other conveyance, such title or interest as will be good against all other persons. *Marks v. Robinson*, 82 Ala. 78, 2 South. Rep. 292; *Allen v. Kellam*, 69 Ala. 442; *Denby v. Mellgrew*, 58 Ala. 147; *Cowley v. Shelby*, 71 Ala. 122; *Jones, Chat. Mortg.* § 497; *Gardner v. Morrison*, 12 Ala. 547. The rule in this state is that a second mortgagee after forfeiture (or before, if there is no provision that the mortgagor may retain possession) may maintain either detinue or trover against a stranger or person claiming only through the mortgagor by a sale or conveyance of the property made subsequent to the execution of the second mortgage. 82 Ala., 2 South. Rep.,



and 12 Ala., *supra*. We have stated that in a court of law, after forfeiture, the legal title vests in the mortgagee, and the default goes to the whole property. *Thompson v. Thornton*, 21 Ala. 808. The mortgagee, thus invested with the entire legal title, may sell and convey the property to a third person. *Downing v. Blair*, 75 Ala. 218; *Welch v. Phillips*, 54 Ala. 309; *Scott v. Ware*, 65 Ala. 174; *Jones, Chat. Mortg.* § 454.

In a court of law, after default, the mortgagee is the absolute owner of the property, subject only to the equitable right of redemption, and such rights as grow out of this equitable right of redemption. The mortgagor can convey no greater right than he owns. Consequently, a second mortgagee could not maintain trover against a prior mortgagee, or the vendee of a first mortgagee. The latter holds a superior legal title. This was expressly decided in the case of *Landon v. Emmons*, 97 Mass. 37. A mortgagor can mortgage his equity of redemption, and this was the estate acquired by the plaintiff by his second mortgage. He had an equitable lien, by virtue of his mortgage, upon the equity of redemption. Case will lie to recover damages for the conversion or destruction of property upon which a party has a mere equitable lien, upon the general principle that when there is a tortious act, from which damage results, the law must furnish a remedy, rather than the wrong shall go unredressed. *Hurst v. Bell*, 72 Ala. 340; *Hussey v. Peebles*, 53 Ala. 432; *Lomax v. Le Grand*, 60 Ala. 537; *Elmore v. Simon*, 67 Ala. 523; *Thompson v. Powell*, 77 Ala. 392. The count in case, as that in trover, was in legal form, and not subject to demurrer. The defendants' plea showed an outstanding legal title in the first mortgagee, superior to that of plaintiffs, with which by his purchase from the first mortgagee, he connected himself. If the facts averred in the plea were found to be true, they furnished a complete bar to the further prosecution of the suit in trover. By the purchase from the first mortgagee, the defendants acquired all rights, and could make all meritorious defenses to an action on the case for the conversion of the property, or the destruction of plaintiffs' equitable mortgage, that the first mortgagee might have made, had the suit been instituted against him, except, perhaps, as to a question of cost, to be hereafter referred to.

We have seen that after forfeiture the mortgaged property became vested in the first mortgagee. He was authorized to sell the same, and convey the legal title and ownership of the property to a purchaser. His rights to the property, and those of his vendee, were absolute, except as to the equity of redemption left in the mortgagor, or his assignee or vendee. If the property mortgaged was of less value—was insufficient to satisfy the debt secured by the first mortgage—the holder of the equity of re-

demption sustained no damage. If the purchase price received by the first mortgagee exceeded the amount of his debt, the surplus, *ex aequo et bono*, belonged to the holder of the equity of redemption, for which assumption would lie. *Troy v. May*, 13 South. Rep. 263, (present term.) If the property was of more value than sufficient to satisfy the debt secured by the first mortgage, and it was injured or destroyed or disposed of, not in accordance with the provisions of the mortgage, an action on the case would lie by the mortgagor or second mortgagee. *Prima facie*, a mortgagee, who, after default, takes possession of the mortgaged property, and converts the same, or in any manner disposes of it, is not liable for such action. *Prima facie*, he has done only what the law allows him to do. To make him liable, in such a case, it is necessary to aver and prove the act was wrongful, and that damages were sustained; and, to show damage, it is necessary to aver and prove that the property was more than sufficient to satisfy the debt secured by the first mortgage. In such case the recovery would be the difference between the value of the property and amount of the debt for which the property was appropriated under the prior mortgage. The rule here declared does not militate against the principle that no one shall take advantage of his own wrong, but proceeds upon the principle that the plea shows, *prima facie*, no wrong has been done to plaintiff, to his injury. We therefore hold the facts averred in the plea were a full answer in bar to the further prosecution of the suit under the pleadings. Plaintiff might have replied to the plea, and averred the facts necessary to authorize a further maintenance of the suit, in accordance with the principles of law, as we have declared them. *Ewing v. Blount*, 20 Ala. 694.

There is no objection made to the plea because it fails to offer to pay the costs which had accrued before the purchase of the property and the filing of the plea. We are not permitted to consider any causes of demurrer not specially assigned. Code, § 2690, and authorities cited. The plaintiffs were entitled to their costs accruing before plea No. 4 was filed. There is no error in the record. Affirmed.

(38 Ala. 610)

#### WADSWORTH v. DUNNAM et al.

(Supreme Court of Alabama. June 7, 1893.)

"INTOXICATING BITTERS AND BEVERAGES"—WHAT CONSTITUTE — QUESTION FOR JURY — "GINSENG CORDIAL"—INSTRUCTIONS.

1. Whether "ginseng cordial" is an "intoxicating bitters or beverage," within the meaning of a statute prohibiting their sale, is a question for the jury.

2. On a trial where the issue was whether "ginseng cordial" was an "intoxicating bitters or beverage," and the evidence that it was a

medicine was that the mixture, in addition to alcohol and water, contained ginseng and other roots having medicinal properties, while an expert testified that he had analyzed the cordial, and that the ginseng and other herbs contained no medicinal properties whatever, and there was evidence that the cordial was not used by sick persons, but was sold to persons having no occasion for medicine, and drank, to intoxication, as a beverage, it was error for the court to assume in its charge that the mixture possessed medicinal properties.

3. On a trial where the issue was whether "ginseng cordial" is an "intoxicating bitters or beverage," a charge that it was not intoxicating unless its "moderate and reasonable use" would produce inebriety is erroneous, since those liquors which the law recognizes as *per se* intoxicating produce inebriety only by an immoderate and unreasonable use.

4. In determining whether a compound is an intoxicating beverage, within the meaning of a statute prohibiting the sale of such beverages, the question is not what quantity is necessary to produce intoxication, but whether that quantity, be it great or small, may be taken without other baleful effects than such as are usually incident to intoxication.

Appeal from circuit court, Shelby county; Le Roy F. Box, Judge.

Action by F. P. & C. L. Dunnam against A. J. Wadsworth on certain promissory notes executed by defendant to plaintiffs. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

The defendant filed a special plea, and set up as a defense to the notes sued on that they were given in settlement of an account between the plaintiffs and the defendant, which account contained items for intoxicating bitters or beverages having the name of "Ginseng Cordial," which were sold to him by the plaintiffs in violation of an act of the legislature prohibiting the sale of spirituous, vinous, or malt liquors, or intoxicating bitters or beverages, in precinct No. 4 of Shelby county, in which precinct the sales were made. Whether or not ginseng cordial was an intoxicating liquor constituted the only issue of fact in the cause. The facts bearing on this plea are sufficiently stated in the opinion.

W. S. Clay, for appellant. Henry Wilson, for appellees.

MCLELLAN, J. This action is on certain notes given by Wadsworth to F. P. & C. L. Dunnam in settlement of an account. Some of the items of this account were charges for bottles of "ginseng cordial" sold by plaintiffs to defendant. A statute of force at the place of these sales made it "unlawful for any person or persons to sell, give away, or otherwise dispose of, any spirituous, vinous or malt liquors, or intoxicating bitters or beverages," and imposed a penalty for its violation. Acts 1882-83, pp. 613-616. The defense was that this ginseng cordial was an intoxicating bitters or beverage, within this act, and the plea to this effect presented the sole issue on the trial below. Ginseng cordial is not what is generally known as intoxicating liquor, such as whisky, brandy, gin, and the like, nor, on the other hand,

is it what is generally and properly known as medicine, or as a toilet or culinary article, recognized as such in standard authority,—the United States Dispensatory, for instance,—such as tincture of gentian, paregoric, bay rum, cologne, essence of lemon, and the like, which, though containing alcohol, and capable of producing intoxication, are not intoxicating liquors, bitters, or beverages within prohibitory statutes; and it is not, therefore, to be declared, as matter of law, either that this cordial is, or that it is not, within the provisions of the act referred to. Whether it is so or not is a question of fact for the jury, under the instructions of the court. Black, Intox. Liq. § 8; Intoxicating Liquor Cases, 25 Kan. 751; Carl v. State, 87 Ala. 17, 6 South. Rep. 118.

On this issue of fact there was evidence—indeed it was not controverted—that the cordial in question contained alcohol, and the evidence for the defendant was that the proportion of alcohol was so great as that the mixture was about as intoxicating as whisky. There was no pretense on the part of plaintiffs that the decoction was useful, or intended to be used as an article for the toilet, or for culinary or mechanical purposes. Their sole theory was that it was a medicine containing only sufficient alcohol to prevent fermentation. But the only evidence adduced in support of this theory was that "the mixture consisted of thirty parts of water, eight parts of alcohol, two parts of simple syrup, and ginseng and other roots and herbs possessing medicinal properties." On the other hand, an expert testified for defendant that he had analyzed the cordial, and that the ginseng and other herbs it contained possessed no medicinal properties whatever; and the evidence further went to show that the cordial was not sold to, or used by, sick persons, but was sold to persons having no occasion for a medicine, and drank by them, to intoxication, as a beverage. In view of this contention of the plaintiffs that the mixture was a medicine, and not a beverage, and this evidence on the part of the defendant that it was not a medicine at all, and possessed no medicinal qualities, but was an intoxicating beverage, it was manifest error for the trial court to assume, as it did, in the third charge given at plaintiffs' request, that the mixture did possess medicinal properties. Cary v. State, 76 Ala. 78; Sandlin v. Anderson, Id. 403; Joyner v. State, 78 Ala. 448; Carter v. Chambers, 79 Ala. 223; Jonas v. Field, 83 Ala. 445, 3 South. Rep. 893.

In giving many of the charges requested by the plaintiffs, and in refusing some of those asked by the defendant, the court below proceeded on the idea that, aside from other considerations, ginseng cordial could not be said to be an intoxicating bitters or beverage if it produced intoxication only when used unreasonably, inordinately, immoderately, or excessively, and would not

have this effect if used reasonably and moderately, or in ordinary, and not excessive, potations. Thus, charge 2 given for plaintiffs, in its last sentence, declares: "If the bitters sold in this case would not in ordinary and reasonable use, intoxicate, the jury must find for the plaintiffs." Charge 4 for plaintiffs is in the following language: "It is not the question whether it was possible to use the bitters as an intoxicating beverage, but whether it is reasonably susceptible of such use, and it must be such by moderate and practical use, not by immoderate or excessive use. If the jury believe from the evidence that the bitters must have been drunk immoderately or excessively in order to make it practically or reasonably susceptible of use as an intoxicating beverage, then they must find for the plaintiffs." Charge 7 of plaintiffs' series is as follows: "If the evidence shows that the bitters sold by plaintiffs were only intoxicating when used excessively or immoderately, then the jury must find for the plaintiffs." And so with several other instructions given at plaintiffs' request, while one or two charges asked by defendant, and refused, were intended to instruct the jury that the decoction might be held to be an intoxicating beverage notwithstanding moderate use of it would not produce intoxication. In giving these charges for the plaintiffs the court below, in our opinion, set up a false criterion for the determination of the question involved. The words employed in the instructions are, of course, to be taken in their ordinary significance. The word "intoxication," as therein used, means an abnormal mental or physical condition due to the influence of alcoholic liquors, a visible excitation of the passions, an impairment of the judgment, or a derangement or impairment of physical functions or energies. Black, Intox. Liq. § 423; Insurance Co. v. Jones, 94 Ala. 434, 10 South. Rep. 530. This implies a condition which would not result from the reasonable, ordinary, and moderate use of the most intoxicating liquors. Intoxication by means even of those liquors which the law itself recognizes as *per se* intoxicating, in general acceptance, is produced by their unreasonable, inordinate, immoderate or excessive use, and to say that no liquor is intoxicating unless its moderate and reasonable use will produce inebriety is to declare that no liquor whatever is intoxicating. This cannot be, and is not, the test. The true criterion is that declared by Justice Brewer in the Kansas Liquor Cases referred to above, and adopted by this court in *Carl v. State*, supra. It is thus stated: "If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone,—that its use as an intoxicating beverage is practically impossible by reason of the other ingredients,—it is not within the statute. \* \* \* On the other hand, if the intoxicating liquor remain as

a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients, and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. 'Intoxicating liquors, or mixtures thereof.' This, reasonably construed, means liquors which will intoxicate, and which are commonly used as beverages for such purposes, and also any mixture of such liquors as, retaining their intoxicating qualities, it may fairly be presumed, may be used as a beverage, and become a substitute for the ordinary intoxicating drinks." Given that the particular compound will intoxicate, the question is not what quantity of it is necessary to produce intoxication, but whether the necessary quantity, however great or small, may reasonably be drunk. It is of no consequence that it may require from two to eight bottles of this "ginseng cordial" to produce intoxication, if that quantity may be taken without other deleterious consequences than such as are incident to intoxication. If the quantity requisite to a state of intoxication may be safely used, it is a compound "reasonably liable to be used as an intoxicating beverage," and therefore within the statute. The instructions to which we have adverted appear especially misleading and erroneous when referred to the undisputed evidence that the compound was agreeable to the taste; that it was used solely as a beverage, and to a great extent as such; and that it could be relied on to produce intoxication without any baleful consequences, other than are incident to intoxication by means of other alcoholic liquors. Their natural effect in this connection, taken with evidence on the part of plaintiffs that it required from two to eight 14-ounce bottles to produce intoxication, was to impress the jury that the cordial was not an intoxicating beverage merely because it took a good deal of it to accomplish inebriety, when upon no principle or reason can the quantity alone have any bearing on the matter, so long as the compound is agreeable to the taste, and the necessary quantity may be safely taken. These charges, clearly, should not have been given. What we have said will suffice for the guidance of the circuit court on another trial. Reversed and remanded.

(99 Ala. 325)

LOUISVILLE & N. R. CO. v. GRANT et al.  
(Supreme Court of Alabama. June 20, 1893.)

CARRIERS OF GOODS — INJURIES TO STOCK WHILE  
BEING TRANSPORTED — RELEASE FROM LIABILITY  
BY CONTRACT — EFFECT — NEGLIGENCE — QUESTION  
FOR JURY.

1. Though shippers of live stock agree to release the carrier from liability for all loss or damage to such stock which is not the result of the willful negligence of its agents, the carrier

is liable for damages arising from its own or its servants' negligence.

2. In an action against a railroad company for injuries to horses transported over its line, it appeared that it was the last of three connecting lines over which the stock was shipped, and plaintiffs averred that such injury was caused by defendant's negligence. Defendant receipted for the stock as in "good order and condition," and there was other evidence that the horses were unhurt when received from the connecting line, and that they were injured when they reached their destination. Defendant's conductor testified to facts which made it difficult to see how the injury could have occurred on defendant's line. Held, that whether or not the horses were injured by defendant's negligence was a question for the jury.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Action by Grant & Richardson against the Louisville & Nashville Railroad Company to recover damages for injuries to horses while being shipped over defendant's road, and caused by its negligence. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendant appeals. Affirmed.

The plaintiffs below, Grant & Richardson, sued the Louisville & Nashville Railroad Company for damages "for the failure of defendant to convey safely and securely, and to deliver safely and without injury, 27 horses, the property of plaintiffs, and which were received by defendant as a common carrier, to be delivered by the defendant to plaintiffs at the city of Montgomery, in the state of Alabama, for a reward;" and the further averments are "that the defendant failed to convey safely and securely, and to deliver safely and without injury, the same to plaintiffs, at the place aforesaid, as it was the duty of defendant to have done. And plaintiffs aver that said stock was shipped by plaintiffs from Oswego, in the state of Kansas, to Montgomery, in the state of Alabama. That all of said stock, while in possession of defendant, as such common carrier, were injured and damaged and became sick, sore, and faint from deprivation of food, rest, and water, and from long confinement without rest, in a close car; and that when said stock reached the city of Montgomery, Ala., on the 26th day of December, 1889, they were in a bad condition." And then the complaint proceeds to describe their condition in detail. One was thrown down in the car, and trampled on and hurt inwardly; one was strained in the stifle joint; one was injured across his back, from being thrown down and trampled upon by other animals; and that the load of stock was damaged, bruised, injured, and disfigured. Then follows these further averments: "And plaintiffs aver that said horses, at the time they were received by defendant as aforesaid, as a common carrier, to be safely conveyed over its line of railroad, and to be delivered to plaintiffs in the city of Montgomery, Alabama, as aforesaid, for a certain reward to the defendant in that behalf, were of the value, at least, of five thousand dollars, yet the defendant, not

regarding its duty, as such common carrier, did not convey such stock or horses to the said city of Montgomery, Alabama, as aforesaid, and did not safely and without injury deliver the same to the plaintiffs at said city of Montgomery; but, on the contrary, the said defendant, being such common carrier, as aforesaid, did by its carelessness, negligence, and default in the premises injure the said stock above particularly mentioned and described, to the damage and injury of plaintiffs to the amount of \$3,000." The defendant took issue on the complaint, and on the trial a verdict was rendered for plaintiffs for \$600. There was but one exception reserved by defendant in the course of the trial, and that one was on the refusal of the court, at its instance, to give in its favor the general charge.

J. D. Richardson, one of the plaintiffs, testified that his partner, Mr. Grant, shipped the stock to witness from Oswego, Kan., consigned to him at Montgomery, and sent him the contract or bill of lading, which he identified and offered in evidence. Its material parts are that special rates are given, upon conditions that its rules of shipment as specified in its contract of affreightment or bill of lading are to be accepted and complied with; and in consideration of the acceptance by the shippers of these conditions the St. Louis & San Francisco Railway Company agreed to transport for the parties of second part (the plaintiffs) one car of horses to Nicholas Station, at the rate of — dollars per car load, the same being a special rate, lower than the regular rates mentioned in their tariff, in consideration of which the parties of the second part (plaintiffs) released the party of the first part (said St. Louis & San Francisco Railway Company) from the liability of a common carrier in the transportation of said stock, and agreed that such liability should be only that of a private carrier for hire, and from any liability for any delay in shipping said stock after the delivery thereof to the agent of said railway company. The shippers accepted for transportation the car provided by the railway company, used for the shipment of stock, and assumed all risk of injury which the animals or either of them might receive in consequence of any of them being wild, unruly, or weak, or maiming each other or themselves, or in consequence of heat or suffocation or other ill effects from being crowded in the car, or of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk or damage which might be sustained by reason of any delay in such transportation, or loss or damage from any other cause or thing, not resulting from the willful negligence of the agent of the railway company. The contract concludes: "And it is further stipulated and agreed between the parties hereto that, in case the live stock mentioned herein

is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the St. Louis and San Francisco Ry. Company, except to protect the through rate of freight named herein." The witness testified that Nicholas, referred to in the bill of lading, is Nicholas Junction, on the Kansas City & Memphis Railroad; that from Oswego to Montgomery the time was about four and a half or five days, and the distance about 700 miles; that he had no one in attendance on said stock on the journey; that the bill of lading, which was signed by his partner, Grant, was the only contract he took or was taken by his partner for the shipment of this stock. The evidence tends to show that the car containing the stock left Oswego in the afternoon of the 21st, arrived at Birmingham at 11:45 A. M., the 25th of December, and left the same day at 3:30 P. M., arriving at Montgomery, and car placed in stock yard at that place, at 11:15, and shippers notified at 12 M. of the 26th of December, and that the horses were in a damaged condition, very much as described in the complaint. W. W. Brown, for plaintiff, testified that he was a clerk in the office of the Kansas City, Memphis & Birmingham Railroad Company at Birmingham, which has a connection with the St. Louis & San Francisco Railway Company, and also with the defendant company; that the stock in question arrived at Birmingham, and was delivered to the defendant company, at 11:45 A. M., December 25th; that the stock was free from bruises, and in good condition, and was so receipted for by the defendant company, at the time the stock was delivered to it by the Kansas City, Memphis & Birmingham Railroad Company. On the cross-examination he testified that the car was in the yard of the Kansas City & Memphis Company; that they were not unloaded or taken out of the cars; that he saw them first in the train, and did not go into the car; that he looked for injuries, and could have told whether there were any swollen or bruised hocks; that the car was placed on the defendant's track, and it was the custom of railroads to receipt for any freight "in good order and condition," and, if anything was found wrong, to notify the road from which they got it; that he could not testify that the horses were not bruised at all, but they were not scratched up or scarred in any way; that he looked for scars, and it was his business to do so; that he made a personal and close examination of this stock, and was positive that the stock was in good order and condition, and free

from bruises, scratches, and scars; that they were fed in the car, by means of a trough along the side of the car, and he looked through the cracks and through the door when opened to feed them, and reiterated the statement that the stock was in good condition when delivered to defendant. W. T. Calloway, for defendant, testified that he was the conductor on the defendant's train that brought the car of stock to Montgomery; that his train had no rough handling, and no wreck or run off, and that the road between Birmingham and Montgomery was in good condition; that there was no one in charge of the stock; when he received them at Birmingham all the stock was standing up; that one horse got down on the way, at Jamison, 44 miles from Birmingham, and had his foot in the crack of the car, about two or three feet from the bottom; that he tried to get the horse up with the aid of a brakeman, but could not delay the train there, and went on to Clanton, 11 miles from Jamison, where he got the animal up; and he further stated that he did not know whether the stock was otherwise injured or not. W. T. Kerlin testified for plaintiff on rebuttal that he had been connected with the defendant corporation for the last 15 years, and had been handling live stock all his life, and that a thorough examination of live stock could not be made, or he could not do so, without unloading it.

Chas. P. Jones, for appellant. A. A. Wiley, for appellees.

HARALSON, J. The proof shows that the St. Louis & San Francisco Railway Company, which received the car load of horses involved in this litigation, has through connection from Oswego, Kan., to Montgomery, Ala., connecting with the Kansas City, Memphis & Birmingham Railroad Company at Birmingham, and that road had one with the defendant's road at that point. The plaintiffs introduced and read in evidence, without objection on the part of defendant, a contract of affreightment, made by plaintiffs with the St. Louis & San Francisco Railway Company, to transport this car of stock from Oswego, Kan., on its way to its destination, Montgomery, Ala., to Nicholas Junction, on the Kansas City & Memphis Railroad, under which contract—as both sides seem to admit by their course of proceeding—said car came from its starting point to its destination at Montgomery; and the proof shows that the defendant receipted the Kansas City, Memphis & Birmingham Railroad Company for said car at Birmingham. Under that contract the defendant was relieved from its common-law liability as a common carrier. The liability of the carrier under it is reduced to the lowest point the law allows,—freedom from damages not arising from its own or its servants' negligence. Beyond that measure it could not go, although it attempted

vainly to do so by stipulating that it should not be liable for loss or damage which did not result from the willful negligence of its agents. It was bound, notwithstanding such a stipulation, to exercise reasonable and proper care and foresight, to avoid loss and injury to the property it transported. *Railroad Co. v. Henlein*, 52 Ala. 606; *Banking Co. v. Smitha*, 85 Ala. 47, 4 South. Rep. 708; *Railway Co. v. Harwell*, 91 Ala. 340, 8 South. Rep. 649. Restricted to the liabilities in this contract—limited by construction within legal bounds—the plaintiffs commenced this action, and claim under it for all that it allows. Under the complaint filed, however, it plays no part in the trial, further than to prescribe the degree of negligence to which the defendant may be held. It will be observed that, as the complaint in the cause is framed, the action is not predicated upon the absolute liability of the defendant as an insurer of the safe delivery of the stock, but it proceeds upon the alleged negligence of the defendant in the transportation of the horses. Negligence is the gravamen of the action. The averment is "that the defendant did, by its carelessness, negligence, and default in the premises, injure the said stock." Under such averments the burden was on the plaintiffs to show that the injury occurred after the animals came into the possession of the defendant. *Railway Co. v. Harwell*, (Ala.) 11 South. Rep. 781. The proof tended to show that the horses were received at Birmingham, and there delivered in good condition to the defendant. If the evidence of the plaintiffs' witness W. W. Brown is to be believed, that fact would reasonably appear in the case. Besides, the defendant receipted for them as being in "good order and condition." If they were in good order and condition when delivered to defendant at Birmingham, and were in very bad order and condition when they arrived at Montgomery, one of two conclusions is unquestionably true: either the evidence tending to show their good condition at Birmingham is a mistake, or else they were injured on the journey from that place to Montgomery. When the plaintiffs, assuming the burden, as they did by the terms of the complaint, made such a state of proof as we have as to the condition in which the animals were delivered to the defendant, they made out a prima facie case against the defendant, on which they might have recovered, unless it in turn overcame that proof, and showed that the injury complained of was not done after, but before, it received the animals, and when they were in the custody of another company. To do this it introduced as a witness the conductor who brought the car containing the stock with his train from Birmingham. He swears to a state of facts making it not easy for one to see how damage could have occurred on the route. There is difficulty in arriving at a conclusion how it was. The evidence is conflicting, and very strong on each side. Surely, then, it was a

case for the jury, and not for the court, rendering it improper for the general charge asked by the defendant to have been given. Affirmed.

(100 Ala. 662)

**BIRMINGHAM MINERAL R. CO. v**

**PARSONS.**

(Supreme Court of Alabama. July 22, 1893.)

**RAILROAD COMPANIES—FAILURE TO MAINTAIN CATTLE GUARDS—STATUTE—VALIDITY—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.**

1. Acts 1886-87, p. 163, § 1, requiring railroad companies to put in cattle guards, and keep them in order, "whenever the demand is made upon them, or their agents or employees, by the owners of the land through which said road passes that said cattle or stock guard is necessary to prevent the depredation of stock upon their farm," is not in conflict with any provision of the state constitution because it leaves it to be determined by such landowners when such cattle guards shall be built.

2. Acts 1886-87, p. 163, § 2, providing that as to all stock passing over or through cattle guards on any line of railroad, and committing depredations on land, the company shall be liable for the damages proven, and all costs, etc., is unconstitutional, in that it imposes an absolute liability on the company for such damage, whether it is guilty of any negligence, or want of compliance with the requirements of the statute, or not.

3. In an action against a railroad company under such statute, a count of the complaint which alleges, as the ground of recovery, that defendant negligently and carelessly "left open" the stock gaps, is insufficient, since it is not intended that such gaps should be closed.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action by A. F. Parsons against the Birmingham Mineral Railroad Company to recover damages to plaintiff's crops, caused by the failure of defendant to erect and maintain proper cattle guards on its road, where it entered plaintiff's land. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The complaint, as amended, contained three counts. The gravamen of the first count is that the damage was caused by the defendant's failure, on the plaintiff's demand, to construct proper stock gaps where its road entered upon and left the plaintiff's fields, and that the stock gaps which the plaintiff had constructed were so carelessly, negligently, and unskillfully done that stock passed over them and caused the damage complained of. The gravamen of the second count is that, after the plaintiff's demand to erect stock gaps where its road entered upon and left plaintiff's land, the defendant so negligently and carelessly left open its said stock gaps, as constructed, that stock entered upon plaintiff's land, and caused the damages complained of. The gravamen of the third count is that after the demand by the plaintiff the defendant negligently failed to put in stock gaps, of proper construction, and that, by reason of such failure, stock and cattle entered, through and by way of defendant's line of

road, into the plaintiff's cultivated lands, where he had a crop, and caused the damages complained of. The defendant demurred to each of these counts, assigning to each count substantially the same ground of demurrer, which was, in effect, that at common law the defendant was not required to erect and maintain stock gaps where its road entered and left the plaintiff's lands, and that the statute approved December 11, 1886, (Acts 1886-87, p. 163,) creating such requirement is unconstitutional and void. The demurrer to the second count also proceeded on the idea that, if the statute referred to was constitutional, it created no duty on the part of the appellant to close its stock gaps. The demurrer to each of the counts was overruled, and the rulings of the court thereon constitute the only assignments of errors.

Hewitt, Walker & Porter, for appellant.  
W. R. Houghton, Francis D. Nabers, and Kennedy & Hickman, for appellee.

**PARSONS, J.** The demurrer to the complaint, which was overruled, presents a single question for our consideration,—that of the constitutionality of the act of the legislature approved December 11, 1886, (Acts 1886-87, p. 163.) It is entitled "An act requiring railroads to build, and keep cattle and stock guards in order, upon their respective lines of roads." Its first section is: "That all railroads within the territorial limits of the state of Alabama, shall be required to put in cattle or stock guards, upon their respective lines of roads, and keep the same in order, whenever the demand is made upon them, or their agents or employees, by the owners of the land through which said road passes, that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms." The second section provides that on and after the passage and approval of the act, as to all stock passing over or through cattle guards upon any line of railroads in this state, and committing depredations and damages to the owners of the land, the company shall be liable for the full amount of damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages, which damages can be recovered by suit in the justice or circuit courts of Alabama, where such damages were committed: provided, that the railroad company can only be required to construct cattle guards whenever said company's road enters the field or upon the premises of any person, or where the premises, or any portion of the same, are exposed by reason of said road entering upon them, or running through them.

1. It is well understood that railroad companies are not bound, by any principle of the common law, to fence their roads, make

cattle guards, or erect any other barrier or stay against the intrusion of stock upon their roads or right of way, and are not liable for injuries happening merely for want of such erections. 7 Amer. & Eng. Enc. Law, pp. 906, 912; 1 Bor. R. R. 614; Railroad Co. v. Lyon, 62 Ala. 74. Whenever a company is under obligation to fence its right of way, or erect cattle guards, it is by virtue of a contract or statute. On the other hand, it is equally well settled that acts of incorporation of railroad companies are subordinate to the general police regulation of the state, and that the requirement to fence their rights of way, and erect and maintain cattle guards, falls legitimately within legislative authority. As is well said in American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 32: "The police power of a state is a most important power, essential to its very existence, and has been declared by the supreme judicial interpreter of the federal constitution to embrace 'the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of good morals,' and the legislature cannot, by any contract, divest itself of the power to provide for these objects." Beer Co. v. Massachusetts, 97 U. S. 25; Van Hook v. City of Selma, 70 Ala. 361; Railroad Co. v. Baldwin, 85 Ala. 619, 5 South. Rep. 311; 7 Amer. & Eng. Enc. Law, 907. The unconstitutionality of the act we consider is insisted on, "first, because it requires the railroad to erect cattle guards whenever demand is made upon it, by the owners, that the cattle or stock guard is necessary to prevent the depredation of stock upon their farms, thus making the landowner the sole judge of the necessity, and from whose decision the railroad has no appeal." This objection relates especially to the first section of the act. The criticism cannot be sanctioned. This is a mere option which the statute gives the owner of the land. The guard—if, and when, constructed—is for his benefit alone. The public has no interest in it, further than the general interest every good citizen feels that every other person shall be protected in his rights of property; and of what detriment can it be to the railroad that the owner is permitted to exempt it from a duty which, without his exemption, would be absolute, whether the owner needed or desired the cattle guard or not? If the statute had simply required the companies to erect and maintain these guards, in all instances, whenever they entered the field or premises of a party, there could, under the authorities, be no objection raised to the validity of the law. Why, then, should the statute, if, in its enactment, it would lighten the burden, if any, of the corporations, without injury to the persons whom it was designed to benefit, by bestowing this option on them, incur judicial displeasure? The point of this suggestion

becomes more pertinent when it is remembered that when the duty to fence or build cattle guards is made absolute, without reference to an option on the part of the owner of the land, the owner may release the obligation, as seems to be well settled. 7 Amer. & Eng. Enc. Law, 907; 1 Thomp. Neg. p. 526, § 26. The case of *Railway Co. v. Todd*, (Ky.) 15 S. W. Rep. 56, is opposed to this view, and holds that this power of police regulation cannot be delegated to the citizen. No authority upon which the decision is based is given. The constitution of this state certainly contains nothing against the bestowment of such an option on the landowner, in connection with the exercise of this police jurisdiction and authority, and we are at a loss to see on what principle it can be denied. The states delegate this power, without question, in their creations of municipal governments, railroad commissions, medical and examining boards, quarantine commissions, the bestowment of the authority for the creation by the people of counties and parts of counties, of agricultural districts in which fences may be dispensed with, and stock not allowed to run at large, and in other instances, perhaps, which might be named; and it can be readily seen that this police authority may be more safely and beneficially exercised, often, in leaving its exercise to the option of others, within prescribed and proper limitations, than without.

2. There can hardly be any question but that this second section imposes an absolute liability on railroad companies "for the full amount of the damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages," whether they have failed, or not, according to the requirements of the law, "to put in cattle or stock guards upon their respective lines of roads and keep the same in order." Indeed, this liability is clearly stated in the words of the section itself. There are many conflicting authorities on this question, which we will not review, or attempt to reconcile. In 7 Amer. & Eng. Enc. Law, 907, it is stated that "statutes have been passed in England, and many of the states, requiring railway companies to fence their tracks, [which includes cattle guards, *Id.* 913,] and holding them liable for all injuries occasioned by a failure to do so, irrespective of whether or not they have been guilty of negligence" in operating their trains; and many authorities bearing more or less intimately on the question are cited as supporting the text. *Id.* 927. Counsel for appellant, in their elaborate argument on the question, (reviewing many of the authorities,) conclude: "We concede that if the act of 1886 had imposed absolute liability in cases where the railroad fails to erect gaps at all, in compliance with the statute, this would have been a valid police regulation, because a penalty imposed for a viola-

tion of the act. But the act of 1886 goes further, and imposes such absolute liability on the railroad, though it may have fully complied with the act, in erecting and keeping in order its gaps, provided stock get over them, and commit depredations. It is therefore manifestly unconstitutional, because it attempts to impose absolute liability, when the requirements of the act may have been fully complied with, and no negligence exists. This is not a valid police regulation." This question is not a new one in this court. In *Zeigler v. Railroad Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an act which provided: "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this state, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotive or railroad cars." It was there said of that statute, that it dispenses with all proof of the wrong it seeks to redress. "It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees,—an injury which no human prudence or foresight could prevent; and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. \* \* \*

We can perceive of no reason, in law or morals, for holding them [railroad companies] to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident, or accidents which no human prudence can foresee or avert." This case, in these utterances, has been many times approved by us, and other courts. *Wilburn v. McCalley*, 63 Ala. 443; *Mead v. Larkin*, 66 Ala. 88; *Davis v. State*, 68 Ala. 63; *Green v. State*, 73 Ala. 32; *Railroad Co. v. Hembree*, 85 Ala. 485, 5 South. Rep. 173. Under the influence of these decisions, we are constrained to hold that the second section of said act, in that it imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right. The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies "to put in cattle or stock guards upon their respective lines of roads and keep the same in order," and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the state. It may be maintained as such, separate from the second section. 3 Brick. Dig. p. 128, § 28; *Ex parte Cowert*, 92 Ala.



97, 9 South. Rep. 225. And "every person, while violating an express statute, is a wrongdoer, and as such is, ex necessitate, negligent, in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor;" and when a duty is required, and no remedy provided for its breach, the remedy is by common-law procedure. *Grey v. Trade Co.*, 55 Ala. 403; *Lowndes Co. v. Hunter*, 49 Ala. 507; *Autauga Co. v. Davis*, 82 Ala. 703.

3. The demurrers to the first and third counts in the complaint were properly overruled. The second count bases a recovery on the allegation that the defendant "so negligently and carelessly left open their stock gaps on that part of its said road which runs through the said land of the plaintiff that," etc., specifying the damages suffered. We are not certain of what is meant by leaving stock gaps open, and what negligence is attributed to defendant in so doing. Consulting our knowledge of such barriers against stock, we would suppose they were never designed to be closed, but always open. The duty prescribed by the statute is to put in cattle guards, and keep them in order, and not to keep them closed. It would seem, therefore, that defendant violated no duty to plaintiff in keeping the gaps open, and the demurrer to the second count, for this reason, should have been sustained. For this error the judgment of the court below is reversed, and the cause remanded.

(99 Ala. 308)

**JENNINGS et al. v. PIERCE et al.**

(Supreme Court of Alabama. June 22, 1893.)

**PRACTICE—DISMISSAL OF SUIT BY PLAINTIFF—OBJECTIONS BY PERSONS BENEFICIALLY INTERESTED—MANDAMUS.**

1. Where persons other than the plaintiff of record are interested in the prosecution of a suit, the court will protect them by refusing to allow such plaintiff to dismiss the suit, provided the parties beneficially interested indemnify him against any costs to which he may be subjected.

2. Where a suit is dismissed at the instance of the plaintiff of record, in spite of objections by persons beneficially interested in the prosecution thereof, the remedy of the latter is by mandamus, and not by appeal.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Action by Thomas W. Jennings against Henry W. Pierce. From an order dismissing garnishment proceedings instituted in aid of said action, Richardson & Reese and S. G. Pruett, claiming to be beneficially interested in such proceedings, appeal. Dismissed.

Thomas W. Jennings, on the 21st of September, 1891, sued out an attachment against Henry W. Pierce, a nonresident, returnable to the city court of Montgomery. The writ, coming to the hands of the sheriff, was levied by him by summoning H. C. Chandler, who had in his possession a lot of mules and other personal property said to be the de-

fendant's, to answer as garnishee. The said Chandler, appearing as garnishee, answered, admitting the possession of said property so levied on, but stated in his answer that one Hollis Pierce claimed it as belonging to him. A notice was issued, under the statute, to said Hollis Pierce, to come in and propound his claim, which he did. Meantime, and before any action on the answer of the garnishee, or the claim of the property in his hands set up by said Hollis Pierce, the plaintiff took judgment against said nonresident defendant, Henry Pierce, upon proof of publication to him, for the amount of the debt and interest that the attachment was sued out to recover. A motion was made in the court by the plaintiff to sell the property in the hands of the garnishee, and have the proceeds held, on the ground that the property was perishable, and liable to waste and destruction in being held. This motion was resisted and overruled. Finally, the plaintiff, on the 11th of August, 1892, gave to one Hal. T. Walker a power of attorney, empowering him to appear in said city court, and dismiss said garnishment proceedings instituted in plaintiff's name against said Chandler; and said Walker, on the 22d of September, appeared in court, and, producing and exhibiting his power of attorney authorizing him to do so, made a motion in said cause to dismiss said suit out of court, which motion Messrs. Richardson & Reese, the attorneys who had brought and theretofore conducted said suit for plaintiff, and S. G. Pruett, resisted, on the ground that plaintiff had, on the 11th of August, 1892, assigned to said Richardson & Reese an interest in said debt against the defendant in attachment for the payment of the fees for services rendered by them to him in said cause, and also on August 9, 1892, by assignment to said Pruett, for a valuable consideration, of the remainder of the interest of plaintiff in said suit and garnishment process against said Chandler, after the indebtedness to said Richardson & Reese for fees had been paid.

Richardson & Reese, for appellants. Arrington & Graham, for appellees.

HARALSON, J. There are many assignments of error which lie beyond the dismissal of the garnishment suit against H. C. Chandler, as debtor to Henry Pierce, the defendant in attachment. These are based on rulings connected with the garnishment proceeding, and it will be unnecessary to consider them, since, according to the view we take of the case, they disappear with the errors assigned for the dismissal of that suit. This appeal, let it be noticed, is not prosecuted by either of the parties to the original attachment suit, nor by either party to the garnishment proceeding, but by Messrs. Richardson & Reese and S. J. Pruett, who are strangers to the record, but who claim

to be the owners of plaintiff's cause of action, and to have the right to prosecute it. It may be stated generally as a well-settled principle that a plaintiff has the absolute right at common law to discontinue his suit before or after issue joined, and without the leave of the court. 1 Amer. & Eng. Enc. Law, 184; Hawes, Parties, § 2. In *White v. Nance*, 16 Ala. 345, it was held that a plaintiff in an action of ejectment or trespass to try titles may dismiss the suit whenever he thinks proper. In the opinion rendered Judge Dargain said: "It is true a suit at law may be carried by one who is beneficially entitled to the money in the name of him in whom is vested the legal title, and a court of law will protect the rights of him beneficially interested, and will not permit the plaintiff to dismiss the suit, if the party entitled to the proceeds of the recovery will indemnify him against the costs to which he may be subjected." We adhere to what was there said as a proper practice in such cases. We are not informed by the record that Messrs. Richardson & Reese and Pruett offered to indemnify the plaintiff against the costs to which he might be subjected by the further prosecution of the case, and we are to presume they did not. Without such an offer they had no right to resist the dismissal of the cause by plaintiff on the grounds set up by them.

There remains another ground, on which the appeal in this case cannot be sustained. In *Brazier v. Tarver*, 4 Ala. 569, it is said: "We think it very clear that when a suit is once dismissed at the instance of the plaintiff upon the record the correctness of the proceeding cannot be inquired into upon a writ of error, for this course would involve the defendant in a controversy in which he has taken no part, and in which he has no interest. We do not doubt that it is the duty of a court to protect the rights and interests of those who are beneficially interested in suits or choses of action. Such suitors can, and ought to be, protected against the improper interference of the plaintiff on the record, but the only mode to correct erroneous action in this particular is mandamus." The action of the court below in dismissing said garnishment suit, so far as appears, was without error, and, the cause being improperly here on appeal, is dismissed, at the costs of the appellants, as to the appeal, in this and in the court below. Dismissed.

(98 Ala. 425)

## RUTLAND v. CHESSON et al.

(Supreme Court of Alabama. June 22, 1893.)

## DEED—CONSTRUCTION AND EFFECT.

A deed made to a person for life, and to others in remainder, provided for part payment of the consideration at subsequent dates, and stipulated that the deed should not be operative until such payments were fully made, and that

when made title should vest as above. Held that, on the execution of the deed, the remaindermen took a vested equitable interest.

Appeal from circuit court, Macon county; J. R. Dowdell, Judge.

Ejectment by W. J. Rutland against C. W. Chesson and others. From a judgment for defendants, plaintiff appeals. Reversed.

Thos. H. Watts, for appellant. W. F. Foster, for appellees.

COLEMAN, J. This was an action in ejectment to recover certain lands described in the complaint. The facts are agreed upon, and the respective rights of the litigants depend upon the legal construction of the following written instrument: "Know all men by these presents, that we, A. J. Chesson and B. F. Chesson, in the consideration of the sum of seven hundred and seventy dollars, to be paid to us by J. F. Chesson, as follows, viz.: three hundred dollars on the 24th day of October, 1887, and two hundred and thirty-five dollars on the 1st day of October, 1888, with interest thereon from date; and two hundred and thirty-five dollars on the 1st day of October, 1889, with interest thereon from date,—we do hereby bargain, sell, and quitclaim and release unto the said J. F. Chesson, for the term of his natural life, and at his death to C. W. Chesson, A. B. Chesson, Claudia O'Donnell, Lula Foster, and Willie Lee Rutland, the following described lands in said county, viz.: four hundred and fifty acres, more or less, in section eleven, (11,) township fifteen, (15,) range twenty-one, (21,) known as the 'J. F. Chesson Place,' bounded on the east by lands of A. J. Chesson and lands of Mrs. J. W. Echols and Mrs. P. Echols, and on the north by the lands of Mrs. M. D. Oswalt and W. G. Frazier, and on the west by lands of Benj. Johnston and W. G. Frazier, and on the south by lands of B. N. Chesson and Benj. Johnston. But this deed is not operative until the payments herein described are fully made, and, when so fully made, then said lands are to have and to hold unto the said J. F. Chesson for and during his life, and at his death to the same to have and to hold in fee simple to said C. W. Chesson, A. B. Chesson, Claudia O'Donnell, Lula Foster, and Willie Lee Rutland; and this conveyance is without warranty from the said named grantors. In testimony whereof, the said A. J. Chesson and B. F. Chesson doth hereunto set their hands and seals, this 13th September, A. D. 1887." All of the notes for the purchase money mentioned in this instrument were paid during the lifetime of J. F. Chesson, the grantee of the life interest; but one of the remaindermen, W. Lee Rutland, died in October, 1888, before the payment of the last note. The plaintiff succeeded to the rights and interest of W. Lee Rutland.

The only question is whether W. Lee Rutland owned an inheritable estate in the lands at the time of his death under the foregoing

instrument, which descended to plaintiff, and which estate, upon the payment of the last note, became an estate in fee. The grantor accepted payment in full of the agreed price, and, according to the terms of the instrument, it then became operative, and the legal title passed from him. So far, then, as respects the grantor, the condition, whether regarded as precedent or subsequent, has been fully performed, and the title passed upon the performance of the condition, which was payment of the notes. The condition in the deed was made for his benefit, to be taken advantage of at his election only, and, whether precedent or subsequent, is not available to any other person. Willie Lee Rutland, through whom plaintiff deduces title, was named as one of the grantees, and was a beneficiary under the grant. His interest was the same as the other grantees. By no possible construction of the instrument could the other named beneficiaries' or grantees' interest be augmented by his death. The several interests of each was alike determined by the grant itself. The first taker acquired only a life estate. The grantor clearly had nothing left in him, and, when it passed from him, it necessarily vested under the grant. The appellant, who brought the suit, contends that there are inconsistent provisions in the instrument, in this: that the granting part of the deed conflicts with the words "shall not be operative," and invokes the rule that, when there are inconsistent provisions in a deed, the first must control. He also contends that, if there be a condition, a proper construction of the whole instrument must determine it to be a condition subsequent, and, under either view, Rutland took a vested interest. On the other hand, it is contended by appellee that the condition is precedent, and, as Rutland died before the performance of the condition, no estate vested in him, and plaintiff inherited nothing. The whole contention arises from the following provision of the deed: "But this deed is not operative until the payments herein described are fully made," etc.

Looking at the deed in all its parts, we do not think the legal questions which have been so fully discussed in briefs necessarily arise. The consideration of the grant was the payment of \$770, evidenced by three promissory notes, payable in three annual payments to the grantor, which were duly executed, and the grantee took possession under the deed. There can be no doubt that the notes were founded upon a valuable consideration, and were obligatory upon the maker, and, upon default of payment of either note, the grantor could have sued and recovered judgment, and compelled payment, or filed a bill in chancery, and enforced a vendor's lien upon the land. If this conclusion be correct,—and we do not doubt its correctness,—it cannot be contended that the purchaser took no immediate vested interest. He clearly acquired an equity by the

agreement. The deed was executory, becoming executed upon payment. The provision that "the deed is not operative until the payments are made," when construed in connection with the grant, clearly manifests that the intention and effect of this provision were merely to retain title of ownership as a security for the debt. Under this construction, there are no inconsistent provisions in the deed. Suppose there were no remainder-men provided for in the deed, and the life grantee had contracted for the entire estate sold and quitclaimed; now, if, after paying two of the notes, he had died, would it be controverted that his legal heir or personal representative had the right to pay the last note, perform the condition, and thereby acquire the legal title contracted for? The statement of the proposition is conclusive upon appellee. *Bingham v. Vandegrift*, 93 Ala. 283, 9 South. Rep. 280; *Tufts v. Stone*, (Miss.) 11 South. Rep. 792. There can be no doubt that the remainder-men took a vested interest under the deed. It was merely equitable until the purchase money was paid. When this was paid, the legal title passed. The plaintiff, by the death of Rutland, succeeded to his equitable interest. The legal title followed the equitable estate, and vested in the plaintiff. The conclusion of the trial court was erroneous. Reversed and remanded.

(100 Ala. 631)

# McCROSSIN v. DAVIS.

(Supreme Court of Alabama. June 22, 1893.)

ANIMALS—ESTRAYS—ADVERTISEMENT—FAILURE TO COMPLY WITH STATUTE—EFFECT—TITLE OF PURCHASER—EVIDENCE.

1. Civil Code, §§ 1340, 1343, provide that, where an estray is appraised at more than \$20, the probate judge must advertise the estray for a specified time in a newspaper, in a particular manner. *Held*, that where, in detinue to recover a mule, defendant claimed title from one who purchased the mule as an estray after it had been appraised at \$25, evidence by the proper probate judge that he was "satisfied that the advertisement was duly made" was insufficient to show that such provisions of the statute were complied with.

2. Where plaintiff established his ownership, and the record fails to show that the estray proceedings were in compliance with Civil Code, §§ 1343, 1344, a judgment for plaintiff is proper.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action of detinue by Bob Davis against P. McCrossin to recover a mule. From a judgment for plaintiff, defendant appeals. Affirmed.

On the trial of the cause, as is shown by the bill of exceptions, the plaintiff testified that the mule which was taken from him on January 13, 1891, and delivered to McCrossin, in Birmingham, was the mule he had traded for with one King. This mule was particularly described, and it was shown that King bought the same mule from Baines, and that Baines bought the mule from Null,

and that Null bought said mule from one Fox, who testified that he brought the mule into the county. The testimony for the defendant was as follows: E. J. McCrossin testified that on the 23d September, 1889, he purchased from Peter Miller a mule which was taken under the writ of detinue in this suit, and that, shortly after he bought the mule, Miller carried him off, and he did not see him again for about 15 months; that, on recovering the mule, he sold him to P. McCrossin, the defendant in this suit, who has had the mule ever since. W. P. and P. McCrossin's testimony was the same as that of E. J. McCrossin. It was admitted that the estray proceedings before the justice of the peace complied with the statutory requirements in full. J. L. Prickett testified that on the 27th September, 1888, he took up one black mule, which corresponded with the description previously given. It was admitted that the mule was the property appraised, and a proper bond had been made, and that the fee for advertising had been paid to the judge of probate of Jefferson county, and that the mule was appraised at \$25. M. T. Porter, the probate judge of Jefferson county, identified the estray records of probate court, in which were the following entries: Name of taker up, before what officer taken, justice of the peace, name of appraisers, the value and description of the mule; and there was also on the estray records a receipt for \$12.50 from J. L. Prickett, "in full payment of an estray bond which was given and approved for the sum of twenty-five dollars." The probate judge testified "that he was satisfied that the advertisement was duly made." "It was admitted that Prickett sold the mule described in the estray papers to Peter Miller some time during the year 1889." This was all the evidence shown by the bill of exceptions, and the court rendered judgment for the plaintiff, which judgment is here assigned as error.

J. Q. Cohen, for appellant. Thomas M. Owen, for appellee.

COLEMAN, J. Appellee, Davis, sued the appellant in detinue to recover a mule. The action was tried by the court under the statute, without the intervention of a jury. The court rendered judgment for the plaintiff. The only error assigned is as to the judgment rendered. We are of the opinion, that the identity of the mule is sufficiently established by the evidence. The only material question is whether the estray proceedings sufficiently complied with the statute, to give the purchaser who purchased the mule as an estray, and through whom

the defendant derived title, a valid title against the original owner. The taker up of an estray who proceeds according to the statute is invested with a qualified property in the animal, and, upon his complying with the statute, he may become the absolute owner, after the expiration of 12 months. *Hudgins v. Glass*, 34 Ala. 110; *Stephenson v. Brumson*, 83 Ala. 455, 3 South. Rep. 768. The title thus acquired does not rest upon the judgment of any court, condemning the animal to sale, or decree investing the taker up with the ownership upon ascertaining that the requirements of the statute have been complied with. The title is made to pass upon complying with the statute. The requisitions of the statute are necessary muniments of title, against the original owner, and it is incumbent upon one who relies upon such a title to see that the statute has been complied with, and to preserve the evidence to show such compliance. The decisions are numerous which hold that "estrays" proceedings are stricti juris, and the burden is on him who claims under title thus acquired to show affirmatively that the statute has been strictly complied with. *Dillard v. Webb*, 55 Ala. 468; *Cory v. Dennis*, 93 Ala. 440, 9 South. Rep. 302; *Stewart v. Hunter*, (Or.) 16 Pac. Rep. 876, 8 Amer. St. Rep. 267, 272, note; *City of Ft. Smith v. Dodson*, 51 Ark. 447, 11 S. W. Rep. 687, 14 Amer. St. Rep. 62, and note. The record fails to inform us that the following provisions of the Civil Code<sup>1</sup> were complied with: Sections 1343, 1344. The mule was appraised at more than \$20. The proof does not affirmatively show that sections 1340 and 1342 of the Code,<sup>1</sup> as to the advertisements of the estray, were complied with. We find no error in the conclusion of the court, and the judgment must be affirmed.

<sup>1</sup> Civil Code, §§ 1340, 1342-1344, provide as follows: "Sec. 1340. Where the estray is a horse, mare, mule, jack, or jenny, and appraised at more than twenty dollars, the judge of probate must, on the return of the appraisement and the payment of the sum hereinbefore provided for, advertise such estray in some newspaper of his county for three successive weeks; and, if no newspaper is published therein, then in the paper nearest thereto." "Sec. 1342. The advertisement must contain the name of the person by whom the estray was taken up, and the time when, the appraised value, description of the animal, and the name of the justice before whom the proceedings were had. Sec. 1343. Such judge must also make out a list of all estrays, and post up the same at the courthouse door on the first day of each term of the circuit court, which list must show all estrays taken up within twelve months preceding such day, and not restored to their owners. Sec. 1344. All estrays, required by this chapter to be advertised in a newspaper, must be brought to the courthouse of the county in which they were taken up, on the first day of the circuit court next after such taking up."

(101 Ala. 415)

## HUGHES et al. v. McKENZIE.

(Supreme Court of Alabama. June 22, 1893.)

MORTGAGE—WHAT CONSTITUTES—ABSOLUTE DEED  
—EVIDENCE.

Complainant purchased land for \$1,000, paying \$600 in cash, and giving a note for the balance, and received from the vendor a bond for a conveyance. Defendant subsequently, by arrangement with complainant, paid his note, and by the latter's direction the land was conveyed directly to defendant. At the same time complainant gave defendant his note for \$480, "for value received of him." Several witnesses testified that the money paid by defendant was a loan to complainant, and such evidence was strengthened by the fact that the \$480 note would exactly cover such loan and one year's interest thereon at the rate which complainant testified was agreed upon. Defendant testified that he paid the \$400 with the understanding that the land should be his, but that complainant could rebuy the land by repayment of the sum advanced by a certain date, which was not done; and that he subsequently surrendered the \$480 note, and took the land. *Held*, that defendant held the property as security only.

Appeal from chancery court, Crenshaw county; John A. Foster, Chancellor.

Bill by Charles McKenzie against Richard S. Hughes and others to have a conveyance declared a mortgage, and for incidental relief. From a decree for complainant, defendants appeal. Affirmed.

The bill, filed February 22, 1890, alleged that, eight years before, complainant purchased from T. J. Boswell and wife the 400 acres of land described in the bill, for the agreed price of \$1,000; that he paid \$600 in cash, and agreed to pay the remaining \$400 at a future day, for which he executed to said T. J. Boswell his promissory note, and Boswell and wife gave complainant their bond to make to him a conveyance to said land, with the usual covenants of warranty, upon the payment of said note for the balance of the purchase money; that on the 29th September, 1884, complainant borrowed from defendant Hughes the sum of \$400, and procured said Hughes to pay the same to said Boswell for him, and, for the purpose and with the intention of securing the repayment of that sum so borrowed to said Hughes, complainant procured and authorized said Boswell and wife to convey said land to said Hughes; that, contemporaneously, Hughes executed to complainant a defeasance, to the effect that said conveyance to him was intended to be and was a mortgage to secure the repayment of said sum of \$400 borrowed by complainant from him; that afterwards, about the 1st January, 1886, Hughes entered into the possession of the said lands, under his said mortgage, and now retains the possession thereof, together with about \$600 rents derived therefrom since he went into their possession. Complainant further alleges that he has paid his indebtedness to said Hughes, but, if he is mistaken, he is ready and willing and offers to pay him whatever sum the court may ascertain to be due and owing by him to said Hughes on

said note and mortgage. He further alleges that on the 28th March, 1884, he and his wife mortgaged said lands to one M. W. Wimberly, to secure a debt therein named; that said Wimberly sold and transferred said debt and mortgage to Thomas F. Owen, and afterwards he sold and transferred the same to H. T. Wimberly; that complainant may be due and owing something on said last-named mortgage; if so, he is willing and offers to pay whatever sum the court may ascertain to be due and owing in that behalf. The said Hughes, H. T. Wimberly, and Mrs. N. F. McKenzie, wife of complainant, are made parties defendant to the bill. The prayer is that the conveyance from T. J. Boswell and wife to said Hughes be decreed to be a mortgage, to secure said sum of \$400; that a reference be ordered to the register, to ascertain what, if anything, is due and owing by complainant on said mortgages to said Hughes and said Wimberly; that complainant be permitted to pay any such sums, and that thereupon said mortgages be canceled, and plaintiff put into possession of said lands; that said Hughes be held to account for the rents of said lands to complainant since he went into possession of the same; and for general relief. H. T. Wimberly answered the bill, claiming that there was due and owing on his mortgage about \$395, and that it is a valid and superior lien to all others on said lands, as security for the payment of said indebtedness. The defendant Hughes answered, denying the transaction of the Boswell conveyance to him, as stated by complainant, and states the same to have been as follows: That complainant applied to him, before said conveyance was executed, to borrow the remaining sum due as purchase money, proposing to give defendant a mortgage on said lands as security, which proposition defendant refused to accept; that complainant came again to borrow the \$400 for the purposes specified; and stated that, if defendant would pay off the remaining note due to Boswell on the land, he would let defendant have it on his own terms, and defendant agreed, if Boswell would make to him a deed in fee to the lands, he would pay him the \$400, whereupon complainant met defendant at the house of said Boswell, and defendant then and there paid him the \$400, and he and his wife executed the conveyance to defendant, and afterwards defendant verbally contracted to sell the lands to complainant for \$480, provided it was paid within 12 months, and took the note for that sum from him, payable October 1, 1885; that defendant made no other contract with complainant besides this one, except that it was further agreed that, if complainant could not pay that sum within the 12 months, he was to pay \$150 rent for 1885; that complainant failed to pay either said sum or the rent, and, at request of complainant, defendant agreed to allow him to retain possession for the year 1886 at \$100 rent, and for the year

1887 at the agreed rent of \$150; and in the latter part of 1887 complainant came and stated that he was unable to pay either rent or purchase money, whereupon defendant canceled all the rent contracts, and agreed to cancel the note for \$480, and remit the interest on a note of complainant and one Merrill for about \$80, whereupon the whole transaction was closed, and complainant moved off, and defendant took possession of said lands. The deed from Boswell and wife to defendant recites the consideration thereof to be \$600 paid by complainant, and \$400 paid by defendant, and complainant's note to defendant for \$480 and the deed bear the same date.

Gamble & Powell, for appellants. J. C. Richardson, for appellee.

**HARALSON, J.** There were four persons present when the deed from Boswell to defendant was executed and delivered,—the complainant, the defendant, Lee, and Boswell. The deed from Boswell to defendant is absolute in form. It recites a consideration of \$1,000 for its execution,—\$600 as having been paid by complainant, and \$400 by the defendant. There is no dispute of the fact that about 1882 complainant purchased the lands in controversy from Boswell, for the consideration of \$1,000; that he paid in cash a part of the purchase money, and executed his note for the balance, and Boswell gave complainant his bond, conditioned to make title to the land upon the payment of the purchase money in full; and, at the date of said conveyance from Boswell to defendant, complainant had paid to Boswell \$600, making payment on that day, as Boswell says, of \$40, leaving a balance due to be paid of \$400. On the day that said conveyance was executed, and on which defendant paid to Boswell \$400, complainant executed to defendant Hughes a note for \$480, payable on the 1st day of October, 1885, the consideration being, as expressed, "for value received of him." Complainant deposes in reference to this note that it was for money that day borrowed from defendant, with which to complete the payment for the land to Boswell; that defendant had agreed to let him have the sum needed for the purpose, at 20 per cent. interest; and that this note is for that sum, with \$80 added as interest; and that defendant gave to him a written obligation to reconvey the land to him on the payment of that note, which obligation was destroyed by fire, with his dwelling, in the fall of 1887; and that the deed was executed to defendant to secure that loan. J. A. Lee testifies that he was acquainted with the land transaction between complainant, defendant, and Boswell; that he was present when the conveyance from Boswell to Hughes was executed; that its acknowledgment was taken before him as an officer, and the deed

was made for the purpose and under the agreement by defendant and complainant that it was to secure defendant the payment of \$400 due by complainant to him; and he states, as his best recollection, that there was a written agreement between them to that effect, the contents of which, as he gives them, were "that the \$400, with interest, should be due and payable on the 1st day of October, 1885, and, if said McKenzie failed to pay said amount when due, said Hughes was to have the reasonable rent of the land until he was paid the said amount." T. J. Boswell testified that the consideration as expressed in his deed to defendant is true; that complainant paid him \$600, and defendant paid him \$400, at the instance and request of complainant; that he knows nothing of the transaction between the complainant and defendant further than that he executed the deed at the request of complainant; that his recollection is complainant was to pay defendant \$480 on the 1st of October, 1885, and, if he did so, defendant was to make him a deed at that time, and, if complainant failed, he was to pay defendant \$150 rent for 1885. The defendant denies the transaction as stated by complainant, and swears that he paid the money with the understanding, that the land was to be his, but he agreed afterwards that if complainant would pay him \$480 on October 1, 1885, he would sell and convey to him the lands, but, failing, he was to pay \$150 rent for that year; that he did fail, and defendant rented the place to him for \$100 for 1886, and \$150 for 1887, and in the latter year he gave up the place to defendant, stating that he would not remain on it another year for it. Thereupon defendant told him he did not desire his place for less than its value, and he would surrender his rent claims, amounting to about \$400, his interest on the Merrill note, about \$80, and the \$480, at which complainant expressed himself satisfied, and in a short while moved off the lands. One Armstrong testified for defendant that he heard complainant say he owed defendant, and turned over the place to him for the debt; that he was unable to pay for it; that plaintiff also said, if he did not pay the purchase money, he was to pay rent. J. L. Merrill testified that he had signed a note as security for complainant for \$350 or \$400 to defendant, borrowed money, with which complainant made the first payment on the lands bought from said Boswell; that complainant stated defendant was to pay Boswell the balance due on the land, about \$400, cancel the note for \$350 or \$400 held against complainant and witness for money borrowed to pay on said lands, and that the lands were to belong to defendant; but complainant also stated that, if he could raise the money defendant had paid to Boswell for him, defendant was to convey the lands to him. John S. Whittington, for defendant, testified that

complainant told him that he had bought the place from Boswell, but could not pay for it, and had never received a deed, and defendant had purchased it, and afterwards rented it to him for 10 years, and, being unable to pay the rent, he was going to give it up to defendant.

From the foregoing it is seen that there is very great conflict in the evidence upon the question at issue in this cause, as to whether this transaction is a conditional sale or an equitable mortgage to secure a debt. As between complainant and Boswell, equity regards the transaction as executed, and as operating to transfer the estate from the vendor, Boswell, and to vest it in the vendee, the complainant. "By the terms of the contract, the land ought to be conveyed to the vendee, and the price ought to be transferred to the vendor. Equity, therefore, regards these as done,—the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendor is looked upon and treated as the owner of the land." 1 Pom. Eq. Jur. § 368; 1 Story, Eq. Jur. § 790; 2 Story, Eq. Jur. § 1212. In equity, therefore, complainant is regarded as having had a perfect title to the land, and, as between Boswell and defendant and complainant, in the conveyance by Boswell to defendant, the complainant was the real grantor. The evidence is without conflict that Boswell had no contract of sale with defendant, and that he executed the conveyance at the instance and by the direction of complainant. Nor from the evidence are we permitted to doubt that the \$400 which was paid by defendant to Boswell, as a part consideration for the conveyance, was paid for complainant as a loan to him, to enable him to fulfill his contract of purchase. The conveyance bears inherent evidence of the correctness of this conclusion. Complainant and J. A. Lee swear positively to the fact; Boswell's evidence is confirmatory of it; and the evidence of the other witnesses does not disprove it. Complainant gave his note for \$480 on the occasion to defendant. He says \$400 of this note was for the amount defendant loaned him,—a fact that Lee and Boswell's evidence strongly confirms,—and that the \$80 was the interest he charged him on it, at 20 per cent. per annum. It is coincident that \$400 was the balance due on the land, which the conveyance recites defendant paid, and \$80 is 20 per cent. on that sum for a year, the two making the exact sum for which complainant gave his note to defendant, and suggest the correctness of complainant's evidence as to the consideration of that note, especially since defendant offers no explanation of how the note happened to be for \$480. Why any note should have been given at all, if defendant's version of the transaction is correct, is not easily understood, for the note recites that it is for value

that day received by complainant from defendant, and the defendant says the agreement to resell the lands to complainant was verbal, entered into after the lands had been conveyed to him. It would have been more natural and far better, if defendant's account of the transaction is true, for it to have expressed the consideration as defendant states it to have been. From a careful review of the evidence, we ascertain that the relation of debtor and creditor did not exist between the complainant and defendant prior to the transaction we consider; that it began in a negotiation for a loan from the defendant to the complainant; that the negotiation ended in defendant advancing for complainant to Boswell the sum of \$400, for which complainant executed his note to defendant for \$480, payable on October 1, 1885; that said note has been from that date to this a continuing debt in the hands of defendant against the complainant, on which he has been and is liable to suit; that Boswell had no negotiation with defendant for the land, but executed his deed to him by the direction of complainant, in consideration of the payment by defendant for complainant of the balance due on the land; that the land was sold in the beginning and was conveyed for \$1,000; and that \$400, the sum defendant says he paid as a consideration for his conveyance, is in great disproportion to its real value. After this, if any doubt remained as to the character of the transaction, we would resolve it in favor of its being a security or equitable mortgage for a loan. Daniels v. Lowery, 92 Ala. 521, 8 South. Rep. 352; Knaus v. Dreher, 84 Ala. 320, 4 South. Rep. 287; Vincent v. Walker, 86 Ala. 333, 5 South. Rep. 465; Turner v. Wilkinson, 72 Ala. 366. The defendant does not deny that complainant procured him to pay the balance due by himself on the land to Boswell, and, according to his account of the transaction, the agreement was that, if complainant repaid the \$480 in 12 months, he should have the property. Such a transaction is construed in equity to be a mortgage, and not a conditional sale. Nelson v. Kelly, 91 Ala. 574, 8 South. Rep. 690. This case is not different in substance from that of Parmer's Adm'r v. Parmer, 88 Ala. 545, 7 South. Rep. 657. In that case H. A. Parmer had bought the land from Mrs. Allen, and had not received a conveyance. He induced her to convey, in absolute form, the same to H. K. Parmer, and took from the latter an agreement to reconvey the land to him, upon the payment of the debt. It was held to be a mortgage. Referring afterwards to this case, to distinguish it from cases which are here cited by appellant, it was said: "In equity, Parmer, the complainant, had a perfect title to the land. The conveyance was made at his instance, to secure his debt, and he was therefore the real grantor. All the title, equitably con-

sidered, which the defendant held, came from complainant, and the stipulations between the parties were the stipulations of the real grantor and grantee, and for the benefit of the former." *Downing v. Iron Co.*, 98 Ala. 268, 9 South. Rep. 177. This language is precisely applicable to this case, to show the relations of complainant and defendant and the effect of their dealings. We find no error in the record, and the decree of the chancery court must be affirmed. In stating the account ordered, it will be well for the register to ascertain and report to the court the amount, if any, that may remain due and owing by complainant to H. T. Wimberly, on his mortgage to him. **Affirmed.**

(99 Ala. 276)

**BIRMINGHAM BLDG. & LOAN ASS'N v. MAY & THOMAS HARDWARE CO.**

(Supreme Court of Alabama. June 22, 1893.)  
**STATUTES—REPEAL BY IMPLICATION—MECHANICS' LIENS—EQUITABLE JURISDICTION—BILL TO ASCERTAIN PRIORITIES.**

1. Code, § 3018, provides for a mechanic's lien on buildings or improvements and the land on which they are situated. Section 3019 declares what priorities shall exist between mechanics' and other liens. Section 3048 provides for the enforcement of mechanics' liens in equity. Act Feb. 12, 1891, repealed section 3018, and enacted in lieu thereof another provision, declaring the lien in more extended form. *Held*, that Code, §§ 3019, 3048, were not so dependent on the repealed section as to be impliedly repealed therewith, but were equally applicable to the substituted provision.

2. The fact that a material man obtained a lien on the property, and purchased at the sale thereunder, does not preclude him from afterwards filing a bill in equity against mortgagees of the property, of whose rights he was ignorant at the time of the previous suit, and who were not parties thereto, to have declared the priorities of their respective liens.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Bill by the May & Thomas Hardware Company against the Birmingham Building & Loan Association and others to foreclose a mechanic's lien, and for incidental relief. From a decree for complainant, defendant association appeals. **Affirmed.**

The allegations of the bill as amended show that the May & Thomas Hardware Company, a body corporate, the appellee, furnished to the defendant S. B. Ethridge, by contract with him, building materials for buildings and improvements on certain lots of land owned by him, which are described as being in Avondale, Jefferson county; that on November 6, 1891, said Ethridge and his wife executed a mortgage on said lots to the Birmingham Building & Loan Association, the appellant, and on the 11th December, 1891, they executed a second mortgage to said association on said lots; that those mortgages were foreclosed by the association on September 15, 1892, according to the power contained therein, and it became the purchaser of them at the mort-

gage sale; that said improvements were erected on said lots in the months of November and December, 1891, and in the months of January, February, March, April, and May, 1892, and the materials were furnished in the months of February, March, and April, 1892, for which said Ethridge was indebted to complainant, the said May & Thomas Hardware Company, in the sum of \$180; that on the 18th day of May, 1892, the complainant filed a statement under the mechanic's lien law in the probate court of Jefferson county, and within six months brought suit in the circuit court of Jefferson county against said Ethridge alone, on said claim, and on the 18th July, 1892, recovered a judgment against said Ethridge, in which judgment a lien on the property was declared in favor of complainant, and the property ordered sold for the satisfaction thereof; that under a venditioni exponas issued in said cause the sheriff sold said property on the 20th day of September, 1892, and the complainant became the purchaser thereof at the price of \$50; that at the time of said sale and purchase by complainant, on the 26th September, 1892, the fact that defendant, the appellant, had foreclosed its said mortgage, and had become the purchaser of said property, was unknown to complainant. The bill prays for a reference to ascertain the value of the property at the time said materials and improvements were furnished and its value afterwards; that a decree be rendered for its enhanced value by reason of materials furnished, and that the property be sold, and the proceeds distributed between them in accordance with the priorities and claims of said association and complainant, and for any further relief to which complainant may be entitled. The defendant association made a motion to dismiss the bill for want of equity, and demurred to it on grounds that the court had no jurisdiction, that complainant had no lien on the property described, and that if it had any rights it had an adequate remedy at law to enforce them. The court overruled said motion to dismiss, and the demurrers to the bill as well; hence this appeal.

E. J. Smyer, for appellant. Wade & Vaughan, for appellee.

HARALSON, J. Chapter 8, pt. 2, tit. 2, Code 1886, headed "Liens of Mechanics and Material Men," provided a system of statutory law on that subject, comprising 31 sections, from 3018 to 3048, inclusive. On the 12th February, 1891, the legislature passed "An act to provide liens for mechanics and material men, and to repeal sections 3018, 3022, 3025, 3026, 3028, 3041, of the Code, and section 3027, as amended by the Acts of 1888-89." Acts 1890-91, p. 578. These sections, 7 in number, were parts of this general mechanics' and material men's lien



law, leaving 24 of its sections still of force. In the place of these repealed sections other provisions were supplied, forming, with the unrepealed sections, a system supposed to be more complete than the one that existed before. So far as we have observed, the old and the new are susceptible of harmonious adjustment; but, if not, the last section of the new provides "that all laws in conflict with the provisions of this act are hereby repealed," and in case of conflict the latter will prevail. There can be no question, then, that this later enactment was not intended to create an entirely new system of law on this subject in abrogation of the old, but to amend the latter to the extent of the repeals indicated in its first section, and in its new provisions, and leave the balance to be adjusted to these amendatory provisions. While section 3018 of the Code, which declared the lien, is repealed, section 2 of the new enactment, which also declared it in more extended form, takes its place on the new system; and sections 3019 and 3048, not having been repealed, are to be applied to said section 2 of the amendatory law, as they were to section 3018 before its repeal. This was the view the court seems to have taken of the character of this statute in *Wimberly v. Mayberry*, 94 Ala. 251, 10 South. Rep. 157; *Colby v. St. James Colored M. E. Church*, 13 South. Rep. 515, (at present term.)

The supposed lack of equity in this bill is based on the contention that, section 3018 of the Code, having been repealed, sections 3019 and 3048,<sup>1</sup> upon which the right to maintain the bill depends, were necessarily repealed with it, since the two latter were inoperative without the former; but we have shown above that section 2 of the amendatory act of 1890-91, under which this case arose, took the place of said repealed section—3018—as an amendment of it, and said sections 3019 and 3048 became applicable to it immediately upon its enactment. This question being out of the way, the case of *Wimberly v. Mayberry*, supra, is decisive of the equity of this case.

The grounds of demurrer based also upon the supposed want of equity in the bill must for the same reasons fail. Nor is there any merit in the other ground of demurrer,—that the complainant had an adequate remedy at law. The suit in the circuit court was against Ethridge alone. The defendant company was not concluded in its liens, or in the assertion of their priorities, by anything that took place in that proceeding; and the complainant, in having obtained said judgment against said Ethridge, and purchased said property at the sheriff's sale, was not precluded from filing his bill to settle with

the appellant the priorities of their respective liens, as this bill is intended to do. There is no other adequate remedy to adjust these competing liens, except a proceeding in equity. There is no error in the rulings of the court below, and its decree is affirmed.

(99 Ala. 252)

DE ARMOND et al. v. WHITAKER et al.

(Supreme Court of Alabama. June 22, 1893.)

EJECTMENT—VERDICT.

Where an action of ejectment is tried on an agreed statement of facts, a verdict for more land than the agreed statement shows is in controversy will be set aside on appeal.

Appeal from circuit court, Marshall county; John B. Tally, Judge.

Action by James Whitaker and others against John De Armond and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Elijah Whitaker, the husband of Nancy Whitaker, died on the 23d of January, 1884, intestate, leaving no children. He was seised of certain lands in controversy, and he and his wife, Nancy, were residing thereon at the time of his death. The case was tried on an agreed statement of facts, of which the following is a copy: "In this cause it is agreed by and between the parties to this cause that this case may be tried on the following statement of facts, and the jury charged accordingly: \* \* \* Plaintiffs and defendants both claim title through or from the common source, Elijah Whitaker. That Elijah Whitaker died seised and possessed of the land sued for on the 23d day of January, 1884, without having made any will, and without having any children, but a widow, Nancy Whitaker. That the plaintiffs in the case are the brothers and sisters of the deceased, Elijah Whitaker, and the children of his deceased brothers and sisters, embracing all of his brothers and sisters and the descendants of deceased brothers and sisters. Said Elijah Whitaker and his wife, Nancy, were both residents of Marshall county, Alabama, and after his death his said widow, then a resident of said county, filed in the probate court of said county her application for a homestead, and proceedings were had thereon, setting apart the land in suit to her as a homestead, without any administration on the estate of said Elijah Whitaker, which said proceedings are hereby made a part of this agreement, and referred to as such. She was residing on the land in question at the time of such application and proceedings thereunder. This application and proceedings were under the statute, (Acts 1884-85, p. 114.) That on the 11th day of May, 1887, said Nancy Whitaker, as is admitted, sold and conveyed said lands in dispute, mentioned in the plaintiffs' complaint, to the defendant David Davis, by deed recorded in

<sup>1</sup> Code, §§ 3018, 3048, provide for liens on buildings and improvements in favor of mechanics and material men, and declare that such lien may, when the amount claimed is not less than \$100, be enforced in equity.

Book P of deeds, page 270, in the office of the judge of probate of Marshall county, Alabama, and which deed is hereby referred to and made a part of this agreement. The defendant De Armond was in possession of said land as tenant of said Davis at the time of the bringing of this suit. The annual rental value of the land in dispute is thirty dollars since the commencement of the suit. That said Nancy Whitaker died in Marshall county, Alabama, in the year 1889, and before the commencement of this action. There has been no administration of the estate of Elijah Whitaker, nor on the estate of said Nancy Whitaker." The petition of Nancy Whitaker, made a part of the agreed statement of facts, the order of the court appointing commissioners to lay off the exemptions under said petition, their return, and the order of confirmation of said report, are set out, and are substantially as follows: The petition avers that petitioner is the widow of said Elijah Whitaker, and is over 21 years old; that said Elijah Whitaker departed this life on the 23d day of January, 1884, which was more than 60 days before the filing of this petition; that he left no minor children, and left in said county and state personal and real property not to exceed the amount exempted to widows and minors, as provided under the laws of the state, and there has been no administration on said estate; and concludes by praying for the appointment of commissioners to set apart to her, under the acts of the legislature of 1884-85, such personal and real property as is exempted to her as such widow under said act. The court appointed two commissioners, Benton Robinson and David Davis, as commissioners, and commanded them to make a complete inventory of all the personal property of the estate of said decedent, together with the real estate exempted from administration, and the payment of debts, and set apart to the said Nancy Whitaker, as such widow, all the personal and real property exempted to her as such widow under the provisions of the laws of this state, and make return. The commissioners in their report state that, "pursuant to a commission issued by you, [the judge of probate,] directed to us, of date the 17th September, 1886, we have made an inventory below of the personal property belonging to the estate of Elijah Whitaker, and set the same apart for the widow, Nancy Whitaker, under [as] the laws of the state provide. [Here the property is described aggregating in value \$179.] Also we have set apart to her, as exempted as a homestead, one hundred and sixty acres of land,—\$500,—bounded as follows: On the north by the lands of James Whitaker; the east by Bolling Whitaker; on the south by the lands of Widow Clay, widow of James Clay; on the west by the lands of J. H. Whitaker,—and known by [the name of] 'Great Swag,' as 20 acres off S. end of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , also S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , also N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$

and S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , in section 9, T. 6, range 3 east; in all, 160 acres, in Marshall county,—set apart to Nancy Whitaker, widow of Elijah Whitaker, deceased, under the laws in such cases provided." The report was confirmed by the court. The deed of Nancy Whitaker to David Davis, in its description of the land conveyed, follows the description of the lands as contained in the report of the commissioners, set out above. The court, on this evidence, gave the general charge in favor of the plaintiffs, and refused a like charge requested by defendants. The verdict was for the plaintiffs for the land sued for. Judgment was rendered for the plaintiffs on a plea of not guilty for the following described lands: The N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , all of section 9, in township 6, of range 3 E., lying and being in Marshall county, Ala., the same lands described in the complaint. The errors assigned were for the giving of the general charge in favor of plaintiffs, for the refusal to give the one requested for defendants, and for rendering judgment on the agreed state of facts for the plaintiffs.

A. A. Wiley and John G. Winston, Jr.,  
for appellants.

HARALSON, J. The petition of the widow for exemption, made a part of the agreement of the parties, on which the case was tried, avers that the said Elijah Whitaker left at his death real and personal property not exceeding the amount exempted to widows and minors under the laws of this state, following substantially the language of section 1 of the said act of 1884-85, under which the petition purports to have been filed. The number of acres of land exempted to widows at that time, if it did not exceed \$2,000 in value, was 160 acres, and the commissioners who set aside the exemption in this instance—which they report as 160 acres—valued it at \$500. The number of acres described in the complaint as sued for is 180 acres. The verdict was "for the land sued for in this action." The judgment was for the recovery of the identical land described in the complaint,—180 acres. The report of the commissioners purports to set aside 160 acres to the widow, but, when footed, it amounts to 140 acres. The agreed state of facts recites that said Nancy Whitaker "filed in the probate court of said county her application for a homestead, and proceedings were had thereon, setting apart the land in suit to her as a homestead;" and yet we have just seen that the land sued for and that described in the report of the commissioners is different. The agreed state of facts further recites as an admission for the trial that "Nancy Whitaker sold and conveyed said lands in dis-

pute, mentioned in the plaintiffs' complaint, to the defendant David Davis." The lands described in the conveyance are "20 acres off the south end of N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , also N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , also S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , also N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , also S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , all in Sec. 9, T. 6, R. 3, containing 160 acres, [in] Marshall county, Alabama, which was set apart to me by the probate court of Marshall county, under the act of the legislature of 1884-85, as the widow of Elijah Whitaker, deceased." The land described in the conveyance of Mrs. Whitaker to Davis is different from that described in the complaint, judgment, and the report of the commissioners, but it is admitted that they are the lands which are mentioned in the plaintiffs' complaint, and that defendant De Armond was in possession of them, as the tenant of said Davis, at the time this suit was brought. These discrepancies of description have not been noticed in argument on either side, but the case has been treated as though Elijah Whitaker owned at his death only 160 acres of land, which was set apart to his widow, under the proceedings for that purpose; the contention being, on the one side, that when so set apart the absolute title vested in her, which she had a right to convey and did convey to David Davis; and, on the other, that such proceedings vested in her only a life estate, and the remainder reverted to the heirs of Elijah Whitaker at her death. Whichever of these contentions may be correct, it is evident from what has been shown that the plaintiffs have recovered of defendants 180 acres of land,—20 acres more than the agreed state of facts show were really in controversy, and when we are left in ignorance as to what lands said Elijah Whitaker owned at his death, whether more or less than 160 acres. If he owned the 180 acres sued for, the probate court had no jurisdiction to set aside the homestead exemption under Mrs. Whitaker's petition, whether his estate was solvent or insolvent. *James v. Clark*, 89 Ala. 606, 7 South. Rep. 161. If he owned only 160 acres, and it was of less value than \$2,000, and no administration was had on his estate after 60 days from his death had elapsed, that court did have jurisdiction to have her exemption set aside under said act, and it would have vested absolutely in her, as completely and fully as if said estate had been regularly administered upon and declared insolvent. *Smith v. Boutwell*, 13 South. Rep. 568, (at present term.) In the state of this record, with the discrepancies and seeming contradictions we encounter in the proofs, there was too much uncertainty to justify the general charge for the plaintiffs. On another trial, from what has been said, the real facts may be ascertained, and the cause tried on its merits. Reversed and remanded.

(100 Ala. 618)

## HIGHLAND AVE. &amp; B. R. CO. v. MADDOX.

(Supreme Court of Alabama. June 22, 1893.)

STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—PLEADING AND PROOF—VARIANCE.

1. Where a person, driving a wagon with curtains closed, attempts to cross a street-railroad track without looking for a car at a point nearer than 75 yards from the crossing, and is struck by a car approaching him from behind, he is guilty of such contributory negligence as will defeat his recovery, in the absence of wanton negligence on the part of the railroad company.

2. The fact that defendant, at a point outside the city limits, was running its car at the rate of 15 miles an hour, and did not give any signal of approach, is not such wanton negligence as will entitle one who attempts to drive across its track without looking to damages sustained by being struck by such car.

3. Where the complaint, in an action for damages caused by a collision with defendant's car, alleges that the accident occurred within the city limits, and the proof shows that it happened beyond the limits, the variance is fatal.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by Matthew F. Maddox against the Highland Avenue & Belt Railroad Company to recover damages for injuries to plaintiff's horse and wagon, by a collision with a dummy engine on the line of defendant's road, alleged to have been caused by the negligence of defendant's servants. There was judgment for plaintiff, and defendant appeals. Reversed.

The defendant requested the court to give the following charges, and separately excepted to the court's refusal to give each of the charges as asked: (1) "That there is no evidence in this case of willful, intentional, or reckless negligence," (2) "That the cause of action set forth in the first count of the complaint as amended is barred by the statute of limitations," (3) "That the cause of action set forth in the second count of the complaint as amended is barred by the statute of limitations," (4) "That, if the jury believe all the evidence, they should find a verdict for the defendant," (5) "That the evidence in this case shows that the place of the alleged collision was not in the city of Birmingham, and this constitutes a fatal variance, which will prevent a recovery by the plaintiff on the complaint as amended."

Alex T. London, for appellant. W. R. Houghton, for appellee.

HARALSON, J. The evidence of Maddox, the only witness examined for the plaintiff, shows that he was the driver of the delivery wagon at the time it and the horse attached to it were injured; that the accident occurred on 10th July, 1890, at 7 o'clock in the morning; that the place of the accident was where Avenue G crosses Twenty-Seventh street, in their extensions, just

outside the limits of the city of Birmingham; that he entered Avenue G to the east of Twenty-Seventh street, and drove in a trot, west, towards Twenty-Seventh street, where the road he was traveling crossed said street and the railroad track, which latter ran along said avenue until it reached said street, and there turned north; that the said road ran to and parallel with the dummy-line track to Twenty-Seventh street; that, when he was about 75 yards away from the crossing, he looked in both directions, and saw no train approaching; that the wagon had curtains on the sides and in the rear, and they were down at the time; that he did not stop before driving on the railroad crossing; that the front wheels of the vehicle had gotten across the track, when the engine of the company ran against the rear of the wagon, and turned it over, and injured it and the horse; that he was acquainted with the crossing; had passed it several times before; and that he was not aware of the approach of the train until it struck his wagon. According to this statement, the driver was guilty of contributory negligence, which will prevent a recovery by plaintiff, unless it was overcome by the reckless, wanton, or intentional negligence of the defendant, and such negligence was not shown by anything this witness stated.

As we stated in *Lee's Case*, 92 Ala. 267, 9 South. Rep. 230: "No principle is now more firmly established in our jurisprudence, it may be said, than that which fastens upon persons about to go upon or across the track of a railway, under ordinary circumstances, the absolute duty of stopping and looking and listening for approaching trains." And this duty, as there held, is as incumbent on persons in vehicles as on foot, subject to a modification there stated, which has no application to this case. Was there any other evidence in the cause which tended to show recklessness or wantonness on the part of defendant's employes, at the time, in the management of the train, such as is the legal equivalent of willful or intentional wrong? There was evidence tending to show that the defendant's train was running, at the time of the collision, about 15 miles an hour, and that the whistle was not blown or the bell rung. The engineer and conductor of the train testified that it was moving five or six miles an hour. But no mere running at the highest rate of speed indicated, at a place like the one where this collision occurred, nor a failure to ring the bell or blow the whistle or keep a proper lookout, is more than simple, as contradistinguished from reckless or wanton, negligence. *Lee's Case*, supra; *Railroad Co. v. Kornegay*, 92 Ala. 228, 9 South. Rep. 557; *Railway Co. v. Chewning*, 93 Ala. 25, 9 South. Rep. 458. The engineer of the train testified that the dummy train, consisting of an engine and

two passenger cars, was going west, into the city, at the time of the collision; that the curve, where the railway turns north in Twenty-Seventh street, was a sharp one; that he saw the wagon when he was 600 feet from the crossing, being driven along Avenue G in the same direction the train was moving; that he slowed down his engine, as a matter of necessity, owing to the sharpness of the curve, and was running not more than five or six miles an hour when he reached the curve; that there was no other road to the curve, except the one the wagon was going, and before reaching the crossing, and a few feet from it, it stopped, and he did not further check his engine; that, when he was 10 or 15 feet from the wagon, the driver started across the track in front of him, and, as soon as he saw the wagon start across, he applied his brakes, reversed the engine, and used all the means at his command to stop, without avail, before striking the rear of the wagon, and the locomotive did not run more than 25 or 30 feet from where he first applied his brakes and reversed the engine. The conductor first saw the wagon 15 or 20 steps from the crossing, moving along beside the front of the train, going at the rate of 3 miles an hour, and the train 6; that the wagon got to the crossing first, because it had the nearest route to go. He saw no more of the wagon till he felt the brakes applied and the shock of the collision. There is no conflict in the statements of this witness and that of the engineer. The latter testifies that, when the engine was within a few feet from the crossing, the wagon stopped, and the conductor says he last saw it 15 or 20 steps (from 45 to 60 feet) from the crossing. The most we can say of this evidence, if it shows any negligence on the part of the employes of the company, is that it was simple negligence. There was, certainly, no element of recklessness or wantonness in it; and whether considered on the uncontradicted evidence of the plaintiff, or on that of defendant, the plaintiff was not entitled to recover.

The first and fourth charges requested by defendant, and refused, should have been given. There was no error in refusing the other charges requested, except the fifth. The fifth charge is to the effect that the place of the collision, as shown by the evidence, was not in the city of Birmingham, and therefore there is a fatal variance between the complaint as amended and the proofs. The proof shows that the accident occurred within about 40 feet of the eastern boundary of the city, in the center of an avenue and street, in their extension beyond the limits of the city of Birmingham. The complaint alleges that the accident occurred in the city of Birmingham. The variance was material. Reversed and remanded.

(96 Ala. 635)

## MITCHAM v. SCHUESSLER et al.

(Supreme Court of Alabama. June 22, 1893.)

## ATTACHMENT—INTERVENTION—EVIDENCE—INSTRUCTIONS—MORTGAGES—VALIDITY.

1. On the trial of a claimant's right to certain attached property, the claim being based on a mortgage of the property, the law day of which had elapsed, evidence is incompetent of a declaration made by defendant in attachment to claimant, in the absence of plaintiff, that he would deliver claimant the attached property if the mortgage debt were not paid before a certain time.

2. On the trial of a claimant's right to certain attached property, the claim being based on a mortgage of the property, evidence is incompetent of a declaration made by claimant's husband and agent, in the absence of claimant, that the mortgage debt had been paid.

3. On the trial of a claimant's right to certain attached property, the claim being based on a mortgage of the property, the verdict must be for plaintiff in attachment, if claimant has not satisfactorily shown that when the attachment was issued she had a valid, existing debt, secured by mortgage on the property.

4. The fact that the mortgagee permitted the mortgagor to remain in possession after the law day of the mortgage does not affect the validity of the mortgage, if the mortgage is bona fide, and the debt secured has not been paid.

5. Indulgence to the mortgagor for an unreasonable time after the law day of the mortgage is a circumstance which may be considered by the jury in determining the bona fides of the mortgage, in its inception, and as to whether the secured debt has been satisfied.

Appeal from circuit court, Chambers county; J. R. Dowdell, Judge.

Action in attachment by Schuessler Bros. against C. P. Baird and A. W. Mitcham, as claimant. From a judgment for plaintiffs, claimant appeals. Reversed.

After G. T. Mitcham, the husband of A. W. Mitcham, the claimant, had testified that he was the general agent of the claimant, and that on October 4, 1891, he had gone to the defendant's house to demand the payment of the balance due on a mortgage, and that Baird told him, if he did not pay him on the 6th of October, 1891, he would send him the mortgaged property, the claimant introduced one W. L. Baird as a witness, and asked him if he heard a conversation between G. T. Mitcham and C. P. Baird on the 4th of October, 1891, and, if so, to state what he saw and heard. The plaintiffs objected to said question, whereupon the claimant informed the court that she expected to prove by said witness that he saw said Mitcham at the house of said Baird on that day, and heard said Baird say to G. T. Mitcham that, if he did not pay the balance on the debt on the 6th, he would deliver him the property. The court sustained the objection to said question, declined to allow said testimony to be given, and to this ruling of the court the claimant duly excepted. The plaintiffs, in rebuttal, introduced one Dr. J. W. Cooper as a witness, who testified that in the early fall of 1890 he met G. T. Mitcham, and, after telling him that he thought of making farming arrangements with said C. P. Baird,

and that C. P. Baird wanted to trade him a mule, he asked said Mitcham if Baird owed him anything, or if he had any claim against the mule, and that said Mitcham told him that he did not; that Baird had paid up, and that he (Cooper) could go ahead, and trade for the mule, which constituted some of the property sued for in this suit. The claimant objected to this testimony of Cooper on the grounds—First, that admissions made by G. T. Mitcham in her absence could not bind A. W. Mitcham; second, that the same were illegal and irrelevant. The court overruled these objections, and the claimant duly excepted. Upon the introduction of all the evidence, the court, at the request of the plaintiffs, gave the following written charges, to the giving of each of which the defendants separately excepted: (1) "The burden of proof is on the claimant to show that when the attachment was levied there was a debt existing from C. P. Baird to the claimant, secured by mortgage, and if the claimant (Mrs. Mitcham) has not satisfactorily to the jury, shown that at the time the attachment was issued she had a valid, existing debt, secured by the mortgage, then the jury must find for the plaintiffs." (2) "The court is asked to charge that the law day of Mrs. Mitcham's mortgage was the 1st day of October, 1890, and if the jury believe from the evidence that the mules were permitted to remain in C. P. Baird's (the mortgagor's) possession until the 6th day of October, 1891, and if from the evidence, and from the facts in the case, this was an unreasonable time to permit the mortgagor to remain in possession of the mortgaged property after the law day, this may warrant the jury in inferring, and, in connection with the other evidence, in finding, that the mortgage debt was paid, or that the mortgagor was held up as a protection for his (Baird's) property against the demands of his creditors, unless the jury believe from the evidence that the indulgence of the mortgagee is compatible with fair dealing, and induced by no intention to favor the mortgagor to the prejudice of his creditors."

W. J. Samford, for appellant. N. D. Denison, for appellees.

COLEMAN, J. Schuessler Bros. sued out an attachment against one C. P. Baird, which was levied on the 17th of October, 1891, upon certain personal property. A. W. Mitcham claimed the property, and executed a replevy bond, and an issue was made up to try the right of property. Evidence was introduced by the plaintiffs, tending to show the indebtedness of the defendant in attachment, the levy of the attachment, and that up to within 10 days prior to its levy the property was in the possession of the defendant in attachment, who claimed the same as his own. The claimant's title is derived through a mortgage executed by the defendant on the

25th day of February, 1890, upon the property levied upon under the attachment. The execution and consideration of the mortgage were duly proven, and the mortgage admitted in evidence. The mortgage debt became due October 1, 1890, and was credited with \$81.94 October 18, 1890, and indorsed as follows: "It is agreed that the payment of the balance on this mortgage be extended to Oct. 1st, 1891." There was evidence tending to show that the extension was granted because of the inability of the mortgagor to pay the debt when it fell due. It was proven that G. T. Mitcham, husband of claimant, was her agent, and by virtue of the mortgage, with the mortgagor's consent, he took possession of the property on the 6th of October, 1891, and had it in possession, as the agent of the claimant, at the time of the levy of the attachment.

There was no error in excluding the conversation between G. T. Mitcham and the defendant in attachment; plaintiffs not being present at the time, and having no knowledge of it.

The court erred in admitting the testimony of the witness Cooper. Admissions of the husband, made in the absence of the wife, are not binding on her, and this is especially applicable to his declarations, as an agent, as to any past transaction, or his admissions which are not explanatory of some contemporaneous act or transaction within the scope of his authority, or made while in the execution of his agency. *Tanner v. Railroad Co.*, 60 Ala. 621; *Railroad Co. v. Hawk*, 72 Ala. 112; *Railroad Co. v. Hill*, 76 Ala. 303; *Railroad Co. v. Smith*, 74 Ala. 206; *Bynum v. Pump Co.*, 63 Ala. 462. The admissions of the husband, testified to by the witness Cooper, as to the satisfaction of the mortgage debt, are not within the rule, and should have been excluded.

We think the first charge given for the plaintiffs, when considered with the evidence, was free from error. The evidence satisfactorily showed that the property belonged to the defendant, subject to the rights of the mortgagee; and if the debt secured by the mortgage, through which claimant claimed title, had been paid, the jury were properly instructed to find the issue for the plaintiffs.

The second charge given for the plaintiffs is somewhat involved, and, as a whole, not strictly correct. Indulgence for an unreasonable time after the law day of a mortgage is a circumstance which the jury may consider, in connection with other facts, in determining the bond fides of a mortgage, in its inception, or as to whether the secured debt has been satisfied. *Beall v. Williamson*, 14 Ala. 55; *Dearing v. Watkins*, 16 Ala. 20; *Bank v. Willis*, 5 Ala. 770. But if the mortgage is bona fide, and the debt secured has not been paid, no indulgence to the mortgagor, although the effect of such indulgence be to protect the debtor in the possession and

enjoyment of the property, will affect the validity of the mortgage security. In such cases the only remedy of the mortgagor is to redeem, and his creditors can acquire no other rights. *Ware v. Shoe Co.*, 92 Ala. 145, 9 South. Rep. 136; *Pratt v. Nixon*, 91 Ala. 192, 8 South. Rep. 751; *Kelly v. Longshore*, 78 Ala. 204; *Bingham v. Vandegrift*, 93 Ala. 283, 9 South. Rep. 290.

Reversed and remanded.

(100 Ala. 67)

**FLEMING v. MONTGOMERY LIGHT CO.**  
(Supreme Court of Alabama. July 27, 1893.)

**GAS COMPANIES—RIGHT OF CITIZENS TO METERS.**

A gas company which has been granted the exclusive privilege of supplying gas in a city for a certain number of years, under an agreement that at all times it would supply the citizens for private use with a sufficient quantity of gas, need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas.

Appeal from city court of Montgomery; T. M. Arrington, Judge.

Suit by David Fleming against the Montgomery Light Company. From a decree for defendant, complainant appeals. **Affirmed.**

Charles Wilkinson, for appellant. Tompkins & Troy, for appellee.

**COLEMAN, J.** Appellant, as complainant, filed the present bill for the purpose of enjoining the respondent, the Montgomery Light Company, from removing its gas meter from the premises of complainant, and to enjoin the respondent "from refusing to furnish your orator gas." Complainant's rights are very clearly set forth in the bill, and grow out of an agreement entered into in the year 1852 between the city of Montgomery and the John Jeffrey Company, by the terms of which the exclusive right and privilege of manufacturing and supplying gas for a period of 50 years for the city of Montgomery and its inhabitants was granted to the John Jeffrey Company, the said company agreeing on its part "at all times to supply the inhabitants of the city of Montgomery for private use with a sufficient quantity of gas of the most approved quality." The Montgomery Light Company has succeeded to all the privileges and assumed all the obligations of the John Jeffrey Company; and the bill makes the further averment "that it is the duty of the respondent, under its charter, to supply all applicants with gas and electric lights, one or both, at the option of the consumer." There is nothing in the agreement by which the light company may compel the inhabitants of the city, or any one of them, to use its gas and electric lights. Stripped of the statement of facts necessary to present the complainant's case in an intelligible form, the one question raised is whether the assumption to supply the inhab-

itants of the city of Montgomery with gas imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas for inhabitants who do not use or consume gas, but who desire to be supplied "with meters and connections with the defendant's gas pipes, so that, in case an accident—which is apt to occur—should happen, they "could use the gas." A statement of the proposition suggests its answer. There can be no difference in principle between the case stated and the one in the bill, in which it is shown that at one time complainant used gas for lights, but at the time of filing of the bill, and previous thereto, complainant used in his building electric lights, furnished by a different company or corporation, and was not a patron of defendant company, and the injunction was to make provision "to use gas" "in case an accident should happen to the electric light in use by orator." Plaintiff's contention is that, although he has made other arrangements with a different company for light, yet it is the duty of respondent to keep on hand gas and electricity, with proper meters and connections and electric burners, "in case of an accident" to the company, which has contracted to supply him, and that, too, without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract between the city and respondent, expressed or implied. There is no equality or equity in such a proposition. It is hardly necessary to cite authorities, but we refer to the following: *Williams v. Gas Co.*, 52 Mich. 499, 18 N. W. Rep. 236. There is no error in the record. Affirmed.

(100 Ala. 546)

## LINDSAY v. MORRIS et al.

(Supreme Court of Alabama. June 22, 1893.)

## GARNISHMENT—CONTEST OF ANSWER—ISSUES.

1. Code, § 2981, directs that the affidavit of contest to a garnishee's answer shall be filed the same term as the answer, and thereupon an issue made up under direction of the court. *Held*, that the court can allow the tenders of issue to be filed at a subsequent term.

2. Code, § 2981, requires plaintiff to allege, in the issue tendered the garnishee, in what respect the latter's answer is untrue. Plaintiff, in attempting to set aside a bill of sale from defendant to garnishee, by contest of their answer "not indebted," failed to allege that he was a creditor of defendant at the date of the bill, or that the bill was intended to defraud creditors, the amount or nature of garnishee's debt, or how evidenced, or what property of defendant's garnishee had. He did allege that the bill was never accepted by all the vendees named, and that it required a precedent release or impairment of their existing rights by those accepting its benefits; thus applying to it the conditions of securities given for existing debts under section 1736, *Id.*, but not alleging this bill to be other than absolute. *Held*, that the issues tendered, while insufficient, were not frivolous, and should have been specially demurred to, and amended, "under the direction of the court;" not stricken out on motion.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

The appeal in this case is prosecuted by David Lindsay, the plaintiff in the lower court, from a judgment rendered, granting a motion of the garnishee to strike from the file the tenders of issue made by the plaintiff. Reversed and remanded.

Richardson & Reese, for appellant.

HEAD, J. At the suit of appellant, Lindsay, the appellees, Josiah Morris & Co., were summoned to answer, as garnishees, what they were indebted to Samuel Hyams, the defendant in attachment. On February 25, 1892, they filed in open court a general answer of "not indebted." During the same term, on March 3, 1892, the court made an order requiring the garnishees to appear on the next day and answer orally. They accordingly appeared, and were examined orally, and their answer reduced to writing and filed. This oral answer disclosed no admission of indebtedness to, or possession of effects of, the defendant Hyams, upon which the court could have rendered any judgment against the garnishees. It treats very indefinitely of a bill of sale, which, it seems, was executed by Hyams to or for the use of the garnishees and others on the 9th day of December, 1891, but the particulars of the instrument and the property described in it are not shown. It was executed prior to the suing out of plaintiff's attachment; and it not being disclosed by the answer that plaintiff was an existing creditor of Hyams when the bill of sale was executed, and no facts being stated from which it can be inferred that the sale was actually fraudulent, and no description of the property being given, there was nothing to support the plaintiff's motion for judgment upon the answer. On the 11th day of March, 1892, which was during the term of the court at which the answers were filed, the plaintiff, in strict pursuance of the statute, contested their truths by filing in the cause the prescribed affidavit; and in that condition the cause was continued until the next term. At that term, when the cause came on for trial, the plaintiff obtained leave of the court to file, and did then file, in writing, tenders of issues to be made up, under the statute, for trial, upon the contest which had been inaugurated by the filing of the affidavit aforesaid. Thereupon the garnishees moved the court to strike the tenders of issues from the file on two grounds: (1) Because they were not filed at the same term at which the affidavit of contest was filed; (2) because they did not allege wherein the answer was untrue. The court sustained the motion, and the plaintiff excepted. We think the first ground of this motion to strike was not well taken. The statute directs that the affidavit of contest must be filed at the term at which

the answer is made, and thereupon an issue must be made up, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue; and, if required by either party, a jury must be impaneled to try such issue. Code, § 2981. It is manifest the statute does not in terms direct this issue to be made up at the same term the affidavit is filed; but, if such is the implication, it is not mandatory, and it was competent for the court to allow it to be made up at a subsequent term; and this the court did when it granted leave to the plaintiff to file the tenders of issue. *Ex parte Opdyke*, 62 Ala. 70; *Beckert v. Whitlock*, 83 Ala. 123, 3 South. Rep. 545. When that was done the court's discretion (if it be a matter of discretion merely, which we do not now decide) was exercised, and the issues tendered and filed became properly a part of the record of the cause, and it was not allowable to strike them out on the ground that they were not filed in time. Moreover, when the cause was continued at the previous term there was nothing involved in it but the matter of this contest. The continuance must therefore have been granted for the sole purpose of trying the contest at a subsequent term.

As to the second ground of the motion. As we have seen, section 2981 of the Code, unlike the older statute, (Clay, Dig. p. 60, § 25,) requires the plaintiff to allege in the issue tendered in what respect the answer of the garnishee is untrue. This requirement manifestly intends that the tender shall allege a state of facts showing a liability on the part of the garnishee to the defendant, or possession of property by the garnishee belonging to the defendant, and that these facts shall be so stated that a definite issue can be joined thereon. The effort of the plaintiff was, by the special tenders of issue he filed, to invalidate a certain bill of sale of goods executed by defendant Hyams to the garnishees and others on the 9th day of December, 1891, and to subject the property thereby sold and in possession of the garnishees to the payment of his debt against Hyams. It is too clear for controversy that the special allegations upon this subject, discarding the leading conclusions of the pleader, do not show the bill of sale to have been invalid. In the first place, it is not alleged that plaintiff was a creditor of Hyams at the time it was executed; nor is there any pretense of allegation that the instrument was executed with intent to hinder, delay, or defraud the creditors of Hyams. The only attack made upon it consists in the allegation made in the first tender of issue, that it was never accepted by all the vendees named therein; and in the second original and first amended tenders, that the vendees "were required to accept said bill of sale, and the security thereby provided, upon its terms and conditions, before participat-

vided for them, and thereby to make a release and impair their existing legal rights before participating in or receiving the security therein provided for them, and that the property described and alleged to have been transferred in said bill of sale was agreed by said Hyams and by said vendees to be less in value than the debts secured by said bill of sale;" the pleader thus attempting to apply to an absolute bill of sale given in payment of a debt the provisions of section 1736 of the Code, applicable to instruments given for the security of debts. It may be that these special tenders of issue, in the shape they were presented, are and should have been treated as frivolous, and for that reason properly stricken from the file; but there was a tender of issue filed, general in form, which alleged that the garnishees were indebted to the defendant, or did have property in their hands belonging to him. This tender is clearly insufficient under the present statute, in that it does not set forth the amount of the indebtedness, or nature thereof, or how evidenced, nor does it set forth what property of defendant the garnishees have in their possession. But, though defective in these particulars, it was not frivolous on its face. It would have been sufficient to try the case upon, if not objected to. It was capable of amendment so as to cure the omissions. The question now raised is, what is the proper practice, under the present statute, when a defective and insufficient tender of issue is filed, which is not frivolous, and which shows a substantial cause of recovery against the garnishee? Under the old statute, which required simply that the issue be made up under the direction of the court, omitting the present requirement that the tender of issue must set forth wherein the answer is untrue, it was said in some of our decisions that it was not proper to demur to the tender, as the making up of the issue was under the direction of the court, who would see that it was properly made up. Evidently the direction which the court can and must exercise relates alone to the form of the issue. It cannot know what specific allegations the plaintiff desires to rely upon for a cause of action against the garnishee, and therefore can give no directions as to what those allegations shall be. That must be left to the pleader. Now, as we have seen, the statute requires the tender to set forth wherein the answer is untrue. This must be done with such degree of particularity as that a certain definite issue can be formed thereon. It occupies very much the position of the complaint in an ordinary action. Upon due consideration, we conclude that the proper practice, when the tender of issue is not frivolous on its face, and shows a substantial cause of recovery against the garnishee, but is defective and insufficient in the particulars of its averments, is for the garnishee to point out the



defects by demurrer, so that the plaintiff may be advised of the specific objections, and be given an opportunity to obviate them by amendment. A general motion to strike them from the file gives the plaintiff no sufficient notice of what the objections are, and no sufficient opportunity to meet them by amendment. In the present case all the tenders of issue were stricken from the file on general motion. The garnishees should have demurred, setting forth the particular grounds of objection they relied on. For this error the judgment is reversed, and cause remanded.

(100 Ala. 626)

**BANK OF MONTGOMERY et al. v. OHIO BUGGY CO. et al.**

(Supreme Court of Alabama. July 27, 1893.)

**COMPOSITION WITH CREDITORS—RIGHTS OF CREDITORS INTER SE.**

Where creditors meet, on the invitation of their debtor, and agree to extend their claims, with a provision that they should be paid in four installments, and that the debtor should incur no new indebtedness pending the term of the extension, none of the assenting creditors can take legal steps, or enter into an agreement, to secure preference over the other assenting creditors, at least till the debtor has committed a default.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Suit by the Ohio Buggy Company and others against the Bank of Montgomery and others to have certain property, which had been conveyed to the defendants, decreed to be held by them in trust, and for an accounting. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

On February 8, 1892, the Montgomery Carriage Works, a partnership composed of three members, being unable to pay their creditors,—all of whom were simple contract creditors,—addressed a circular letter to each one of them, calling them together for the purpose of deciding what should be done for their benefit. In obedience to this call, most of the creditors, on February 17, 1892, met in the city of Montgomery. At said meeting the Montgomery Carriage Works submitted a statement of their condition, showing them to be unable to meet their indebtedness, but declaring themselves willing to abide the judgment of their creditors, and at the same time requesting that they should be permitted to continue business, "in order that they might pay their creditors in full, and save something for themselves" out of their assets. Upon the submission of this statement, a committee was appointed out of the creditors present to consider the situation, and see what was best to be done under the circumstances. This committee, after investigation and consideration, made its report, which contains the substance of the composition agreement entered into between the Montgomery Carriage Works and their creditors, and which was in the following

language: "Your committee appointed to take under consideration the proposition of said debtors, and report thereon, do recommend that the proposition of said Montgomery Carriage Works be accepted, and an extension be granted said debtors, as follows: Said Montgomery Carriage Works to execute and deliver to each of its creditors its notes or the amount due each creditor, in four equal amounts, payable on or before the 1st day of January, 1893, July, 1893, January, 1894, July, 1894, with interest at six per cent. payable annually, payable at bank in Montgomery, Ala. Said debtors to execute an agreement not to create any new indebtedness until all of said notes are paid. Said debtors to reduce and keep their expenses at the lowest possible point, and to submit their books to the inspection of any of its creditors, or their duly-appointed representative, whenever requested. In the event said debtors create other or additional indebtedness, or fail to pay any of said notes when due, than and in such event all of the notes given in settlement, as herein provided, shall immediately mature, and become due and collectible. This report means that in case it is necessary, in the conduct of the business of the Montgomery Carriage Works, to purchase goods, no more shall be purchased than are necessary, which goods shall be paid for in cash as soon as they are in their store and checked." The report of the committee was assented and agreed to by the Montgomery Carriage Works, and unanimously adopted by all the creditors present. In compliance with this report, the Montgomery Carriage Works entered into an agreement in writing, pledging themselves to abide by its requirements, and this agreement was deposited with M. P. Le Grand, president of the Bank of Montgomery, who was one of the creditors, for the benefit of all the creditors. A communication was addressed by the Montgomery Carriage Works to each one of the creditors who were not present, stating to them what had been done at the meeting above referred to, and asking that they agree thereto, which request was complied with. The complainants in the present case were not present at this meeting of the creditors, but assented to the arrangement. On December 31, 1892,—one day before the first notes, which were executed in accordance with the agreement, fell due,—the Montgomery Carriage Works executed a bill of sale of substantially all of their property to a part of said creditors who had so agreed to said extension, and entered into the composition arrangement, and who are made the defendants to the present bill. The consideration of this sale was the payment of certain debts due to the creditors of the Montgomery Carriage Works, "which said debts were in existence at the time of, and extended under the terms" of, the arrangement entered into between all of the creditors of the Montgomery Carriage Works. All the other facts

are sufficiently stated in the opinion. The prayer of the bill is that upon the final hearing the chancellor will "render a decree declaring the property conveyed to said defendants, as aforesaid, to be a trust fund for the equal benefit of the creditors of the said the Montgomery Carriage Works, including orators, and that said defendants be held as trustees, and to hold said property in trust for the benefit of your orators and the other creditors of the Montgomery Carriage Works, and that they be made to account for all the property included in said bill of sale, and account for all the proceeds of such as may have been sold by them, with interest thereon." There was also a prayer for general relief. The respondents demurred to the bill, and assigned many grounds, setting up in different ways the want of equity in said bill. On the submission of the cause upon the demurrers, the chancellor overruled each ground of the demurrer. Hence this appeal.

Stringfellow & Le Grand and Arrington & Graham, for appellants. Brickell, Semple & Gunter and T. Scott Sayre, for appellees.

STONE, C. J. The reporter will set out the substance of those parts of the agreement of extension finally agreed upon between the Montgomery Carriage Works, a partnership composed of three members, and its creditors, which is not made intelligible in this opinion. It bears date in February, 1892, and, it is averred, was agreed to by all the creditors of the company. Those who unite in filing this bill, although not of the number who participated actively in the meeting at which the agreement was entered into, were, and still are, creditors of the company, and they assented to, and accepted, the terms agreed on. In the agreed terms of extension the company's debts were divided into four equal parts, to bear interest at 6 per cent.; the first installment to mature January 1, 1893, and the remaining installments at intervals of six months afterwards; the interest to be paid annually; the last installment to mature July 1, 1894; notes to be executed for the several installments, as per the agreed terms of extension. The Montgomery Carriage Works bound itself to contract no other debts pending the term of the extension. The bill then avers that on December 31, 1892,—the day preceding the maturity of the first installment of its extended indebtedness, as agreed on,—the Montgomery Carriage Works executed a bill of absolute sale of its entire property and effects to the Bank of Montgomery and certain other named creditors, each of whom had agreed to said terms of extension, in payment of its said debts to them, and thus stripped itself and the members composing the partnership of all means for the payment of its other debts. The debts due to complainants are wholly un-

paid, and the Montgomery Carriage Works and its members are insolvent. The prayer of the bill is that the defendants, who thus received the effects of the Montgomery Carriage Works, be decreed to hold the same in trust for all the creditors alike, and be held to account for the effects so received to all the creditors, pro rata, who assented to the said extension; and there is a prayer for general relief. There was a demurrer to the bill, assigning many grounds, all of which were overruled by the chancellor. From that ruling the present appeal is prosecuted.

Under the facts of this case, if the averments of the bill be true, the agreement of February, 1892, between the Montgomery Carriage Works and its creditors, has many of the controlling properties of a composition among creditors with their common debtor. Each made concessions. The creditors made liberal concessions in the matter of the time when their several demands should be due and collectible, and in the rate of interest to be paid. The debtor partnership bound itself to incur no new debts until existing indebtedness should be paid off. Now, this was not simply an agreement, or series of agreements, between each creditor and the debtor. It had a broader scope. True, it was, in its obvious extent, an agreement bipartite, between the debtor, on the one side, and the creditors on the other. It extends further. By an irresistible implication, it was an agreement among the assenting and acquiescing creditors to move as a unit, and to share a common fate, at least until default should be made by the debtor. To hold otherwise would be to declare that the meeting of the creditors accomplished nothing,—intended nothing. In *White v. Kuntz*, 107 N. Y. 518, 14 N. E. Rep. 423, the court, speaking of a composition by a debtor with creditors, said: "Such an agreement, if entered into by a debtor with a number of his creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each, in that case, was the undertaking of the rest as a consideration for his own undertaking. Where creditors thus mutually agree with each other, the beneficial consideration to each creditor is the engagement of the rest to forbear." In *Breck v. Cole*, 4 Sandf. 79, speaking of a composition by a debtor with his creditors, the court said: "Every composition deed is, in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor." In *Good v. Cheesman*, 2 Barn. & Adol. 323, an agreement of composition had been entered into between a debtor and his creditors, by which the debtor bound himself to pay two-thirds of his income for the benefit of his creditors, the payments to be made to a trustee to be named by the creditors. They had failed to name the trustee. One of the creditors brought suit on his original de-

mand, and the composition agreement was relied on in defense of the action. The court sustained the defense, holding that the said agreement constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and that the consideration to each creditor, which made it binding on him, was the forbearance of the other creditors. See, also, *Legard v. Hodges*, 1 Ves. Jr. 477, where it was said by Lord Thurlow to be a universal maxim "that, wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any one claiming under him, voluntarily or with notice, raises a trust." Of course, to make such agreement binding, there must be a consideration; but mutual agreements to forbear, on the part of the creditors, supply the element of consideration, as between them. We hold that, at least until the Montgomery Carriage Works committed a default, each assenting creditor was bound to take no legal step, and to enter into no agreement, by which to secure to himself a preference or priority over other assenting creditors, and that the property and effects the defendants secured by the purchase of December 31, 1892, must inure to the equal, pro rata benefit of all the creditors who participated in the agreement, or assented to its terms. Of course, this opinion is pronounced on the postulate that the bill truly sets forth the transaction.

Affirmed.

(40 Miss. 235)

RECTOR PROVISION CO. v. SAUER et al.  
(Supreme Court of Mississippi. Oct., 1891.)

STATUTE OF FRAUDS—SALE OF GOODS—SUFFICIENCY OF MEMORANDUM—TELEGRAMS.

1. In an action for breach of a contract of sale it appeared that plaintiff, the R. P. Co., made defendant's broker an oral offer for 500 barrels of B. flour at a specified price. The broker wired defendants: "R. P. Co., 500 brls. B. flour, bill of lading attached. Care of V. bank. Answer immediately." Afterwards the broker said to plaintiff, "Here is a telegram from my house confirming the sale;" but he did not state its contents, nor did plaintiff read it. Defendants failed to ship the flour. Neither telegram was in evidence. *Held*, that it was not shown that the contract was in writing, as required by the statute of frauds.

2. If the telegram of the broker be treated as in evidence, and it be assumed that his declaration that the sale was confirmed is evidence of a memorandum in writing by defendants, it would show that they accepted the offer conveyed by such telegram only, and that is insufficient to charge them, because both telegrams, taken together, failed to show the substantial terms of the contract.

3. In such case, the declaration of such broker that he had a telegram confirming the sale cannot be accepted as sufficient evidence to raise the presumption of the existence of a memorandum containing all that is necessary to charge defendants.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by the Rector Provision Company against N. & W. Sauer to recover damages

for the breach of a contract of sale of a certain quantity of flour by defendants to plaintiff. From a judgment entered on the verdict of a jury directed by the court in favor of defendants, plaintiff appeals. Affirmed.

Appellant sued the appellees by attachment in assumpsit on open account for 75 cents a barrel on 500 barrels of flour on a contract of sale. Defendants pleaded the general issue, and claimed that there was no valid contract under the statute of frauds. It appears from the evidence that plaintiff made an offer to J. H. Gray, defendants' broker at Vicksburg, for 500 barrels of Brilliantine flour, at \$4.30 per barrel. Gray sent the following telegram to defendants: "Rector Provision Co., 500 brls. Brilliantine flour, bill of lading attached. Care of Vicksburg bank. Answer immediately." The only evidence that the offer was accepted was that Gray went to the plaintiff and said, "Here is a telegram from my house confirming the sale." Gray did not tell what the contents of the telegram were, nor did the plaintiff read it. This telegram was not produced at the trial, but plaintiff proved that formal notice had been given to defendants to produce it. On the 29th of July plaintiffs wrote defendants: "On the 26th inst. we bought of your Mr. Gray 500 barrels of Brilliantine flour at \$4.30 per barrel, F. O. B. at Chester, Ill. To-day Mr. Gray showed us a telegram declining to ship same." August 5th defendants telegraphed Gray: "Send shipping instructions for Rector lot." On August 7th plaintiffs wrote defendants: "Please ship us out of our order to your Mr. Gray for 500 barrels of flour, 75 barrels of Brilliantine at \$4.30, F. O. B., and one hundred half barrels at \$4.30, F. O. B. Please ship this by rail at 45 cts. barrel rate. Make draft 80 days." August 10th defendants wrote plaintiffs: "After long waiting, we have received shipping orders contained in yours of 7th inst., and after we had ordered the 500 barrels, which we countermanded. The tenor of your letter is quite different to the offer received by our Mr. Gray, which makes it a cash sale, and no 30 days' acceptance. Besides, we cannot supply the half barrels." There was some other correspondence. On August 17th defendants wrote, finally declining the sale. After this evidence was in, the defendants moved the court to exclude all the evidence, because plaintiff had failed to prove that the contract was in writing. The court sustained the motion, and gave a peremptory instruction to find for the defendants.

M. Marshall, for appellant. Birchett & Shelton, for appellees.

CAMPBELL, C. J. As the telegram sent by Gray to the appellees was not put in evidence, the admission or declaration made

by Gray to Rector, that he had a telegram from his house "confirming the sale," was insufficient to satisfy the statute of frauds, because it does not show the terms of the sale, which is necessary. *Frank v. Eltringham*, 65 Miss. 281, 3 South. Rep. 655. It fails to show what sale was confirmed. We express no opinion on the ruling admitting the agent's declaration as evidence, as that is not before us, since it was admitted at the instance of the appellant. If the telegram sent by Gray to the appellees, and which counsel for the appellees treat as being in evidence, was before the court in connection with all the correspondence between the parties, it would appear that the "note or memorandum in writing of the bargain," made and signed by the party to be charged, was insufficient; for, if it be assumed that the declaration of Gray to Rector is evidence of a memorandum in writing, made and signed by his principals, it would be held that they accepted the offer conveyed by Gray's telegram, and that is insufficient to charge them, because the two telegrams together failed to "show the substantial terms of the bargain, so that it may be seen and understood from the writing, and without the aid of parol testimony." *Frank v. Eltringham*, 65 Miss. 281, 3 South. Rep. 655. There is no mention in the telegram sent by Gray of the price of the article, which is the essential part of the contract, and that which gave rise to this controversy. 8 Amer. & Eng. Enc. Law, pp. 722, 726. So, in any view of this case, the action of the circuit court in instructing for the defendants was correct.

The presumption invoked by counsel for the plaintiff to the effect that the declaration by Gray that he had a telegram confirming the sale should be accepted as evidence of a sufficient memorandum (one containing all that is necessary) to charge the parties, cannot be indulged. It cannot be held to prove anything more than that some sale was confirmed, and it devolved on the plaintiff to show what sale was confirmed, and it was not sufficient to prove it by parol evidence. The plaintiff had the telegram sent by Gray, and interrogated witnesses about its terms. If that had been put in evidence, it would have appeared that the writings signed by the parties sought to be charged were insufficient, and it is not allowable to obtain by intendment the result which should be reached by direct evidence, and which it plainly appears could not be thus reached in this case. Affirmed.

(69 Miss. 323)

**MONTGOMERY v. GOODBAR et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATION.**

Where an assignment purports to convey all the assignor's property for the benefit

of his creditors, a reservation of a sum of money to be used by the assignor in purchasing necessities for his family avoids the assignment.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Action by Goodbar & Co. against H. C. Montgomery aided by attachment. There was a decision in plaintiffs' favor, and the usual judgment condemning the property to be sold was entered. Defendant's motion for a new trial was overruled, and he appeals. Affirmed.

Defendant, H. C. Montgomery, a merchant doing business at Sunnyside and Shannondale, in Leflore county, made a voluntary assignment of all his property of whatever kind and description for the benefit of his creditors, with preferences. The next day plaintiffs, Goodbar & Co., sued out an attachment against him, predicated of this assignment. The attachment was levied on the property assigned. The assignee interposed a claim, and gave bond for the forthcoming of the property. The affidavit in attachment alleges that the appellant had property or rights in action that he unjustly refused to apply to the payment of his debts; that he had assigned or disposed of his property or rights in action with intent to defraud his creditors, and that he had converted his property into money or evidences of debt with intent to place it beyond the reach of his creditors. The issue joined on the plea in abatement was tried first. Appellees contended that the attachment was properly sued out, because (1) the assignment did not contain all the property; (2) the assignor retained \$100; (3) the assignee was required to compromise the debts due the assignor by the assignment; (4) certain persons were preferred as creditors, to whom nothing was due; (5) sales of mules to assignor's wife. Montgomery, the defendant, testified that he reserved for himself about \$100, which he used to purchase necessities for his family. There was considerable evidence introduced by the plaintiffs in proof of all the allegations in the affidavit. The court below gave a peremptory instruction to find for the plaintiffs on the issue joined on the plea in abatement.

Barnett & Thompson, Nugent & McWillie, and S. R. Coleman, for appellant. Longino & Weathersby, for appellees.

WOODS, J. While this case has been thoroughly and repeatedly examined, and every question raised carefully considered, we dispose of it upon one point only,—a point which conclusively determines the controversy in its present aspect. Confessedly, Montgomery, the assignor, reserved \$100 of the estate, which the deed of assignment purported to convey. That this avoids the deed is no longer open to dispute in this state. All contention on this point was finally put to rest in the case of *Marks v.*

Bradley, 69 Miss. 1, 10 South. Rep. 922. Said Judge Cooper in that case, speaking for the court: "It might be sufficient for the disposition of this case to say that the reservation by N. H. Bradley of a part of the proceeds of the policy of insurance, which was the property of the firm, was sufficient to avoid the assignment, because it was an act done at the time and as a part of the assignment, the necessary consequence of which was to prevent the assignment from operating upon the property according to its professed purpose." This determination concludes the controversy, and we find it needless to pass upon any of the numerous other questions presented. Complaint is made that a judgment for condemnation and sale of the property and payment of appellees' demand out of the proceeds has been entered. The judgment is the usual one in such cases, the attachment issue having been found for the plaintiff, followed by a judgment against the defendant for the debt sued for; but the judgment will not and should not be fully executed until the remaining claimant's issue shall have been determined. Affirmed.

(60 Miss. 593)

**BARRETT v. CARTER et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**WHO MAY APPEAL—REVIEW—ASSIGNMENT OF ERRORS.**

1. Defendants, as to whom a bill has been dismissed, have no right to join in an appeal with their codefendant, against whom judgment was rendered.

2. In an action to set aside as in fraud of creditors a sale of a stock of merchandise to a nonresident, who did not appear in the action, the question whether the chancery court had jurisdiction to render a judgment subjecting the land of the nonresident, which had been attached, to the claims of the creditors, will not be considered on appeal by the vendee, since Const. § 147, provides that no judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction.

Appeal from chancery court, Lee county; Baxter McFarland, Chancellor.

Bill by Carter Bros. & Co. against G. W. Barrett, a citizen of Prentiss county, John Dulaney and George Sloan, of Lee county, and G. B. Oliver, a citizen of Texas, to set aside a sale of a stock of goods by Barrett to Oliver. From a judgment in plaintiffs' favor, defendant Barrett appeals. Affirmed.

The bill alleges that Barrett was a merchant in the town of Baldwin, Miss., up to January, 1890; that at that time he owed Carter Bros. & Co. and other foreign merchants, whose accounts Carter Bros. & Co. owned by purchase, about \$2,100 for goods bought in the course of his mercantile business; that about January 1, 1890, Barrett

made a pretended sale of all his stock of goods, which was all the property he had, subject to his debts, to the defendant G. B. Oliver, and that the sale was made to defraud Barrett's creditors, and that he and Oliver confederated together for that purpose, Oliver knowing of and participating in the fraud; that after getting possession of the goods Oliver intermingled them with a stock of goods he owned in the same town, and at the time of the filing of the bill Oliver had sold and put out of reach of legal process most, if not all, the goods; that the goods were worth about \$3,500; that by reason of Oliver's fraudulent conduct in the purchase and putting the goods beyond the reach of legal process, he held them as mere trustee for Barrett's creditors, and he became indebted to the creditors to the amount of the value of the goods, or the amount of their debts; that Oliver has a large stock of goods in Baldwin in the hands of the defendants Dulaney and Sloan, and a large amount of land (describing it) in Lee county, and prays an attachment in chancery against these goods and land, and that the sale be set aside as fraudulent, and a decree be rendered against Oliver for the value of the goods or the amount of complainants' debts, and the property attached be condemned and sold to pay the accounts. Publication was had for Oliver, and service was had on the other defendants. On failure to answer, a decree pro confesso was rendered against Oliver and Barrett, and afterwards a final decree for the amount of complainants' debt, and condemning Oliver's land to the payment of the decree. Sloan and Dulaney demurred to the bill, which was overruled by the court. They then asked leave to file an amended demurrer, and that was refused. Complainants then moved the court to dismiss their bill as to defendants Sloan and Dulaney. This motion was sustained, and an order was made dismissing the bill as to them at complainants' cost. From this decree Barrett appealed, and Sloan and Dulaney file a petition to be allowed to join in the appeal.

W. M. Cox and Clifton & Eckford, for appellant. Clayton & Anderson and Blair & Stribling, for appellees.

COOPER, J. The bill having been dismissed as to the defendants Sloan and Dulaney, they have no longer any interest in the litigation, and their motion to join in the appeal must be denied.

If there would otherwise have been merit in the objection taken to the jurisdiction of the court by the appellant, Barrett, it cannot now avail, for by section 147 of the constitution it is declared that "no judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in

which it was rendered was of equity or common-law jurisdiction." There is no error in the decree as against Barrett, who alone appeals. He cannot assign for error matters affecting only the right of other defendants. Decree affirmed.

(69 Miss. 618)

**BUTLER v. TOWN OF OXFORD.**

(Supreme Court of Mississippi. Oct., 1891.)

**MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NOTICE—AGENTS.**

1. A municipal corporation is not liable for personal injuries resulting from plaintiff's horse becoming frightened by articles deposited in a ditch by the side of a street within an hour or two before the accident, since the time is not sufficient to charge the municipality with notice of the presence of such articles.

2. The mere fact that the person who deposited the articles was the driver of the corporation cart, and that he used such cart in removing the articles from a church pursuant to a request from the rector, is not sufficient to show that the driver was the agent of the municipality in depositing the articles, so as to render it liable for his acts.

3. The fact that there was a slope outside of the regular traveled way towards the ditch is not such a defect in the street as will render the municipality liable for the injuries, though such variation in the surface of the street contributed to the accident after plaintiff's horse had become frightened, and had veered from the traveled road.

Appeal from circuit court, Lafayette county; W. M. Rogers, Judge.

Action by Mrs. V. J. Butler against the town of Oxford for personal injuries received through an alleged defect in the street. There was a verdict and judgment in defendant's favor, and from an order denying plaintiff's motion for a new trial she appeals. Affirmed.

Plaintiff alleged in her declaration that the town of Oxford was a municipal corporation, incorporated under the laws of this state, and, being so incorporated, it was the duty of the town to keep the streets of the town in good order for travel, but that the defendant had negligently and willfully failed to keep said streets in good repair, but incumbered the sides of said streets with trash and articles of an unsightly and startling character, whereby the plaintiff, while driving along said streets, where she was obliged to pass, and in proper use of said streets, in a carriage, was overturned, and seriously damaged. Defendant demurred to the declaration. Demurrer was overruled. Defendant then pleaded the general issue. The trial resulted in a verdict for the defendant. On motion of plaintiff, a new trial was granted. On the second trial the plaintiff showed that, while she was being driven along the streets, a short distance after she had turned a corner, the horse was frightened by a large stove furnace, some pieces of stovepipe, and some pieces of zinc, which were making a rattling noise, being shaken by the blowing wind, that had been put in a ditch on the

side of the street by one of the city cartmen about two hours before the accident. The horse made a considerable jump to the left, and the carriage was turned over, and plaintiff was injured. The evidence also showed that, at the place where the accident occurred, a vehicle going a few feet west of the regularly traveled way would have the wheels on the right side about 10 inches higher than the wheels on the left, caused by the streets not being properly leveled, and it was urged that this contributed to turning over the carriage. The defendant's testimony was to the effect that the driver jerked the horse, and threw him down, when he shied at the stove, and that the carriage was thus overturned, and the injury resulted from careless and reckless driving.

A. H. Whitfield and E. Mayes, for appellant. C. B. Howry and John W. T. Falkner, for appellee.

COOPER, J. Regardless of any question upon the correctness of the instructions given or refused in the court below, the judgment must be affirmed, on the ground that, in no view of the evidence, is there shown a right of recovery by the plaintiff. According to her contention, the accident in which she sustained injury resulted from the fright of her horse, occasioned by an old furnace and some pieces of stovepipe being deposited in a ditch by the side of the street along which she was traveling. The evidence is conclusive that those objects had been placed in the ditch about one hour—certainly not more than two hours—before the accident by one Sam McEwen. It is not suggested that any official of the town had notice that they had been placed there, and it cannot be said that a sufficient time had elapsed from which such notice could be presumed. The articles were not in the wrought highway, but in the ditch beside it. Under these circumstances, it would be the duty of the court to promptly set aside a verdict resting upon the negligence of the town authorities from their presumed knowledge of the condition of the highway.

The principal contention of the plaintiff in the court below seems to have been that the town was liable because the articles were placed in the ditch by Sam McEwen, the driver of the corporation cart, and therefore, as the plaintiff asserts, by the corporation itself; in other words, that McEwen was the agent of the town. We have carefully read and re-read the record, but have failed to discover any evidence upon which the supposed agency can rest. It is said by some of the witnesses that McEwen was the driver of the corporation cart, and that he carried the furnace and other things to the ditch in the cart. But that he was acting for the corporation on this occasion, or that he was authorized by his general em-

ployment so to do, nowhere appears. It is not shown what his duties were at any time. Whether he was the town scavenger or servant, whether he had any duty or authority in reference to streets, or in what respect he was supposed to act, is not shown or suggested. All that appears is that he was the driver of the corporation cart, and that a message was sent to him by the rector of the church to remove from the church an old furnace, and that he went for it with the corporation cart, and carried and placed it in the ditch. These facts are wholly insufficient to establish his agency for the corporation. With equal justice, the town might be held liable for the value of any property McEwen should steal, if the asportation was with its cart. Judgment affirmed.

#### On Suggestion of Error.

COOPER, J. A verdict for the plaintiff, resting upon the supposed defect in the wrought way, would not, in our opinion, have found sufficient support in the evidence. Clearly, the traveled way was reasonably safe, and the slope towards the ditch, outside of that portion of the street along which vehicles were ordinarily driven, was not sufficiently great to be at all dangerous under ordinary circumstances. The plaintiff's horse was frightened, and veered from the traveled road, and, in so doing, upset the carriage, throwing the plaintiff therefrom. Any variation from a level in the face of the street would have contributed somewhat to the overturning of the vehicle, but to attribute the accident to the defect in the way would be in direct conflict with the facts proved by the plaintiff's own witnesses. Suggestion denied.

(45 La. Ann. 1128)

SOLARI et al. v. BARRAS et al. (No. 1.439.)<sup>1</sup>  
(Supreme Court of Louisiana. July Term, 1893.)

#### WILLS—VALIDITY—EXECUTION—EVIDENCE—JURISDICTION OF COURT.

1. The value of the right involved is within the jurisdiction of this court, as alleged and supported by the inventories taken of the assets of the succession.

2. The motion to dismiss the appeal is overruled. If heirship be specially denied, it must be proven in order that the heir may maintain his action.

3. Plaintiffs' suit is dismissed.

4. A notary public before whom a will was executed may be examined as a witness in opposition to testimony admitted to impeach the verity of his act.

(Syllabus by the Court.)

Appeal from district court, parish of St. Martin; Felix Voorhies, Judge.

Action by Joseph Solari and others against Amelia Barras and others to annul the will of J. B. Wiltz, deceased. There

was judgment for plaintiffs, and defendants appeal. Reversed.

Robt. Martin and O. H. Monton, for appellants. Dan. W. Voorhies and J. E. Monton, for appellees.

BREAUX, J. Plaintiffs allege that they are the collateral heirs of the late J. B. Wiltz, and institute this action to annul his will. It (the will) bears date March 31, 1879. The testator had no forced heirs. He bequeathed all his property to his surviving widow. The grounds of nullity alleged are substantially that it was not dictated to a notary; that it was not signed in the presence of witnesses; that the names to the testament were of witnesses called upon by the notary, who signed in the absence of the testator, and did not even know that they were signing an act purporting to be a last will; that it does not contain certain essential recitals, such as that the testator signed it at all, or that he signed it in the presence of witnesses; that the inventory shows assets in the sum of \$5,732.50 to be distributed. The defendant (alleged legatee) denies plaintiffs' allegations, and denies specially that plaintiffs are the heirs at law of the testator. She alleges that the will was executed before a competent notary, in the presence of five witnesses; that it was nuncupative by public act. In the alternative she alleges that, if the will is not good and valid as a testament by public act, it is valid and legal as a nuncupative testament under private signature. She prays that plaintiffs' demand be rejected, and that there be judgment in her favor maintaining the validity of the testament, and declaring her the sole.

The inventory of the community property between the late J. B. Wiltz and his wife, now the defendant, amounted in the parish of St. Martin to the sum of \$2,811.25, consisting of property movable and immovable in that parish. In the parish of Calcasieu the inventory of property, part of which is described as community and part as separate, amounted to the sum of \$2,924. The testament is written in French, from which we extract and translate: "Appeared before me, at my office, John Baptize Wiltz, proprietor, domiciled in the parish of St. Martin, who dictated his testament to me in the presence of the undersigned witnesses, as follows, to wit: I give and bequeath to my wife, Amelia Barras, all the property in my possession at my death, to be owned and disposed of by her." This testament was dictated by the testator to the undersigned notary, in presence of the witnesses, and the notary wrote it as dictated, in presence of the witnesses, and read it to the testator in presence of the witnesses. These formalities were observed in the presence of the witnesses, without interruption, and without turning to other acts. The wit-

<sup>1</sup> Rehearing denied.

nesses and the notary, in the presence of each other and the testator, signed the act on the 31st day of March, 1879. Two of the witnesses have died since, one could not be found, and two have testified in the trial. The latter testified that their signatures as witnesses to the will are genuine, but that they never were witnesses to a testament of the defendant, never were present at the dictation of a will by him, and never were in the notary's office while such a will was being dictated. The testimony of the notary was ruled out on the ground, *inter alia*, that he could not be heard in proof of essential formalities, not stated in the testament. To the ruling a bill of exception was taken, on the ground that such was not the purpose.

#### Jurisdiction Ratione Materiae.

Plaintiffs and appellees in this court move for a dismissal of the appeal on the ground that the court is without jurisdiction *ratione materiae*. The petition for orders to take inventories in general terms refers to property of the community. The order on this petition was issued to make an inventory and appraisement of all the property of the estate. In the notary's *proces verbal* of the inventory part of the property is described as belonging to the community, part as belonging to the separate estate of the deceased, and part of the property to the defendants personally. These inventories are *ex parte*, and do not of themselves fix the ownership of the property. The jurisdictional allegation of plaintiffs, based upon the inventories, sets forth that the community property amounts to the sum already stated, and which is within this court's jurisdiction. For the purpose of establishing jurisdiction, plaintiffs are bound by their allegations, supported by inventories of the property. They have alleged a total representing community assets. The inventories as made do not make it apparent that their allegation is erroneous. The question, at this time, is one of fact, and does not present an issue of ownership, which necessarily must be left to future settlement, and must not be prejudiced by our conclusion maintaining jurisdiction. The interpretation placed by the plaintiffs upon the recitals and description of the inventories in alleging in reference to jurisdiction only is sufficient to maintain the jurisdiction for which the defendant contends. She is the only other interested party in the property. The plaintiffs having alleged that the community property amounted to more than \$5,000, and this allegation appearing correct, we will not dismiss the appeal on the motion filed.

#### Proof of Heirship.

The defendants' first contention is that, the heirship of the plaintiffs being denied, they must be held to the proof of heirship, and that, as they failed to offer any evidence

upon this issue, she is entitled to judgment. In *Blair's Heirs v. Wade*, 1 La. 113, the defendants in their answer denied in express terms the capacity and quality of the plaintiffs named as heirs. On the trial no evidence was offered to prove heirship. In the appellate court their counsel relied on the order of the court below, by which they were permitted to prosecute the suit in the capacity assumed as dispensing them from proof of heirship. It was held that this ground was not tenable. The order of the court authorizing them to present the suit as heirs is generally made *ex parte*, says the court, on the mere suggestion of the party interested to obtain it, unsupported by any evidence. "The answer explicitly required proof of heirship on the part of the appellees, and, as they failed to make it, the judgment of the district court must be reversed." The judgment in this case was one of nonsuit. In *Bennett v. Cignoni*, 41 La. Ann. 1146, 8 South. Rep. 544, the defendant denied that the plaintiff was a legitimate son, as a defense. The court said that he had not made out his case, and dismissed his suit. The plaintiffs, to sustain their suit, and to meet defendant's contention, refer to a number of decisions. The first in order of time is the case of *Parish of St. John v. Shexnaydre*, 34 La. Ann. 850, from which we quote: "The exception as to the right of the parish treasurer to sue for and reserve such fine came too late, having been made after default. Besides, he derived his authority in the premises under the ordinance in question, as well as from Rev. St. § 2841, empowering such officer 'to direct prosecutions for all debts due the parish.'" The case is not analogous. The question was one exclusively of capacity, which was maintained by the court upon grounds entirely different from those involved in the case at bar. All the other decisions to which our attention is invited by plaintiffs' counsel support the proposition that objection to plaintiff's capacity must be pleaded in limine when he sues in a representative capacity; not one relates to the necessity of proving heirship when denied in the answer. Those decisions referred to by us are directly in point, and support the proposition that plaintiffs' authority to sue as heirs must be proven when specially denied in the answer. The authority of the heirs is connected with or part of the right of action to recover, and must be proven, being intimately connected with the claim. The prayer of the answer that plaintiff's demand be rejected, and that her title under the will be recognized, is not a waiver of the special denial, or an admission of plaintiff's right to sue. This demand did not change the onus of proof, or relieve the plaintiffs from proving the authority of an heir to sue whose authority is specially placed at issue. In thus pleading for title under the will, defendant does not admit that which she expressly



denies; that is, the heirs' authority to sue. We will not depart from the authority upon this point laid down in a number of decisions, but we will not extend it further than to dismiss the action. The defendant has no right to a decree rejecting plaintiffs' claim. The failure to make the proof required does not divest the plaintiffs of their right in a future action, as contended by defendants. In every suit, and particularly in litigation arising in the settlement of estates, delays should be avoided, and the rights of parties finally determined in accordance with the forms and the terms required. We will therefore pass upon and decide questions brought up in a bill of exceptions, for it may obviate the necessity of remanding the case should another appeal be taken. Part of the excluded testimony of the notary is admissible; that is, that which does not add to, vary, explain, or contradict the will. Certain of the excluded questions propounded were directed to certain statements and declarations in the will. The testimony of the witnesses to the will should not be considered final and conclusive. Other witnesses may be heard upon the subject if they do not contradict the terms of the will. To illustrate, we will mention that the notary cannot be heard to testify that the testator signed the will, it being silent upon the subject; but he is a competent witness to support the defense that witnesses did sign as declared in the will. It is therefore adjudged and decreed that the judgment of the court below be avoided, reversed, and annulled. It is further adjudged and decreed that judgment as in case of nonsuit be entered against the plaintiff and appellee, with costs in both courts.

(45 La. Ann. 1062)

WELSH v. BAXTER. (No. 1432.)

(Supreme Court of Louisiana. July Term, 1893.)

GUARDIAN AND WARD—ACTION TO REMOVE GUARDIAN—WHO SHOULD BRING.

In directing proceedings against the tutor for his removal from the tutorship, the undertutor is the proper person to commence the action. The judge, on information furnished him as to the necessity of the tutor's removal, can only appoint a curator ad hoc when there is no undertutor. When it is brought to the judge's attention that the funds of the minor have been sent beyond the state, he should at once direct the undertutor to take necessary steps to protect the interest of the minor.

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; Felix Voorhies, Judge.

Action by James P. Welsh, curator ad hoc, against John P. Baxter, to remove defendant from the office of tutor to certain minors. The petition was dismissed on exceptions thereto by defendant, and plaintiff appeals. Affirmed.

L. T. Dulany and Foster & Broussard, for appellant. P. H. Mentz and W. J. Burke, for appellee.

McENERY, J. Bernard P. Milner died in 1891, in the parish of Iberia. He left several minor children. John P. Baxter, under his will, was appointed tutor. The Rev. Father Barty was appointed undertutor. The plaintiff, James P. Welsh, the uncle of the minors, filed a petition in the district court, setting forth many reasons why the tutor should be removed, alleging that the undertutor, although requested to do so by him, refused to bring a suit for the removal of the tutor, and prayed that a curator ad hoc be appointed to bring the suit for the removal of the tutor. The plaintiff was appointed curator ad hoc, and brought this suit. The defendant tutor filed an exception to the action, alleging "that there is an undertutor to the minors named in plaintiff's petition, and, so long as there is such an undertutor, he is the only person authorized under the law to bring such an action against the defendant; (2) that the undertutor has never been ordered or directed in any manner by this Hon. court to bring this suit; (3) that no one, not even a private person, has ever requested the said undertutor to bring this suit, and that the said undertutor has never refused or declined to bring this suit; (4) that none of the facts set out in the petition of the plaintiff asking for his appointment as curator ad hoc for authority to bring this suit have ever been brought, to the knowledge of the undertutor." The undertutor intervened, alleging what is contained in the above exception; averring also that he is at all times ready and willing to perform his duties as undertutor to the said minors, and to obey all orders that the said court may see fit to issue to him in the proper discharge of his duties; that he has been illegally displaced by the appointment of a curator ad hoc, without a hearing, and on an ex parte order of the court. He denies the averments in the petition of plaintiff, and prays for a dismissal of the suit. Plaintiff excepted to the petition of intervention on the ground that the intervener had no interest in the suit. Testimony was heard on the exception, and it appears that the plaintiff spoke to the undertutor about the facts alleged in his petition, but the undertutor was satisfied with the tutor's administration, and affirmed that the funds of the minors were safe and securely deposited. An order of court had been rendered authorizing him to proceed against the tutor. The exception of defendant was maintained, and the suit dismissed. The plaintiff appealed.

The only question presented is whether or not the judge had the authority to appoint a curator ad hoc to proceed against the tutor when there was an undertutor

duly appointed. The undertutor must in all cases act for the minor when the tutor's and the minor's interests conflict. Civil Code, art. 275. Therefore, in the old Code, it was provided when the judge was made acquainted with facts which required the intervention of the undertutor, that he should direct him, or, if there should not be an undertutor, a curator ad hoc or curator ad litem, to proceed contradictorily with the tutor. The curator ad hoc could only be appointed in the absence of an undertutor, or "subrogated tutor," as he was described in the old Code. In 1830 the legislature abolished the curators ad bona and ad litem, and in all cases placed the estates of minors under tutors and undertutors until the minors should attain majority or be emancipated. The curator ad hoc was then the only person under our system who could be appointed to represent a minor not represented by an undertutor. In *McGuire v. Ross*, 12 La. 577, this court said: "The Code of Practice provides that the judge, when made acquainted with the facts rendering it proper to remove a tutor, if he thinks there is probable cause for removal, shall direct the undertutor to prosecute his removal; or, if the minor has no undertutor, he shall then appoint a curator ad hoc to represent him." This case was decided after the abolishment of the curators ad bona and ad litem. The counsel for plaintiff contend with force and ability that the opinion in this case was predicated upon the article of the Code which would read after the passage of said act of 1830 that the judge could only appoint a curator ad hoc when there was no undertutor, and that in the revision of the Code in 1870 it contains no such mandatory provision as was contained in the Code prior to its revision. The article of the Code as it now reads as revised is as follows: "The judge when made acquainted with such fact, if he thinks there is probable cause for removal, shall direct the undertutor of the minors or he shall appoint a curator ad hoc to commence the action." The only change in this article and that under which the decree in the case of *McGuire v. Ross* was rendered is the omission of the sentence "if said minor has no subrogated tutor." This omission, we think, can make no difference in the interpretation of the article, as it was in the original article mere surplusage. In both articles it is provided that he will direct the undertutor to bring the action in the first instance. In the article in the Revised Code of Practice it is evident that the judge is not at liberty to ignore the appointment of the undertutor, since he can only be removed by a direct action in the same manner in which the tutor is removed. Code Pr. art. 1017; Succession of *Hawkins*, 35 La. Ann. 591. The facts alleged in the petition of plaintiff are sufficient to authorize the judge to direct an action against the

tutor to the extent at least of compelling him to file an account, and to show what disposition has been made of the minors' property. It appears from the record that a part of the minors' estate is represented by promissory notes drawing interest, and that they are on, from what the undertutor says, safe deposit in the state of Wisconsin. The tutor has no right to send the minors' property beyond the state except for the collection of money due on obligations. He had no right or authority to invest these funds beyond the limits of the state and out of the jurisdiction of the court having jurisdiction of the tutorship. This fact alone, stated in the testimony of the undertutor, requires prompt attention. The undertutor should be directed at once to institute against the tutor the proper proceedings, to insure the safety of the minors' estate. Judgment affirmed.

BREAUX, J., takes no part.

(45 La. Ann. 1073)

*McGRAW v. ANDRUS. ZUBERBIER et al. v. SAME. WACKERBARTH et al. v. SAME. OPPENHEIMER et al. v. SAME. SCHARFF et al. v. SAME.* (No. 1,451.)

(Supreme Court of Louisiana. July Term, 1893.)

**INSOLVENCY—FRAUDULENT CESSION BY INSOLVENT—RIGHTS OF CREDITORS—COSTS.**

The creditors of an insolvent, who has made a cession which has been accepted, are vested with full power to administer and sell the property of the insolvent for the benefit of all the creditors. Their dominion over the property is supreme, and as all the property of the insolvent debtor, whether on the schedule or not, passes from the debtor, subject only to reimbursement on paying the amount of his debts, with the expenses attending the cession, they have the same power over that concealed, and left off the schedule. The resident creditor, whether participating in the insolvent proceedings or not, is bound by the surrender and acceptance; and it may be stated as a general rule that no individual creditor can take any action, in relation to the property surrendered, to give him an advantage over the others. Whatever concealed property he may be instrumental in recovering inures to the benefit of all the creditors. Where the insolvent has been found guilty of fraud, the effect of the conviction operates upon his person, depriving him of the benefits of the insolvent laws, and subjecting him to punishment. It does not reinvest the property surrendered in the insolvent debtor. Notwithstanding the order staying proceedings, the creditors retain the privilege of protecting themselves, in proper cases, not only by the arrest of their debtor, but also for the seizure of his property not surrendered for the benefit of all the creditors. Property secured in an action in declaration de simulation inures to the benefit of all creditors and all persons interested, as the property had never ceased to be the property of the debtor. The estate of the insolvent must pay all expenses for the recovery of property which inures to the benefit of all the creditors.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; E. N. Cullom, Judge.

Five actions in attachment: Morris McGraw against Clinton B. Andrus; Zuberbier & Behan against same defendant; Wackerbarth, Joseph & Co. against same defendant; L. Oppenheimer & Co. against same defendant; and Scharff Bros. against same defendant. The actions were consolidated, and tried together. Plaintiffs in each action had judgment, and defendant appeals. Reversed in part.

Kenneth Baillio, for appellant. Thos. H. Lewis, Sr., for appellees.

McENERY, J. These suits were instituted in the month of December, 1890, against O. B. Andrus, who had on the 24th day of November, 1890, made a cession of property, and obtained the usual restraining order from the judge, and an order for a meeting of his creditors. The plaintiffs in these suits made substantially the same allegations, and obtained writs of attachment upon a stock of goods, wares, and merchandise at the time in the possession of one L. V. Major. They allege that on the 24th day of November, 1890, said Andrus made what purports to be a cession of property, and that the same was accepted by the judge, subject to the action of the creditors at a meeting to be held, as appears by the suit of Clinton B. Andrus v. His Creditors, (No. 1,474;) that in said cession, and in the schedule of assets annexed to his petition, said Andrus did not include all his property, and especially a lot of goods, wares, and merchandise valued at \$2,000, and which previous to his surrender, and in anticipation of it, he, the said Andrus, moved out of his store into a storehouse situated in another part of the town of Opelousas, and placed in the possession of said L. V. Major, the simulated and pretended owner, but really the clerk and agent of said Andrus, and that said Major was selling and disposing of said goods for the use and benefit of said Andrus; that said Andrus had also concealed from his creditors a large amount of cash, and that in withholding said goods and cash from his schedule he did so knowingly, and with the intent to place the same beyond the reach of his creditors, and to defraud them; that a short time before the cession he ordered goods from merchants on 90 days' credit, which goods were shipped to him, and concealed and withheld from his cession, and put on sale, for his account, use, and benefit, by the said L. V. Major; that Morris McGraw, one of the plaintiffs, on the 18th of November, 1890, through his agent, sold a bill of goods to said Andrus on 90 days' credit and which, on being shipped to him on the 20th, and delivered on the 22d, of November, were immediately turned over to L. V. Major; that a short time before Andrus made his surrender, and after he had placed said stock of goods in possession of Major, he ordered from Scharff Bros., of St. Louis, a delivery

wagon and harness, and six barrels of apples, which he directed to be shipped direct to L. V. Major, the apples to go into his stock, and the delivery wagon to aid the said Major the more effectually to carry on the business which he was conducting for said Andrus, and that in order to conceal the fact that said delivery wagon was to be used, really, in his service, and for his benefit, said Andrus ordered Scharff Bros. to have L. V. Major's name painted on the wagon, and to ship it direct to the latter; that said Andrus fraudulently omitted said delivery wagon and harness from his assets, but placed Scharff Bros. on his bilan as ordinary creditors; that according to the schedule his total assets are \$16,904.30, and his debts amount to \$27,176.22; that the inventory taken of the property shows assets amounting to \$17,175.22, and his privilege and mortgage debt amounts to \$17,154.15, by which showing next to nothing will be realized with which to pay the ordinary creditors; that the concealment and diversion of his property, and fraudulent cession, made by the defendant, Andrus, is injurious to them, and other creditors, as it leaves substantially nothing with which to meet their claims, if said cession be legalized, and definitely accepted; that the order of court accepting the cession was granted in error, and said order, as well as all the other insolvency proceedings taken by said Andrus, should be set aside and annulled. The plaintiffs prayed for citation upon Andrus, and upon Dr. Vincent Boagin, provisional syndic of his estate. They prayed, further, that the cession of said Andrus, and the order of the judge accepting the same, be set aside and annulled, and that their attachments upon the stock of goods in possession of said Major, the delivery wagon, harness, etc., be maintained, and the property sold to satisfy their debts. O. B. Andrus filed an answer denying all the charges of fraud, setting up that the charges are false, and libelous, and that he has suffered damages to the amount of \$5,000, which he claims in reconvention. The provisional syndic, Dr. Vincent Boagin, did not file any formal answer, but some time after the attachments were levied, and in answer to a rule taken by the plaintiffs to show cause why the goods should be sold, as perishable property, and the proceeds to remain in the sheriff's hands, subject to the determination of the suit, he opposed the rule, and asked that the property be delivered to him, as provisional syndic, "in case the same belongs to the insolvent." L. V. Major intervened in the suits, claiming to be the bona fide owner of the property attached. He also made a large claim for damages. The plaintiffs then moved to strike from Major's intervention his prayer for damages against them, upon the ground that the district court of this parish was without jurisdiction in the premises, they being non-residents. The court sustained the motion, and

struck out the claim for damages. The plaintiffs then answered the intervenor's petition, charging that his claim of ownership was a fraudulent simulation, but if not a simulation, pure and simple, then, in that event, that the property was acquired fraudulently; and they prayed, in that event, and in the alternative, that his title be annulled, and the property imputed to their debt. These five consolidated suits were tried together, and having been submitted to a jury, the following verdict was rendered: "Verdict for plaintiffs, rejecting the claims of L. V. Major, intervenor, for the goods claimed by him, sustaining the writs of attachment, at cost of defendant." The lower court thereupon gave judgment to each of the plaintiffs for the amounts claimed by them, respectively, rejected and disallowed the intervenor's claim of ownership to the property attached, and maintained and perpetuated the attachments.

The questions to be solved are whether individual creditors may attack the insolvent debtor when it is alleged and shown that he is using the staying order of the judge as a shield, while he is fraudulently disposing of his property, and, if so, what is the effect of the suit instituted by the creditor; whether the property not placed in the schedule, and seized by him under a conservatory writ, and recovered under an action in declaration de simulation, inures to the benefit of the individual creditor, or to all the creditors.

The cession or surrender of property is the relinquishment that a debtor makes of all his property to his creditors when he finds himself unable to pay his debts. Civil Code, art. 2170. When the cession is made, and accepted by the creditors, the property passes from the debtor, subject only to reinvestment in him, before they have sold it, by a payment by him of the amount of his debts, with the expenses attending the cession. It is only on this condition that he can regain possession of the property. It is in a situation similar to property seized under a *fi. fa.* The debtor's possession and control over the property ceases, and can only be recovered by paying the debt and costs. He is an utter stranger to the property until he recovers it by paying the debt. *Id.* art. 2173; Rev. St. § 1791.

The creditors are vested with full power to administer and sell the property surrendered for the benefit of all the creditors. Their dominion over this property is supreme, and as all the property of the debtor, whether on the schedule or not, passed by the cession and acceptance, they have the same power of control over that concealed, and left off the schedule, by the debtor. The resident creditor, whether participating in the insolvent proceedings or not, is bound by the surrender and acceptance; and it may be stated, as a general rule, that no

individual creditor can take any action in relation to the property surrendered, to give him an advantage over the other creditors. Whatever property he may be instrumental in recovering, which belonged to the debtor, and passed with the cession, inures to the benefit of all the creditors. *Tobacco Co. v. Jefferies*, (La.) 12 South. Rep. 743; *Anderson v. Duson*, 35 La. Ann. 917. We think it is amply supported by authority that the creditors, particularly when no syndic has been elected, have the undoubted right to sue for and recover property which the debtor has fraudulently concealed. The debtor had never parted with the ownership of the property, and title was still vested in him until he made the surrender, when it passed to the creditors. The recovery of the property by judicial process cannot, therefore, give an individual creditor any claim upon it superior to the other creditors. He would recover only that which was vested in all the creditors, himself included. His act would therefore necessarily inure to the benefit of all the creditors.

But the plaintiffs contend that the debtor had been convicted of fraud, and that, *ipso facto*, the order accepting the cession, and the acceptance of it by the creditors, was annulled, and the debtor's property was reinvested in him, and the creditors had the right to pursue it individually. There is only one condition, as stated, that the debtor can get possession of the property, and that is that he pays the amount of his debts. Civil Code, art. 2178. The law never intended that, on conviction of fraud, he should regain possession of his property. It would be conferring a benefit upon him. As in this case, the property may have been sold, and the proceeds in the hands of the syndic. What prevents him before judicial process can be leveled at him, securing this amount from the syndic, and placing it beyond the pursuit of his creditors? The benefits conferred upon the honest and unfortunate debtor by the insolvent laws are discharge from his debts, and immunity from judicial pursuit of his person and property. The conviction of fraud can only operate upon his person, depriving him of these privileges, and subjecting him to imprisonment. In the case of *State v. Judge*, 42 La. Ann. 71, 7 South. Rep. 69, it was held that the court, having jurisdiction of the insolvency, and having granted a respite, did not strip itself of jurisdiction over a suit to annul the order obtained by creditors, accompanied by a prayer for conservatory process, which in that case was the issuance of an attachment. In the opinion the court said: "It is right and proper, particularly in cases of respite, that creditors, notwithstanding the order staying proceedings, should retain the privilege of protecting themselves, in proper cases, not only by the

arrest of their debtor, but also for the seizure of his property for their common benefit." In the case of *Mitchell v. Dalton*, 44 La. Ann. 825, 11 South. Rep. 276, a single creditor, on his individual claim, attempted to secure, by attachment proceedings commenced before the cession of property, a privilege on the property of the debtor which was surrendered, for his exclusive benefit, and ignored the insolvent proceedings. The dismissal of the suit, and the dissolution of the attachment, followed this irregular and unwarranted proceeding. We adhere to the doctrine in that case. But in this case the attachment was levied on property not on the schedule, but which was found by the plaintiff creditors, and seized for their individual benefit. The insolvent proceedings are not ignored, but are made the basis of the suit. The irregularity therein, in withholding this property from the schedule, is one of the grounds for the suit. Although conducted separately by the creditors, for their individual benefit, the proceedings may be cumulated with the insolvent proceedings for the benefit of all the creditors. Through the intervention of the provisional syndic, the creditors have made themselves parties to the suit, and they are entitled to its benefits, for the simple reason that creditors cannot pursue the property of the insolvent for their individual use. *Anderson v. Duson*, 35 La. Ann. 917; *Hayden v. Yale*, 45 La. Ann. —, 12 South. Rep. 633.

The plaintiffs assimilate these suits to the revocatory action, and, as plaintiffs in said action, are entitled to the benefit of the property secured, and that it should be applied to their debt. But the action is one to obtain property which, it is alleged, never passed from the debtor. It is a part of the insolvent estate. There was no contract by which the property was transferred. When the contract is serious, though fraudulent, the decree confines it only as to the complaining creditor, and subjects it to the payment of his debt. *Dunn v. Woodward*, 11 La. Ann. 267; *Adams v. Coons*, 37 La. Ann. 305. In the last case referred to above, which is the latest on this subject, this court said: "It is claimed that plaintiff can take no benefit from the judgment in the case of *Friedlander v. Brooks*, 35 La. Ann. 741, annulling the pretended title of Mrs. Coons, and declaring Killeckrankle to be the property of Temple S. Coons, but said judgment only availed *Friedlander*, and entitled him to be paid by preference. If the action had been merely revocatory, such could have been the law, but, being purely an action en declaration de simulation, it is well settled that the effect of the judgment was to unmask the title in favor of all creditors, and all persons interested, and to declare that the property had never ceased to be the property of the debtor." Authorities cited in case: *Lucas v.*

*D'Armond*, 11 La. Ann. 168; *Dunn v. Woodward*, Id. 265; 1 *Larcombiere*, Obligators, p. 776. The provisional syndic has not aided in unmasking the fraudulent concealment of the debtor's property. This has been accomplished by the plaintiff creditors, who have devoted time, money, and labor to reach this property. The mass of creditors receive the benefits of it. They must pay all costs and expenses, including attorneys' fees. It is therefore ordered, adjudged, and decreed that the judgments appealed from in each of the cases of *Morris McGraw*, *Zuberblie & Behan*, *Wackerbarth, Joseph & Co.*, *Oppenheimer & Co.*, and *Scharff Bros. v. C. B. Andrus* be reversed, so far as they decree that the proceeds of the property attached be applied to the claim of the plaintiffs; and it is now ordered that said funds or proceeds of said property be turned over to the provisional syndic of the insolvent estate of C. B. Andrus, subject to the rights and claim of all the creditors thereon. In all other respects, the said judgments are affirmed. It is further ordered that the insolvent's estate pay all costs, including attorneys' fees.

#### On Rehearing.

Both appellant and appellees have filed application for rehearing in the above cases. In relation to the application of appellees, we will leave the amount of attorneys' fees to be fixed in the insolvent proceedings. We are not in the possession of sufficient facts to definitely ascertain the amount. The costs and privileges will, of course, be fixed as now established by law. The provisional syndic asks for an amending of the judgment, releasing the insolvent estate from paying costs of appeal. Without granting a rehearing, we will amend the judgment in this respect. It is therefore ordered that the decree heretofore rendered be amended so as to assess the costs to appellees. In all other respects it will remain undisturbed. Rehearing refused.

(45 La. Ann. 1081)

GUMBLE et al. v. ANDRUS et al. (No. 1,452.)<sup>1</sup>

(Supreme Court of Louisiana. July Term. 1893.)

ATTACHMENT PENDING INSOLVENCY PROCEEDINGS  
—FRAUD OF INSOLVENT—RIGHTS OF CREDITORS.

1. An attachment by an individual creditor for his own benefit will not be maintained pending a cession.

2. After the property of an insolvent has been sold, it cannot be seized by an individual creditor by attachment, who alleges that the insolvent has been convicted of fraud, and that his property is situated as though no surrender had ever been made.

3. The conviction of the insolvent debtor of fraud does not have the effect of annulling the cession accepted by the creditors.

4. The effect of the conviction operates

<sup>1</sup> Rehearing denied.

only on the debtor, depriving him of the benefits of the insolvent laws, and subjecting him to the penalty of imprisonment.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; E. N. Oullom, Judge ad hoc.

Action in attachment by S. Gumble & Co. against Clinton B. Andrus and others. Defendants had judgment, and plaintiffs appeal. Affirmed.

Thos. H. Lewis, Sr., O. F. Garland, and Estillette & Dupre, for appellants. Kenneth Baillio, for appellees.

MOENERY, J. On the 25th day of November, 1890, the defendant O. B. Andrus filed a petition to obtain the benefit of the insolvent laws. On this petition, accompanied by a statement of his assets and liabilities, and a list of his creditors, the district judge accepted the cession for the creditors, and fixed a day for the meeting of creditors, and issued the usual order for a stay of proceedings against the person and property of the insolvent. On the application of several creditors, a provisional syndic was appointed, who qualified in compliance with the order of court. A meeting of creditors was held, and the cession accepted by a majority in number and amount of said creditors, who also voted to accept the cession, and to grant the debtor a discharge. Oppositions were filed by several creditors charging the insolvent with fraud. At the December term of the district court in 1892 this opposition was tried, and a jury returned a verdict finding the insolvent Andrus guilty of fraud in his cession proceedings. On this verdict of the jury the district judge rendered judgment declaring said cession fraudulent, but declined to annul the cession in its entirety. The judgment was signed on December 27, 1892. The plaintiff creditor filed this suit, accompanied by attachment, on November 16, 1892. The ground for the attachment was that the defendant had mortgaged, assigned, and disposed of his property rights or credits, or some parts thereof, with the intent to defraud his creditors, or to give an unfair preference to some of them, and that he had converted his property into money or evidences of debt, with intent to place the same beyond the reach of his creditors. The funds of the insolvent estate in the hands of the provisional syndic were seized under the writs of attachment, as a third party having under his control, or in his possession, rights and credits belonging to the insolvent debtor. Several privileged creditors intervened in the suit. The defendant and these interveners filed an exception to dismiss the suit on the ground of no cause of action. The provisional syndic was made a party to the suit, and filed the same exception. The exception was maintained. The district judge was recused, and the judge ad hoc, who tried the case, ren-

dered an able and exhaustive opinion for his ruling.

The suit was filed after the verdict of the jury, but one month prior to its being signed by the judge. The verdict, standing by itself, was inoperative. It had to be merged into a judgment to become effective. The insolvent debtor had the undoubted right to file a motion for a new trial. Until the judgment became definitive, the staying order remained in force. This case comes directly within the rule laid down in *Mitchell v. Dalton*, 44 La. Ann. 823, 11 South. Rep. 276, where the grounds for the attachment were the same as in the instant case. We said in that case: "The allegations of the plaintiff in his petition that the defendants were insolvent, and that they had defrauded, or were about to defraud, their creditors, made at the time, under the circumstances, in manner, and for the purposes they were, did not warrant the course pursued in the matter by the plaintiff." In that case, as in this, the plaintiff pursued the insolvent, in disregard of the staying order, and attempted to subject property on the schedule of the insolvent to his individual debt. The suit of the plaintiffs, being in violation of the preliminary restraining order granted in the insolvent proceeding, is irregular and void, being directly in the face of a prohibitory law.

The suit of the plaintiffs is also based on the idea that a conviction of the insolvent for fraud in the insolvent proceedings annuls all the insolvent proceedings, and restores the property to the insolvent, which can be seized by individual creditors as though no surrender had ever been made. We are unable to find any law to sustain the views presented by plaintiffs. When the debtor surrenders his property, he relinquishes it in favor of all his creditors. Civil Code, art. 2170. He has no control over it, whatever. He has nothing to say about its administration or disposition. He has only the right to redeem it by paying the amount of his debts, and a residuary interest after its sale, if there should be something remaining. The provisions of article 2175, Civil Code, which says that the surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit, and securing the income of it until sold,—means only that the debtor has a contingent interest in it only, on paying the debts and taking the property back, and receiving the residue after its administration by the creditors. The insolvent law, in consideration of an honest surrender of property, grants to the debtor a discharge of his debts, and freedom of his person and property from judicial pursuit. If convicted of fraud, these privileges are denied him, and punishment by imprisonment is also visited upon him. The conviction can in no way affect the property. To deprive the creditors of the

right they have acquired in it, by the conviction of the insolvent debtor, would, in effect, be to punish the creditors. When the surrender is made all the debtor's property passes into the insolvent estate, whether on the schedule or not. It is all pledged to the creditors for their common benefit. They accept the surrender with this understanding, and no act of the debtor can divest their qualified ownership of the property, except a repurchase of the property by payment of the debts. The death of the debtor does not change the qualified ownership of the surrendered property. If he dies before the sale, his succession retains the same right to redeem, and to the surplus that the debtor had, but the creditors retain and hold the property in the same manner as they did before the death of the debtor. Civil Code, art. 2180. We have not the authorities before us, but we confidently assert that in the administration of the United States bankrupt law a single instance cannot be found where the insolvent was convicted of fraud, and his estate was taken from the jurisdiction of the bankrupt court. It always continued in the hands of the assignee for final distribution among creditors.

The plaintiffs are attempting to seize the fund in the hands of the syndic, which is the common fund of all the creditors, and subject it to their individual benefit. As we have stated in the case of McGraw v. Andrus, 13 South. Rep. 630, the effect of such proceedings, if the circumstances justified it, would be to bring the property, if not on the schedule, into the insolvency, for the common benefit of all the creditors. The property of the insolvent has been sold, and the proceeds are in the hands of the syndic. There is no property, on the theory of plaintiffs, in existence, that can revert to the insolvent debtor. The surplus only could be demanded. But the fund belongs to all the creditors, and it must be administered for their common benefit. After the property has been sold, the debtor's right to redeem it has passed. Under the facts of this case, conceding that the verdict restored the property to the debtor, what would go to him? Only the surplus after paying all his debts. No surplus is alleged in the petition. On the contrary, the insolvency of the debtor and defendant is affirmed. The petition discloses no cause of action. Judgment affirmed.

(45 La. Ann. 1067)

ANDRUS v. HIS CREDITORS. (No. 1,445.)  
(Supreme Court of Louisiana. July Term.  
1893.)

INSOLVENCY—FRAUDULENT CESSION—RIGHTS OF CREDITORS.

1. The verdict of the jury in insolvency proceedings characterized the cession made as fraudulent. The property of the insolvent did

not thereby again become liable to seizure under execution, or by attachment of individual creditors.

2. The interest of the mass of the creditors is not dependent upon the opinion of the majority in number and amount of the creditors, not legally expressed. The restraining order remains. Other proceedings must be taken, and meeting of creditors held.

3. The surrender is made to the creditors, who have the right to sell it for their benefit. That right cannot be defeated by the fraudulent acts of the debtor.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; E. N. Cullom, Judge ad hoc.

Proceedings in insolvency by Clinton B. Andrus against his creditors, for a discharge. From the judgment rendered a part of the creditors appeal. Affirmed.

Kenneth Baillio, for appellants. Thos. H. Lewis, Sr., for appellee.

BREAUX, J. A number of the creditors of the insolvent allege that he has made a fraudulent surrender of his property; has given undue preference to certain creditors to influence them to vote for the acceptance of his cession, and for his discharge; that, after having settled with these favored creditors at a given percentage on the dollar, they gave him their blank powers of attorney, which he caused to be filled in with the names of persons, as agents, whom he knew would vote as he desired. In their opposition, the creditors who are opponents charge that he withheld from his cession, in addition to the cash, a stock of goods, wares, and merchandise worth at least \$1,500, which, in anticipation of his cession, he caused to be moved from his store to another place, in charge of another, to be disposed of by him as if for the account of the person interposed by the insolvent; that he ordered bills of merchandise a few days before his surrender, upon receiving which he turned the goods over to the person selected by him, who sold them for his account, surreptitiously; that persons who were not his creditors voted, and that, the illegal and fraudulent votes deducted, there did not remain the requisite number to accept the cession, or grant a discharge. The opponents allege that all of the insolvency proceedings of C. B. Andrus are utterly null and void, because of said acts; and they pray that the order of court accepting the cession, and all the insolvency proceedings, including the meeting of creditors, and the acceptance of the cession, be annulled and avoided. The insolvent, answering, denies that he made a fraudulent surrender; that he gave an undue preference to any of his creditors; that he offered any inducement to any of them to influence their votes on his surrender and discharge; that he has any interest or control over the store kept by L. V. Major, or that he turned over goods to him to be sold for his account, surreptitiously. He avers that he acted in good faith in all matters of his surrender. The case was

<sup>1</sup> Rehearing denied.

tried by a jury, who found the verdict: "We, the jury, find C. B. Andrus guilty of fraud in his cession." The judgment upon this verdict reads: "It is by reason thereof, and the law and the evidence forming same, now ordered, adjudged, and decreed that the cession made by C. B. Andrus to his creditors be, and the same is hereby, declared fraudulent, and it is further ordered that the prayer of plaintiff to have said cession annulled in toto, and set aside, as not binding on said Andrus, be, and the same is, refused, reserving to said plaintiff his rights to try the right to such a decree in a proceeding in which all the creditors to be affected by it shall be made parties." From the judgment the opponents have appealed, and urge before this court the rescinding of the provisional order of the judge, accepting the cession, and the staying of the proceedings against the property of Andrus, and that all proceedings be quashed and annulled.

We will not review with particularity the evidence upon which the jury acted, for it is manifest their verdict is correct. We do not understand that any attempt is made to reverse the finding of the jury. If there were any attempt made in that direction, it would not be of any avail, for the testimony sustains the verdict as to the fraudulent character of the cession. The acceptance of the cession by the creditors not being established by the affirmative vote of a universal majority of the creditors having the right to vote, must fall, less than the required number of votes having been cast in favor of accepting the cession. By this failure to accept the cession, the effect of the restraining order does not cease, and the property of the insolvent does not return to the possession of the insolvent. If such were the result, the setting aside of a cession on the ground of fraud would have the effect of reinstating the insolvent debtor in the ownership of his property. He would gather benefit by his own fraud and misconduct. The rights of creditors to have the property sold for their benefit would be lost to them, though a cession is a relinquishment by the debtor of his property to his creditors. The duties of the provisional syndic, as defined in the statutes, are to keep as a deposit all the goods and other effects of the insolvent debtor which shall be delivered to him. The restraining order preceding his appointment stays all the proceedings against the insolvent, who shall deliver all his goods, titles, and claims mentioned in his schedule. That order still stands; also, the appointment of the provisional syndic. They must have effect until revoked.

In a recent decision, we held: "The plaintiffs are mistaken in the view of the situation. The very motion and object of bringing the creditors together were, through the vote taken at the meeting, to bring about a result binding on each and all, and in the supposed interest of the mass

of the creditors. As said in *Morgan v. Nye*, 14 La. Ann. 30, the vote of a single creditor is not a mere offer to make a new contract between the creditor and debtor, but is a quasi judicial act, by which the rights of other creditors are to be affected. In *Anderson v. Dason*, 35 La. Ann. 917, this court—of a respite—said: "The effect of the judgment is to erect a judicial contract between the debtor and all his creditors, by which the debtor is allowed a delay for the payment of the sums which he owes him. As the debtor's property is the common pledge of his creditors, and the contract is binding on all the creditors, the law did not, and could not, contemplate to confer on any one creditor the right of annulling the contract without judicial process, on the ground of its alleged violation by the debtor, and to proceed to apply the property thus restored to the possession of the debtor to the satisfaction of his individual debt." *Liquor & Tobacco Co. v. Jefferies*, 45 La. Ann. —, 12 South. Rep. 743. We have quoted freely from this decision sustaining the rights of creditors of the insolvent, and laying down as correct the principle that the same rules which govern ordinary contracts should be applied, and that the creditors should be offered an opportunity to be heard, and their interests consulted, before any change be made. If the rights of the creditors could not be ignored in the case from which we have quoted, they require, in the case at bar, that the preliminary proceedings of insolvency shall not operate to their prejudice.

In case of accusation of fraud after having received the insolvent's answer the court shall order a jury to be summoned for the purpose of deciding the accusation. Rev. St. § 1802. If fraud be found by the jury, it does not, per se, result in rejecting the order of the judge accepting the surrender. The agency of the court is to be applied in preventing or restraining the fraud, and should not abandon, on account of the fraudulent acts of the debtor, all attempts at protecting the rights of creditors. The insolvent debtor is deprived of the benefit of the law passed in favor of insolvent debtors. He is barred from discharge, and other protection offered to the debtor who makes a proper cession. The statutory denunciation of fraud is limited in its effect to the debtor. The creditor is not exposed to loss or prejudice on the discovery of fraud. The surrender is a statutory execution. Instead of exposing the insolvent debtor to the seizure and sale of his property at the instance of individual creditors, and thereby disposing of all his rights and property among contending creditors, the statute provides an execution,—that the property shall be sold, and the insolvent debtor's estate settled *encourcussu*. His fraudulent acts after the cession affect him only. The insolvency proceedings remain



for the benefit of the creditors. "The surrender of property is a relinquishment that a debtor makes of all his property to his creditors." Civil Code, art. 2170. The surrender is not subject to defeat by the fraud of the insolvent. The orders which have been issued remain, and are not subject to collateral attacks. They continue in their effect until rescinded, contradictorily with all concerned. Those rights accruing to creditors by the effect of the restraining order cannot be ignored. The verdict and judgment are directed against the fraudulent acts charged, and leave the proceedings of insolvency unaffected thereby, and the property of the insolvent subject to such future actions as the creditors may see proper to take. The judgment is responsive to the verdict. They are both directed against the fraudulent acts of the insolvent, and leave the proceedings of insolvency unaffected by it, and the property of the insolvent subject to the claims of his creditors.

The action of the meeting of creditors, such as it was, is not final. Creditors having no right to vote participated. It was not a fair expression of the majority of the creditors; in property and amount. Such a body, under the circumstances and the charges proven, has no authority to accept a cession, or grant a discharge. Other proceedings, and at least one other meeting of creditors, will have to be held, in carrying out the object of the insolvency laws. *Gumble v. Andrus*, 45 La. Ann. —, 13 South. Rep. 633, and *McGraw v. Andrus*, 45 La. Ann. —, 13 South. Rep. 630. Consolidated. Judgment affirmed, at appellant's costs.

#### On Rehearing.

The defendants and appellants, in their application for a rehearing, allege: "The lower court awarded them a judgment for costs against Clinton B. Andrus, personally. This court has decided that the cession made by Andrus, including the property attached in the hands of S. V. Major, vest in the mass of the creditors the right of administering and selling the insolvent's property. Andrus, therefore, has no property exigible for those costs, and, if he had, this court has decided that it must go into the mass of his insolvent succession, and that these individual creditors have no recourse whatever upon any property that he might have. Therefore, a personal judgment against Andrus for these costs is entirely nugatory and valueless. These costs should be paid by the insolvent succession, and by privilege. Civil Code, arts. 3195 and 3191, give a privilege for the payment of these claims." There was no issue about costs at any time prior. They follow the judgment. In condemning O. B. Andrus to pay costs in the lower court and in this court, it unavoidably follows that he is condemned to pay the costs, as an insolvent debtor; that

they must be carried on the account of the syndic as an indebtedness of O. B. Andrus, insolvent debtor, to be paid out of the proceeds of the insolvent's estate. Having made a surrender of this property, the costs of suits decided against him since the surrender in matter growing out of, and intimately connected with, his surrender of his property must be paid out of the insolvent's estate. Such is the intention of our decision. Its terms have no other possible reasonable inference. This was also, in effect, in so far as relates to costs, the lower court's judgment. These costs are secured, as to their payment, by such privilege as the law accords. There is no issue presented as to that privilege. We will not grant a rehearing to allow that which the terms of our decision secures. The judgment on appeal is one of interpretation. It does not amend the judgment of the district court. In *Bank v. Bloch*, 44 La. Ann. 893, 11 South. Rep. 466, we interpreted the judgments of the lower court, and subjected the judgment "to the limitations stated in this opinion." In that decision not only interpreting, but limiting, the judgment of the court, in certain respects the appellant was condemned to pay costs. In the decision in the case at bar the court's action is limited to interpreting the judgment. It follows that the appellant owes the costs.

(32 Fla. 53)

#### BLUE v. STATE.

(Supreme Court of Florida. July 15, 1893.)

#### CARRYING CONCEALED WEAPONS — JURISDICTION OF OFFENSE — AMENDMENT OF STATUTE.

An act of February 12, 1885, (section 2421, Rev. St.,) punished the offense of carrying arms secretly by imprisonment not exceeding six months, or by fine not exceeding \$100. The circuit court of any county, where there was not a criminal court of record or a county court, had exclusive original jurisdiction of all violations of such statute. The act of June 2, 1893, c. 4124, amends the stated section of the Revised Statutes by making the punishment imprisonment not exceeding three months, or fine not exceeding \$100, or both such fine and imprisonment. The effect of this amendment is to give justices of the peace, in any county where there is no criminal court of record or county court, trial jurisdiction of all violations of the statute which have occurred since its amendment, but the exclusive jurisdiction of all offenses committed prior to the amendment remains in the circuit court by virtue of the provision of section 32, art. 8, of the constitution, that the repeal or amendment of a criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment.

(Syllabus by the Court.)

Error to circuit court, Jackson county; W. D. Barnes, Judge.

Ned Blue was convicted of carrying a concealed weapon, and brings error. Affirmed.

D. L. McKinnon, for plaintiff in error.  
William B. Lamar, Atty. Gen., for the State.

**RANEY, C. J.** An information charging the plaintiff in error with having on December 27, 1892, carried secretly and concealed about his person a pistol, was filed in Jackson circuit court in the month of May of the present year, and afterwards, on the 20th of June, the accused moved to quash the information, on the ground that the circuit court had no jurisdiction to try or sentence him for the alleged offense, but that such offense was within the trial jurisdiction of a justice of the peace. The motion having been overruled, the defendant pleaded not guilty, and on the day last stated was tried by a jury, who returned a verdict of guilty, and he was thereupon sentenced to pay a fine of \$25 and the costs, assessed at \$33.95, and, in default of the payment thereof, to be imprisoned in the county jail for 60 days from the expiration of a sentence for an assault. When the offense was committed by the accused, the circuit courts had exclusive original jurisdiction of all such offenses in counties where there was no criminal court of record or county court, (sections 18, 24, 25, art. 5, Const.) and they were punishable "by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars," (Rev. St. § 2421.) At the late session of the legislature, an act (chapter 4124) revising certain sections of the Revised Statutes relating to the carrying of concealed weapons was passed, it having been approved by the governor June 2, 1893, and taking effect on such approval. The only change it makes in section 2421 of the Revision is to substitute for the quoted words the words "by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment." The effect of this change, where there are no criminal or county courts, is to make all offenses against it in its changed condition triable before a justice of the peace, (section 2840, Rev. St.) but it does not repeal or pretend to change the former statute as to offendings under it prior to such change. The old statute stands under section 32, art. 3, of the constitution, as to such offendings, and, of course, the circuit court retains its jurisdiction, there being no expressed or implied abrogation of its jurisdiction, nor any grant of jurisdiction to justices of the peace or other tribunal of such former cases. *Brown v. State*, 31 Fla. —, 12 South. Rep. 640; *Ex parte Pells*, 28 Fla. 67, 9 South. Rep. 833. Of course, we do not mean to intimate that the constitutional provision referred to, which is that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment," was intended to limit any power which the legislature may have as to changing the jurisdiction of courts over criminal causes. No such change is attempted, as to former offendings, in the new legislation.

The judgment is affirmed.

(32 Fla. 46)

### SOUTH FLORIDA R. CO. v. PRICE.

(Supreme Court of Florida. July 29, 1893.)

**INJURY TO EMPLOYE — NEGLIGENCE OF FELLOW SERVANT — DUTY OF MASTER TO EMPLOY SUBORDINATE.**

1. The engineer, fireman, and brakeman of the same freight train are fellow servants; and, prior to the passage of chapter 3744, Laws, approved June 7, 1887, the employer company was not liable in damages to one of such fellow servants for injuries sustained in the line of his employment in consequence of the negligence of the engineer in putting his unskilled or careless fireman to the performance of his duty in temporarily handling the engine. *Parrish v. Railroad Co.*, 9 South. Rep. 696, 28 Fla. 251, and *Railroad Co. v. Weese*, 13 South. Rep. 436, 32 Fla. —, cited and approved.

2. Whether it is within the corporate powers of a railroad company, under any circumstances, to oblige itself to the rendition of medical or surgical aid to its sick or injured employees, by assuming it as a duty or otherwise, or to become liable for any negligence of any such surgeon acting in the line of his profession, quere? If it can become so liable, *held*, that its whole duty in that respect will have been performed when it employs a person of ordinary competence and skill in that profession; and that, having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such.

(Syllabus by the Court.)

Appeal from circuit court, Orange county: John D. Broome, Judge.

Action for personal injuries by M. L. Price against the South Florida Railroad Company. Plaintiff had judgment, and defendant appeals. Reversed.

S. M. Sparkman and Foster & Gunby, for appellant. Alex. St. Clair-Abrams and John C. Jones, for appellee.

**TAYLOR, J.** The appellee sued the appellant in the circuit court of Orange county on the 23d of March, 1886, in an action for damages for personal injuries sustained while coupling a car on one of the appellant's freight trains.

The declaration alleges, in substance, that on the 4th day of December, 1885, the plaintiff was a brakeman in the employ of the defendant corporation, and that his duty was to do such work in connection with the running of a freight train of defendant as is usually required of brakemen of freight trains upon said road; that upon said day, while engaged in said employment upon said freight train, while the same was being shifted at or near a station called Seffner, the plaintiff was ordered by the conductor of said freight train to couple together certain cars that were part of said freight train, said conductor being an officer of said corporation, whose orders the plaintiff was bound to obey; that it was the duty of one J. C. Atkinson, the engineer in charge of the engine attached to said train, to do all hauling and shifting with said engine, but at the time of the said order to couple said cars the said engineer was

not attending to his duties as such engineer, but instead had negligently left the said engine in charge of one Horace Dann, the stoker, who was utterly unskilled in the art of running a locomotive engine, but who did then and there negligently and unwarrantably try to perform the duties of said engineer; that the plaintiff, in the capacity of brakeman, as aforesaid, and acting under the said order from the conductor, and supposing that the said engineer was at his post of duty, attempted to carry out and obey said order on the proper signal for the engineer to cause said engine to back the said cars up the required distance to connect the said cars he was ordered to couple, whereupon the said stoker, being unskilled as aforesaid, so operated said engine that the car or cars attached to it were with great speed and violence thrown back against the car at the end of which plaintiff was standing ready to perform his duty and couple the said cars in conformity to the said order of the conductor, whereby the plaintiff was unable to withdraw from between said cars, but, by reason of said cars being thrust back in such unusual and violent manner, the right arm of plaintiff was caught between the coupling irons while the plaintiff was exercising due care, prudence, and precaution, and without any fault on the part of the plaintiff, whereby the bones of the plaintiff's right arm were crushed and broken, and the flesh terribly mangled; that thereupon plaintiff was taken to Tampa, a station on said road, where one Weedon, an alleged physician and surgeon, employed by said defendant corporation to render medical and surgical aid to injured employees of said corporation, did in the exercise of his duty as physician and surgeon for said corporation then and there, on said 4th of December, 1885, set the said broken arm of plaintiff in such an unskilled and negligent manner that, although the plaintiff did faithfully carry out all of the said alleged physician's orders relating to the care of the said arm, yet the said arm, by reason of such negligence and lack of skill in setting, was and is, although entirely healed, rendered ill-shaped, and forever useless in the performance of any manual labor; whereupon the plaintiff claims \$20,000 damages.

To this declaration the defendant demurred, which demurrer was overruled. The defendant then pleaded the general issue, contributory negligence on the plaintiff's part, and that the injury, if any, resulted from the negligence of a fellow servant of the plaintiff, for which the defendant was not liable. The cause was tried on the 19th of June, 1886, and resulted in a verdict in favor of the plaintiff for \$2,500, and from the judgment entered thereon the defendant appeals.

The occurrence herein complained of transpired prior to the enactment of chapter 8744, Laws, approved June 7, 1887, that seems to change the general rule in respect to the liability of the master for injuries sustained by one employe through the negligence of a coemploye. The provisions of that statute, therefore, in no way affect this case, and the questions involved must be determined according to the well-established general principles of law applicable thereto as they existed prior to the adoption of that statute. In *Parrish v. Railroad Co.*, 28 Fla. 251, 9 South. Rep. 696, where the authorities are cited and discussed at length, it was held that prior to the enactment of said chapter 8744, Laws 1887, a master was not liable or responsible to one servant for personal injuries received in the course

of his employment through the negligence of a fellow servant when engaged in a common work or in the same general undertaking; and that the engineer, fireman, and brakemen on the same train are fellow servants engaged in the same common work; and that the employer company, prior to the passage of said statute, was not liable to one of them for personal injuries received in consequence of the negligence of the engineer in putting the handling of his engine in the hands of his fireman, who was either careless or unskilled in the management of such machines. The facts of the present case, as disclosed by the allegation of the declaration and by the proofs, put it on all fours with that case; and therefore it is fully decisive of the main question involved here. In that case we held that there could be no recovery on the part of the plaintiff upon the case made by the pleadings and proofs. The declaration in this case shows upon its face that the injury upon which the plaintiff founds his claim to a recovery resulted from the negligence of the engineer of the train upon which the plaintiff was brakeman, in putting his fireman or stoker in his place to operate the locomotive. The plaintiff, when injured, was endeavoring to couple a stationary car to one that was being propelled by the engine temporarily in the hands of the fireman, which coupling, as shown by the evidence of the plaintiff himself, was one of the duties that he was employed to perform as brakeman. There is no allegation or proof that the engineer and fireman were not entirely competent to perform the respective duties that they were severally employed to do by the defendant company. From the proofs it is not entirely clear as to how the plaintiff did receive his injury, but the theory of his case is that the fireman, who had the temporary handling of the engine, came back to the car to be coupled with too much velocity, either through unskillfulness and incompetency in the manipulation of the engine or through carelessness. There is no allegation or proof that the defendant company had anything to do on this occasion with putting an unskilled fireman in the temporary control of the engine; on the contrary, so far as either allegation or proof shows, the defendant had a skilled engineer there for the duty of operating the engine, and that engineer's neglect of duty in putting his fireman to the performance of it in his stead resulted in the injury to the plaintiff. Under these circumstances the plaintiff cannot recover upon the principles of law announced in *Parrish v. Railroad Co.*, supra, and *Railroad Co. v. Weese*, 32 Fla. —, 18 South. Rep. 486, and the defendant's demurrer to the declaration should have been sustained. The plaintiff, however, in this case undertakes in his declaration to fasten liability upon the defendant company upon a further charge that a surgeon, who was employed by said company to render medical and surgical aid to injured employes, did, in the exercise of his duty as such physician and surgeon, set the injured arm of plaintiff in such an unskilled and negligent manner as to render it ill-shaped, and forever useless to him in the performance of any manual labor. There is no allegation or proof that the physician and surgeon so alleged to have been employed by the defendant company was not competent and skilled in the line of his profession; and, in the absence of such allegation and the proof to sustain it, the defendant is not liable for any negligent exercise by such surgeon of his profession in the treatment of the plaintiff. Even though

we should admit it to be within the corporate powers of such a company to obligate itself to the rendition of medical or surgical aid to its sick or injured employees, by assuming it as a duty or otherwise, or to become liable under any circumstances for any negligence of any such surgeon acting in the line of his profession, still it seems to be well settled that it will have performed its entire duty in that respect when it employs a person of ordinary competence and skill in that profession; and that, having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such. *Secord v. Railway Co.*, 18 Fed. Rep. 221; *McDonald v. Hospital*, 120 Mass. 482; *O'Brien v. Steamship Co.*, 154 Mass. 272, 28 N. E. Rep. 266; *Laubheim v. De Koninglyke*, N. S. Co., 107 N. Y. 228, 18 N. E. Rep. 781. From what has been said it becomes unnecessary to notice the errors as they are specifically assigned.

The judgment of the court below is reversed, with directions to sustain the defendant's demurrer to the plaintiff's declaration.

(32 Fla. 82)

#### STATE v. BLACK RIVER PHOSPHATE CO.

(Supreme Court of Florida. July 19, 1893.)

RIPIARIAN RIGHTS—PHOSPHATE MINING—ABATEMENT OF ACTION.

1. The act of December 27, 1856, entitled "An act to benefit commerce," and commonly known as "The Riparian Act of 1856," (sections 454, 455, Rev. St.) does not vest in riparian owners an unqualified fee in the lands below high-water mark, and out to the edge of the channel in navigable streams, bays of the sea, or harbors of this state. So long as such submerged lands remained unimproved by the construction of wharves, or unreclaimed by filling in from the shore, and converting the water into land, the riparian owner, though the legal title is in him, has, in so far as the statute is concerned, no greater right to the beneficial use of such submerged lands and the waters above them than any other citizen, except for the purpose of protecting from invasion the right to improve which the statute gives him. The statute does not give to the riparian owner the right to take phosphates from the beds of navigable streams, bays of the sea, or harbors, below high-water mark, and out to the edge of the channel, for the purposes of sale. The acts of June 7, 1887, (chapter 3826), and June 9, 1891, (chapter 4043), relating to the phosphate interests of the state in its navigable waters, permit the taking of such phosphates, and prescribe the terms and conditions on which they may be taken; and these statutes apply to riparian owners falling within the provisions of the act of December 27, 1856. *Mabry, J.*, dissenting.

2. The act of June 9, 1891, (chapter 4043), which gives to the board of phosphate commissioners control of the phosphate interests of the state, and authorizes it to institute suits and legal proceedings in the name of the state to protect such interests, does not abate an action previously instituted by the attorney general in the name of the state.

3. A supplemental bill, which presents a continuation of the same trespassing, does not introduce a new subject-matter of litigation.

(Syllabus by the Court.)

Appeal from circuit court, Clay county; W. B. Young, Judge.

Bill by the state of Florida against the Black River Phosphate Company. Defendant had decree, and plaintiff appeals. Reversed.

The act of June 7, 1887, referred to in the opinions, grants to H. S. Greeno and others, and such other persons as may associate with them, the right to dig and remove, for 25 years, from the beds of the navigable waters within the jurisdiction of the state, the phosphate rocks and phosphatic deposits: "Provided, that the persons named and other associates shall not in any way interfere with the free navigation of the navigable streams and waters of the state, or the private rights of any citizen or citizens residing upon or owning the lands upon the banks of" such navigable rivers and waters. The grant is made on the express condition that the grantees shall pay \$1 per ton for every ton of such phosphate dug and removed. It requires the execution of a bond of specified penalty and condition for making true returns of the quantity of phosphate mined and removed, and for making payment annually for the same; and also that their books shall be open for inspection by the comptroller or his duly-appointed agent, and provides that nothing in the act shall be so construed as to grant to the persons named exclusive rights. The statute also enacts: "That any other persons who may incorporate under the laws of the state of Florida shall have the same rights, privileges, and franchises granted to said persons by this act, upon their complying with the requirements provided for in this act."

W. B. Lamar and A. W. Cockrell & Son, for the State. Cooper & Cooper, for appellee.

RANEY, O. J. The appellee, the Black River Phosphate Company, a body corporate under our laws, has been taking phosphate from the bed of Black creek, or, as it is also called, Black river. The company claims to be the owner of lands extending to the water of that stream, which is both tidal and navigable in fact, and founds its claim of title to or right of property in such phosphate, as against the state, upon such riparian ownership and the act of December 27, 1856, entitled "An act to benefit commerce," and commonly known as "The Riparian Act of 1856," (sections 454, 455, Rev. St.) The first section of this statute, after reciting: "Whereas it is for the benefit of commerce, that wharves be built and warehouses erected for facilitating the landing and storage of goods; and whereas, the state being the proprietor, of all submerged lands and water privileges, within its boundaries, which prevents the riparian owners from improving their water lots: therefore," enacts "that the state of Florida for the considerations above mentioned, divest themselves of all right, ti-

tle, and interest to all lands covered by water lying in front of any tract of land, owned by a citizen of the United States or by the United States, for public purposes, lying upon any navigable stream, or bay of the sea, or harbor, as far as to the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up, from the shore, bank or beach, as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce; and upon the lands so filled in to erect warehouses, or other buildings, and also the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel, by bill in chancery or at law and to have and maintain action of trespass in any court of competent jurisdiction in the state for any interference with such property, also, confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands for the purposes within mentioned." The second, or remaining, section enacts "that nothing, in this act contained shall be so construed, as to release the title of the state of Florida, or any of its grantees, to any of the swamp or overflowed lands, within the limits of the same, but the grant, herein contained shall be limited to those persons and body corporate, owning lands actually, bounded by, and extending to low-water mark, on such navigable streams bays and harbors."

The cases in which the act has come before this court for consideration are *Geiger v. Filor*, 8 Fla. 325; *Alden v. Pinney*, 12 Fla. 348; *Rivas v. Solary*, 18 Fla. 122; *Sullivan v. Moreno*, 19 Fla. 200; *Ruge v. Apalachicola Oyster Canning & Fish Co.*, 25 Fla. 656, 6 South. Rep. 489.

In *Geiger v. Filor* (decided in 1859) the court, having stated that by the laws of Spain and England the sovereign of neither country could have alienated the land covered by the water, then observes that the question is not raised "as to the power of the state to alienate, but whether the state has actually transferred to complainants or to the proprietor from whom they derive title;" and afterwards, remarking that the avowed object of the law is to give to the riparian owners "the right and interest of the state in and to the land covered by water as far as the edge of the channel, and to owners who were prevented by the state's title from improving lots so situated between them and the water," it says that, if the complainants are such owners in contemplation of law, their case is made out; but it finds that "they, as assignees of the reserved fee of the original proprietors or dedicators of the streets, are not riparian

owners within the meaning of the statute.  
\* \* \* There are no water lots at the ends of the streets held by them, and they are not the riparian proprietors prevented from improving any lots there claimed by them.  
\* \* \* Neither the complainants nor the original proprietor of the lots derived title to the land between high and low water mark at the end of the streets from this law, and their claim on this ground is unsustainable." We also understand the view of the court to have been that, as between the city and riparian owners of lots which also abut on a street, the city would be entitled to the benefits of the act as to land opposite the end of the street, as long as the street continued to exist as such, and such lot owners afterwards; and, further, that the city was authorized by statute, apart from the riparian act, to construct and maintain wharves at the foot of its streets.

In *Alden v. Pinney* (decided in 1869) it was found that a street intervened between the land of complainants and high-water mark, and consequently that the complainants were not riparian proprietors, and that any full discussion of the effect of the statute was improper. It is, however, observed in connection with the subject of the equitable jurisdiction invoked that riparian proprietors, too, under the act of 1856, "have a title coupled with a trust for the benefit of the public;" and it is said in another connection that wherever the title to this soil—that from the street to the channel—is, whether in the city or the heirs of *Pinado* or in the state, it cannot under existing laws, be used in any event to obstruct navigation or commerce. If the grantees of the state hold it, it is coupled with this trust; and if it is put to such use, or such use is threatened, there are circumstances under which complainants can properly seek a court of law or equity to redress injuries. If this ice house, or any other structure which defendants intend to construct, will be an obstruction to navigation, a hindrance to commerce, or impede or transgress the rights of the public in this respect, the remedy to correct this public evil while it exists in the state courts is not at the suit of an individual citizen, except in case of special damage to himself.

In *Rivas v. Solary* (A. D. 1881) the opinion, after stating that "the question presented is, who has the better right to the wharf and to the submerged land beneath it?" asserts that *Williams*, (under whom both parties claimed,) as owner of lot 19, had all the interest which followed from the act of 1856, "which was all the right, title, and interest of the state to the land covered by the water lying in front of his lot, subject to the trust that it was to be used for the purposes of commerce, as stated in the statute;" that this title was attended with no other restrictions than those contained in the act, and that there was nothing in the

act prohibiting his transfer subject to the same conditions that he held it on. That the effect of deeds to plaintiffs could not be extended so as to make them convey land not embraced within the boundaries or descriptions given by them. That what was granted by the state through the riparian act was in terms something more than the ordinary right which the proprietor of lands on a navigable stream had to its use; and the right to use for commercial purposes, after the act, was an incident to the ownership of the land, which the state gave to the riparian proprietor. That, anterior to the act, Williams' title as riparian proprietor did not extend beyond high water, but afterwards it extended to the channel, the act, in its terms, vesting the full title in him who owns land actually bounded by and extending to "low-water mark;" and that no ground could be seen by the court for holding "that it was simply appurtenant to the adjacent lands." That the state had the absolute proprietary interest in the land, and could grant it to the then riparian owner. It is further said that plaintiffs contend that the right to build a wharf passed as appurtenant to the land granted to them, but this could not be so for the reason that Williams' estate in the "land to the channel" was an estate in the land, and the right to build wharves was an incident to that proprietorship; and that plaintiffs' deed did not include this land, nor does land pass as appurtenant to land. The conclusion was that under the facts of the case Williams' deeds to Miss Wightman and others who had conveyed to complainants did not carry the land subsequently conveyed by him to Solary, and that the order dismissing the bill was proper.

*Sullivan v. Moreno* (A. D. 1882) is, like *Alden v. Pinney*, a case in which the court found that Moreno, who was seeking to enjoin Sullivan from constructing a wharf in front of his holding, did not show title to land extending to high-water mark. The opinion states that prior to the riparian act the state was the owner of the title to the soil of navigable tide waters to the line of ordinary high tide, "subject to the powers of congress in the matter of regulating commerce under the constitution of the United States;" and, further, that by the statute the state divested herself of the submerged lands specified therein as far as to the edge of the channel, and, using the language of the statute, "vested the full title to the same in the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank, or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon the lands so filled in to erect warehouses or other buildings;" and giving the

right to prevent encroachments as specified in the act. In the opinion it is also said that it was held in *Alden v. Pinney* that the evidence there failed to show that the complainants, or those whose title and right they claimed, had a water boundary in 1856, and that it was immaterial to inquire whether the rights granted by the state inured to any one other than one "owning lands actually bounded by and extending to low-water mark;" and also that, if the plaintiff there "had shown himself a riparian proprietor, there would have been such existing and threatened injuries of a special nature, coupled with other circumstances, that he would have been entitled under the statute to the aid of a court of equity to prevent special injury to himself. And of *Rivas v. Solary* it is observed that there "each of the parties claimed through a common source of title, and it was admitted that the parties through whom they claimed held to low-water mark;" and also that "what constitutes riparian proprietorship is a water boundary, either at high or low tide, as may be the law;" and in considering the plaintiff's case as one founded on occupancy of a portion of the water front independent of any riparian ownership, but as a wood and coal yard, and a wharf which he had constructed in front of them out into the water, it is said: "The title to all this soil from the water line to the edge of the channel, with the right to fill it in with stone or other material which he may see proper to use in the construction of structures beneficial to commerce, is in the riparian proprietor of 1856, or his grantee, whoever he may be. \* \* \* Under that act the title to the soil vested in the then riparian proprietor, coupled with the trust to use it for the benefit of commerce. Here the right to prevent the construction of this wharf is in the riparian proprietor."

There is nothing in *Ruge v. Apalachicola Oyster Canning & Fish Co.* that calls for any notice, at least at this point, further than that, in the opinion of Maxwell, J., after remarking that, in view of previous conclusions, it was scarcely necessary to consider the effect of the riparian act, it is observed that, if the Promenade Garden—a park dedicated to the public for health, recreation, and amusement—really went to the shore, there may be a question whether the act vests any right to the water front as a public park; and that the use of it (meaning the submerged land) for such a purpose (meaning that of a park) is not within the contemplation of the act, and either the state holds it, or, if it goes to the Promenade, it goes divested of the character of a park, and, if used at all, must be used for the benefit of commerce in the erection of wharves, warehouses, and other buildings.

It is entirely clear that in no one of these opinions is it undertaken to fully define the relative status of the riparian owners on the

one hand and of the public or state on the other, under the riparian act. The case of *Riyas v. Solary* is the only one whose facts rendered necessary any expression as to the effect or intent of that law; and it, in view of the fact that the court acted upon the admission of both parties that the original proprietorship of Williams extended to low-water mark, cannot be held to have been intended as finally committing the court to any further view of the statute than (1) that it was a valid grant to the extent of vesting in a riparian owner, holding to low-water mark, the legal title, without defining the trusts and uses upon and for which it was to be held and applied; and (2) that the land below high-water mark does not necessarily pass to a grantee of the upland as an incident and appurtenance of the latter, but the submerged land, or any part thereof, may be reserved upon a sale of the upland, or be made the subject of separate sale, or be sold with the upland; the question of the intent of the grantor that the submerged land, or any part thereof, shall or shall not pass with the upland being one of which the solution is to be found in the terms of the deed of conveyance. *Codman v. Winslow*, 10 Mass. 148; *Storer v. Freeman*, 6 Mass. 435; *Mayhew v. Norton*, 17 Pick. 357; *Niles v. Patch*, 13 Gray, 254; *Valentine v. Solomon*, 22 Pick. 85; *Green v. Chelsea*, 24 Pick. 71; *Parker v. Taylor*, 7 Or. 435; *Parker v. Rogers*, 8 Or. 183; *Deering v. Long Wharf*, 25 Me. 51.

It is necessary to a proper solution of the question before us to ascertain the character of the title or holding of the state to the lands under navigable waters at the time of the enactment of our riparian statute. *Potter, Dwar*. St. 177, 178.

In *Com. v. Alger*, 7 Cush. 65, it is said that by the common law of England as it stood long before the settlement of the colony of Massachusetts the title to the land or property in the soil under the sea, and over which the tide waters ebbed and flowed, including flats on the seashore lying between high and low water mark, was in the king as the representative of the sovereign power of the country. But it was held by a rule equally well settled that this right of property was held by the king in trust for public uses established by ancient custom or regulated by law, the principal of which were for fishing and navigation. These uses were held to be public, not only for the king's subjects, but for foreigners, being subjects of states at peace with England, and coming to the ports and harbors of England with their ships and vessels for the purposes of trade and commerce. Again, it is observed in the same opinion: In this holding by the crown two distinct rights are regarded: (1) The *jus privatum*, or right of property in the soil, which the king may grant, and which may be held by a subject, and the grant of which will confer on the

grantee such privileges and benefits as can be enjoyed therein subject to the *jus publicum*; (2) the *jus publicum*, the royal prerogative by which the king holds such shores and navigable rivers for the common use and benefit of all the subjects, and, indeed, of all persons of all nations at peace with England, who may have occasion to use them for the purposes of trade. This royal right, or *jus publicum*, is held by the crown in trust for such common use and benefit, and cannot be transferred to a subject, or alienated, limited, or restrained, by mere royal grant, without an act of parliament. The king's grant, therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance, as the case may be.

The specific nature of the trust in favor of all the subjects of the realm upon which in England the sovereign held the domain of navigable waters and shores, and the soil thereunder, was that those subjects should have the free use of such waters and shores. The waters, though the domain over and right of property in them were in the crown, were of common right, public for every subject to navigate upon and fish in without interruption; and, though the right of property in the soil to high-water mark was likewise in the king, yet the shore was also of common right public. The use of each was in the subjects for the inherent privileges of passage and navigation and fishing, as public rights, and since *Magna Charta* the king has had no power to obstruct navigation or grant an exclusive privilege of fishing; and the right of the people in this respect cannot be restrained or counteracted by the sovereign as the legal and sole proprietor. Any grant of the soil by the king is always subservient, in the hands of the grantee, to the public right mentioned, and is void in so far as it conflicts with these rights. *Ang. Tide Waters*, c. 1; *Attorney General v. Farmer*, 10 Price, 378, 411; *Attorney General v. Burrill*, Id. 350, 377; *Duke of Somerset v. Fogwell*, 5 Barn. & C. 883, 884; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Martin v. Waddell*, 16 Pet. 367. In England, the right of property in navigable waters, as stated above, being in the king, he could abate at his pleasure every purpresture or encroachment thereon that made several to the author of it that which ought to be common to all, whether such encroachment was a nuisance or not; nor could he license anything that was a nuisance to such common right. Whether or not a particular encroachment was a nuisance was always a question of fact, and not one merely of law. Though an erection below high-water mark, or even below low-water mark, be a purpresture, and abatable at the king's



pleasure, it was not necessarily a nuisance. *Ang. Tide Waters*, 196-204; *Weber v. Commissioners*, 18 Wall. 57; *Alden v. Pinney*, *supra*.

But when the Revolution took place, says the supreme court of the United States in *Martin v. Waddell*, 16 Pet. 410, the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government; and a grant made by their authority must therefore be tried and determined by different principles from those which apply to grants of the British crown when the title is held by a single individual in trust for the whole nation. *Com. v. Alger*, 7 Cush. 53, 90, 92, 93.

And subsequently, in *Pollard's Lessee v. Hagan*, 3 How. 219, the supreme court decided that the shores of the navigable waters and the soils under them were not ceded by the original states through the constitution to the United States, but were reserved by the states, subject, however, to the power of the general government, under section 8, art. 1, of the constitution, to "regulate commerce with foreign nations and among the several states;" and, further, that new states admitted into the Union on equal footing with the original states have the same rights, sovereignty, and jurisdiction over all such lands within their borders. By the express provision of the act of congress of March 3, 1845, Florida was "admitted into the Union on equal footing with the original states in all respects whatsoever." These lands must be regarded as having been withheld by the original states as essential to their sovereignty, and as having passed from the United States to the new states upon the same principle; and in *Pollard's Lessee v. Hagan*, *supra*, it is also said that to give to the United States the right to transfer to a citizen the title to the shores and the soil under the navigable waters would be placing in their hands a weapon which might deprive the states of the power to exercise a numerous and important class of police powers.

As tending to illustrate the nature of the tenure of these waters and the lands under them, including the shore, and the use for which the same are intended, it may be remarked that the right of property of the general government in other lands and waters, i. e. the uplands and nonnavigable waters and the lands under the same, in the new states, and those in the original states granted by them to the United States, (*Pollard's Lessee v. Hagan*, 3 How. 224,) was not affected by the attainment of statehood. Section 2, art. 4, Const. U. S.; *Pollard's Lessee v. Hagan*, 3 How. 224. The reason of this distinction is that this class of lands and waters, when not held for forts, magazines, arsenals, dock yards, or other need-

ful buildings, (article 1, § 8, cl. 17, Const.,) or for public parks or similar purposes, is not held for use as such by either the government or the people, but rather to the end that they shall finally become the subject of individual or several ownership, under such processes of disposition as congress may from time to time adopt; the proceeds, in case of sale, to be used for the common welfare, according to the will of the lawmaking power. In the case, however, of navigable waters and the lands thereunder, including the shore, the chief end and purpose of their tenure is the use of such waters, lands, and shore themselves, by each and all of the people as their common property.

In *Bathing Co. v. Heldenheimer*, 63 Tex. 563, it is held that there the gulf shore and surf belong to the public; that every citizen has the same rights there as every other citizen, and none have the right to the exclusive use of this public property; and that any citizen of the state has the right to erect a bathhouse in the surf, so that it is not made a nuisance, or so constructed or used as to materially interfere with the rights of the public to the enjoyment of the waters and the shores of the gulf.

In *Weber v. Commissioners*, 18 Wall. 57, a case in which the harbor commissioners of San Francisco, acting under a statute of California authorizing them to improve the harbor of that port, had caused piling, with capping and planking, to be put on both sides of a wharf which Weber had erected, and which extended into the navigable waters of the bay, such piling preventing any approach to the wharf by vessels, it is said that by the common law the title to the shore of the sea and of the arms of the sea and in the soils under tide waters is, in this country, in the state; and that any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise; and, further, that although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future state, and that upon the admission of California into the Union upon equal footing with the original states absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.

In *McCready v. Virginia*, 94 U. S. 801,



which affirmed the validity of a statute of Virginia prohibiting citizens of other states from planting oysters in the soil of that state covered by tide waters, the doctrine of the opinion is that each state owns the beds of all tide waters within its jurisdiction, unless the same have been granted away; and that in like manner it owns the tide waters themselves, and the fish in them, so far as they are capable of ownership while running; and that for the purpose of such ownership the state represents the people in their united sovereignty, the title thus held being subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States, there being, however, no such grant of power over fisheries. "The fisheries," says the opinion, "remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tidal waters and their beds to be used by its people as a convenience for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship."

In *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110, it was held to be the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the several states within which they are found, with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. And in this opinion it is said: "By the common law the doctrine of the dominion over and ownership by the crown of lands within the realm of England under tide waters was not founded upon the existence of the tide over the lands, but on the fact that the waters were navigable, tide waters and navigable waters being used as synonymous terms in England. That the public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted, except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest; this doctrine being founded upon the necessity of preserving to the public the use of navigable waters from private interruption, a rea-

son as applicable to navigable fresh waters as to those moved by the tide. \* \* \* That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soil under tide water by the common law; \* \* \* and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and so long as their disposition is made for such purpose no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundations for wharves, piers, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the use of the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interests in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in the opinions of

the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular case. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains in the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.

\* \* \* The ownership of the navigable waters of the harbor [that of Chicago] and of the lands under them is a subject of public concern to the whole people of the state. The decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The trust with which they are held, therefore, is governmental, and cannot be alienated except in those instances mentioned of parcels used in the improvement of the interests thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. This follows necessarily from the public character of the property being held by the whole people for purposes in which the whole people are interested. \* \* \*

Necessarily must the control of the waters of a state over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use. \* \* \*

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately withheld in the exercise of the police power of the state. \* \* \*

The legislature could not give away nor sell the discretion of its successors in respect to matters the government of which, from the very nature of

things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it."

Though the language of these decisions from the supreme court of the United States is broader or less restrained in the two former cases than in the last, yet, as intimated in the last, there is no conflict of view in them, when the general expressions of the former are construed with reference to their respective facts,—a point beyond which the general observations of an opinion cannot properly be carried or relied on. Of the facts of the second of them—*McCready v. Virginia*—it is unnecessary to say more than is stated above. In *Weber v. Commissioners* the legislature of California, by an act of March 26, 1851, granted to the city of San Francisco, for 99 years, the use and occupation of portions of the lands lying in front of the city and within a certain designated line, and declared that this line should be and remain a permanent water front of the city. It also provided that the city authorities should keep the space beyond the line, to the distance of 500 yards, free and clear from all obstructions whatever, and reserved to the state the right to regulate the construction of wharves and other improvements so that they should not interfere with the shipping and commercial interests of the bay and harbor. Another statute, enacted about a month later, authorized the city to construct wharves at the end of all the streets commencing with the bay, the wharves to be made by extending the streets into the bay not more than 200 yards beyond the above-mentioned water-front line, and provided that the space between the wharves, when extended, should remain free from obstructions, and used as public slips for the accommodation and benefit of the general commerce of the city and state. In 1853 the predecessors of Weber acquired the title of the city to certain lots, about 120 feet in extent, lying along the stated water front; and in 1854 they built a platform along this front, the whole length of the lots, and then constructed from the center thereof into the bay a wharf 84 feet long and 50 feet wide, leaving a space on each side for the approach and dockage of vessels. The permanent water front, as established, was in many places, including the one in question, at a great distance from the line of the shore of the bay as that shore existed when the state was admitted into the Union. Ships of the largest size then floated at the lowest tide along this line. From the construction of the wharf until the interference of the harbor commissioners, who were acting under a statute of 1863, the owners

and their successors continued in the uninterrupted possession of the same, and collected tolls and wharfage. The decision of the court was that Weber took whatever interest he obtained subordinate to the control by the city over the space immediately beyond the line of the water front, and the right of the state to regulate the construction of wharves and other improvements, and that he was not a riparian proprietor having a right to wharf out into the bay; and that the erection of the wharf was an interference with the rightful control of the city over the space occupied by it, and an encroachment upon the soil of the state, which she could remove at pleasure; and that, having the power of removal, the state could, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the wharf would necessarily be destroyed. The legislation of 1863, whose purpose was the protection of the harbor and the convenience of shipping and promotion of commerce, was clearly within the provisions of that of 1851, as to keeping the space beyond the line clear and free from obstruction, and that that between the wharves at the end of streets should remain for use as slips, and also within the designated reservation in favor of the state; subject to which earlier legislation the predecessors of Weber took whatever interest they obtained.

The facts in the case of *Illinois Cent. R. Co. v. Illinois* were, in short, and so far as they need be stated, that the railroad company constructed its roadway 200 feet in width along the water front of the city of Chicago, on Lake Michigan, with tracks thereon, and with guards against danger in its approach and crossings, and a breakwater on the east beyond the tracks, and necessary works for the protection of the shore on the west, such works being constructed pursuant to the requirements of an ordinance of the city, under authority of law, as a condition of the city's consent to the location by the company of its road within the corporate limits. As to these works, including the roadway, extending as they did out into the water, it was held that they did not as a matter of fact interfere with any useful freedom in the use of the waters of Lake Michigan for commerce, either foreign, interstate, or domestic; and, being authorized by law, they could not be held to be such an encroachment upon the domain of the state as to require the interposition of the court for their removal, or for any restraint in their use. And it was also decided that the company did not by its reclamation from the waters of the lake of the land upon which its tracks were laid, or the construction of the road and works connected therewith, acquire an absolute fee in the tract reclaimed, with a consequent right to dis-

pose of the same to other parties, or to use it for other than railroad purposes; nor did it, by constructing such roads and works, acquire a right as riparian owner to reclaim additional lands from the water for its use or for the construction of piers, docks, and wharves in furtherance of its business, the extent to which the company could reclaim being limited by the conditions of the ordinance both as to the width to which reclamation could be made and the works to be constructed. The company also acquired the fee in certain lots on the lake front and reclaimed land, and built piers and slips in front of the same; and it was held that it had the right to use in its business such reclaimed land and slips, unless it should be found on further examination upon remanding the cause that the piers as constructed extended beyond the point of "practicable navigability" in the waters of the lake. But it was also decided that the construction of a pier or the extension of any land into navigable waters by one not the owner of the riparian land does not give such person, whether an individual or a corporation, any riparian rights. Some years subsequently (A. D. 1869) the legislature passed an act granting to the company all the right and title of the state in and to the submerged land constituting the bed of the lake, and lying east of the tracks and breakwater of the company, for the distance of one mile, the fee of such land to be held in perpetuity by the company, without power to grant, sell, or convey the same; and it was decided that this act not only could not be invoked to extend the riparian rights of the company resulting from its ownership of the lots referred to, but also that, as to the remaining submerged lands covered by the terms of the act, it was not competent for the legislature to thus deprive the state or people of the ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters, and that the cession was inoperative to affect, modify, or in any respect control the sovereignty and dominion of the state over the lands, or the ownership thereof, and that the act of 1869 was annulled by a repealing act of 1873.

It is entirely clear that there is nothing in the *Virginia* and *California* cases that either called for or justified a precise definition of the nature of the tenure or trusts upon which lands below low-water mark are held, or of the powers of the legislature, as the representative of the people, to dispose of them. The general assertions made in them were entirely sufficient for the purposes of the cases under adjudication, and are not authority beyond the issues made therein. The power of the legislature of *California* to grant to *San Francisco*, as against the people of *California*, or even any one else, the submerged land out to the permanent water front, was not questioned in the *Oall-*

fornia case; nor do the state or people of Virginia question the validity of that state's oyster legislation in the McCready Case. The issues in the Illinois case are, however, altogether different, and required the full adjudication and exposition there made, and we have found nowhere any authority that is in conflict with the conclusions presented by it. *Attorney General v. Parmeter*, 10 Price, 378. We are sure that the case of *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643, presents no such conflict, and do not feel that it is necessary to say more of it.

Excluding as immaterial to the question before us all rights growing out of interstate and foreign commerce under the constitution of the United States, the result of these authorities is that at the time of the passage of our riparian act the navigable waters of the state and the soil beneath them, including the shore or space between high and low water marks, were the property of the state, or of the people of the state in their united or sovereign capacity, and were held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the state for at least the purposes of navigation and fishing and other implied purposes; and the lawmaking branch of the government of the state, considered as the fiduciary or representative of the people, were, when dealing with such lands and waters, limited in their powers by the real nature and purposes of the tenure of the same, and must be held to have acted with a due regard for the preservation of such lands and waters to the uses for which they were held.

In construing this act, not only are we to keep in view the real nature of its subject-matter, but it is to be judged in the light of the rule applicable to all grants by the government, which is that they are to be strictly construed, or be taken most beneficially in favor of the state or public, and against the grantee. *Potter*, Dwar. St. 171; *Gould, Waters*, §§ 23, 36; *Brittain v. Canal Co.*, 3 Barn. & Ald. 139; *Proprietors of Stowbridge Canal v. Wheeley*, 2 Barn. & Adol. 792; *Feather v. Queen*, 6 Best & S. 257; *McManus v. Carmichael*, 8 Iowa, 1; *Commissioners v. Water Power Co.*, 104 Mass. 446; *Minturn v. Larue*, 1 McAll. 370; *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634. It will not be presumed that anything was intended to pass that is not denoted by clear and special words. *Martin v. Waddell*, 16 Pet. 411. "As a general rule," says the supreme court of Massachusetts in *Com. v. City of Roxbury*, 9 Gray, 451, 492, 493,—a case similar in its nature to this,—“in all grants from the government to the subject the terms of the grant are to be taken most strongly against the grantee and in favor of the grantor. \* \* \* But this rule applies,

a fortiori, to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation for general and public use.

\* \* \* But where a body like the colonial government holds two distinct powers,—one for granting and distributing lands to parties entitled, for settlement in perpetuity, and of which power it is in the habitual and constant exercise as one of the ordinary and prominent purposes of its establishment, and at the same time has a fiduciary interest and authority over the public domain,—the grant, while it conveys the land, will not be held to include any portion of such public right, unless it is included in its terms by express words or necessary implication.” See, also, *Stevens v. Railroad Co.*, 34 N. J. Law, 532, 553.

The intent and effect of this grant are to be ascertained from a consideration of all its parts. We have before us no simple transfer to the riparian owners of the title of the public or people in their sovereign capacity to the soil from high-water mark to the edge of the channel. The effect of such a grant, considering the fiduciary nature of the holding, would be nothing more than a transfer of the title subject to the public trusts; and whether or not such a transfer would create any beneficial right in the contents of the soil beneath the sea, in so far as such contents could be used or availed of without impairing the public use of such waters, and of the rights incident thereto, is immaterial to decide, and for the reason that, in our judgment, the same conclusion as to the meaning and effect of the act, as it is, follows whichever of these hypotheses we assume. If such simple grant would be to carry the property right contended for by the appellee, the additional terms of the act must have been intended to limit what would have been the effect of such a grant; whereas, if an unqualified grant would not have given it, the added language is insufficient to do so. Ignoring both the title and the preamble, considered merely as such, there is still apparent in its body, or enacting part, the distinct public purpose of connecting the shore and banks of bays, harbors, and streams with the channel of navigable waters. Instead of being an absolute and unqualified gift to individual proprietors of land intervening the shore or banks and the channel, it is, so long as the water shall not be converted into land by filling in, a grant for a particular end and specially defined use, and one in which the terms used, considered with reference to the subject-matter, show that the public trust upon which the property was held was not lost sight of, but its preservation and promotion intended. This purpose, in so far as is shown by the enacting part of the statute, (outside of the words, “for the considerations above mentioned.”

which mean, "to the end indicated by the preamble,") is to be found in the words, "giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank, or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in to erect warehouses or other buildings;" the words "purposes described," used in this connection, referring to that of facilitating the landing and storage of goods as stated in the preamble, by the means indicated in the act; and they in effect incorporate the preamble into the body of the statute, and make it a part thereof. Nowhere in the statute can anything be found that is inconsistent with the intent indicated. The language of the title and that of the preamble and the remainder or body of the statute are in fullest accord with it, and there is no inconsistency between the title and preamble and the remainder of the act. The people of the state being the proprietors of all the navigable streams, bays, and harbors, and of the land beneath them, (Attorney General v. Chambers, 4 De Gex, M. & G. 205; Stevens v. Railroad Co., 34 N. J. Law, 533,) and the legislature, their representative, deeming it to be for the public good and the promotion of commerce that wherever wharves were required to bring together the shore and the channel or the former and the vessels navigating such waters, wharves should be built and warehouses erected for facilitating the landing and storage of goods which might be the subject of conveyance on any of such navigable waters, and recognizing that such ownership of the state and its consequent powers were a bar to the riparian owner building such wharves or improving their riparian lots in any of the ways permitted by the statute, and the public or state not being prepared to undertake the work of building such wharves or filling in the water, it determined to encourage the riparian owner to do what the state alone could do of itself, or authorize another to do, without possibility of any interference that would cause a loss to such riparian proprietor. The plan of the act is that the title of the submerged land should be vested in the riparian owner for these uses and purposes. The state, "for the considerations above mentioned," divests herself and invests the riparian owner with the title to the land. These "considerations" are for the purpose and end that commerce may be benefited in the manner described by the statute; and that the grant is one of the class in which the purpose that the submerged land, which is the subject of the grant, shall, as long as it is of that character, be used or applied for the benefit of commerce, is apparent and controlling. Admitting that it vested the full title in him,—as it would seem it did,—still the sole uses and the purposes of exclusive benefit

to himself for which it was vested are those declared in the act, and necessarily implied in the same. As the holder of such title, he was to have the right and privilege to build wharves into the stream or waters of the bay or harbor as far as may be necessary to effect the purpose of landing and storing goods which at any time are to become or be the commerce of such stream or other waters, not obstructing the channel, but leaving full space for the requirements of commerce. He also has the right to fill up the water from the shore, bank, or beach as far as he may desire, not obstructing the channel; being thus allowed to extend the shore from the original high-water mark towards the edge of the channel by supplanting the water by earth, converting pro tanto the natural water way into earth; and with the further right and privilege, in the latter case, of erecting warehouses or other buildings "upon lands so filled in." Though the act secures to the riparian owner the right of such beneficial improvement of the submerged land, and consequent improvement of his riparian lot, and though the improvements contemplated by the act, when made, can be used for all proper purposes by the owner in the same way that similar properties, however obtained, may be used, yet it never was the purpose of the act that any beneficial use of the submerged land or bed of the waters distinct from that appertaining to any other member of the public should vest in the riparian owner, or be enjoyed by him, except and until there has been an application of the submerged land to the designated purposes of the statute by making improvements of the character indicated. Until this is done none of the exclusive privileges offered by or flowing from the statute, as incident to such improvements, arise. The making of these improvements are contingencies upon which the legislature intended that the exclusive rights necessary to the enjoyment of the same should arise. It never was its intention that the general rights of the public as to the use of the land or water should be impaired, or in any manner affected, so long as the riparian owner did not see fit to avail himself of the special privileges of the act; to hold that it was would be to convert into an obstacle to commerce, and curtailment of the rights of the public, that which was intended as a promoter of both in a specially prescribed manner, and would give without consideration special privileges which it was not intended should accrue except upon the performance of what are the purposes of the act, and must have been deemed an essential to their enjoyment. The statute vests him with the title, or annexes to the title to the riparian land the ownership, of the land granted by it out to the channel, but the beneficial use by him of this title and land are so limited by the other words and general purposes of the act that as against the public, the state, or any citizen of the state, he has,

outside of the right to improve, and thereby secure, the consequential rights incident thereto, and the remedies for protecting such right to improve, no other or greater right or privilege than any other citizen of the state has. As long as he does not avail himself of this right, he is the holder of the legal title, but without certain powers, always incident to sovereignty, in connection with such lands and waters, and subject to the power and duty of the state to restrain the use of such land to the purposes of the grant. *New Orleans v. U. S.*, 10 Pet. 662, 737. Of course, he, in the absence of subsequent constitutional or valid legislation, can protect his exclusive right to improve from invasion by "any other person," but, except for the purposes of making such improvements, he, until he does make them, has no more right to land upon, to traverse, to fish for either floating or swimming or shell fish, or to dig in or use such lands below high-water mark, or the waters above them, than any other citizen has. The terms of the statute, other than those which merely vest the title, limit the use of the land, the subject of that title, just the same, and even more, under the strict rules of construction obtaining in cases of public grants, as the same clauses, in the usual form of an habendum, may limit the ordinary granting words of a deed of conveyance. 2 Bl. Comm. 298; 3 Washb. Real Prop. 437-440; *Watters v. Bredin*, 70 Pa. St. 235; *Nightingale v. Hidden*, 7 R. I. 115, 118. These words cannot be ignored. They were put there to limit and qualify the right of the riparian owner, and preserve to the public every right not clearly expressed by them, or necessarily implied by their meaning, as given to such owner. The use of these lands, and the waters over them, in the digging and removing of phosphates or other substances on or beneath their surface for gain is not within either the expression or the implication of these terms, or the purpose or intent of the statute. Before the act any citizen of the state had the right to go upon these waters, including the shore when the tide is down below high-water mark, and to take fish from such waters and shore, and neither these nor any other of the uses to which they were subject then have been taken away by the statute so long as the riparian owner has omitted to make any of the improvements contemplated by the statute; but he could not go there and dig up the soil independent of the control and regulation of the state, and convert it to his own use or gain, nor can he do so now, nor has the statute given the riparian owner the right to do so. *Gould, Waters*, § 24. Grant that his right to improve, and thereby secure benefits contemplated by the act as the result of such improvements, if he chooses to exercise it, may prevent the state from permitting any one else to go there and take phosphates, and defeat his right to so improve, and believing, as we do, that the ex-

ercise of the right, secured by the statute, to convert water into land by filling in, results in the ownership of such land as any other, or as land relieved of all the trusts of its former submerged condition, still the act grants to the riparian proprietor no such right as to or in the land in its natural condition, and the state has not parted with its power, as the representative of the people, to prevent any use of the land which is not authorized by the statute. *New Orleans v. U. S.*, 10 Pet. 662, 737. Conceding that the legislature may be limited, by the nature of the people's tenure of such lands explained above, in its powers as to the manner in which phosphates may be authorized to be taken, even by a riparian owner, still, in the absence from the statute of any authority to take them from the beds of navigable waters, he cannot do so except by the consent of the state duly given by the lawmaking power, and upon such terms and conditions as it may prescribe.

The decision in *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643, is not in conflict with the above conclusions; and what was expressly stated in the legislation there as to benefits arising when the improvements should be made is with equal force implied here to the extent stated above.

That such limited use of the lands was intended by the legislature is also shown by the last clause of the second section of the act, which clause reads: "Also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands, for the purposes within mentioned." Construing it as meaning to confirm to such proprietors only such improvements as had been made for the special purpose of facilitating the landing and storage of goods, or benefit of commerce, or as intending to confirm for the advancement of the purposes of the act all improvements of whatever nature, it is still clear that the use of the land and such improvements for such purposes of commerce was the end which the legislature had in view. The intent to limit the use of the land in its natural state is further shown by the fact that no authority is given "to erect warehouses or other buildings" except on land which may be "filled in," the idea evidently being that, until the water was made land, only wharves, a known instrument of commerce, should be built on the submerged land; or, in other words, that, so long as any land granted by the act remained submerged, such land should only be used for purposes of commerce. Of course, as soon as it became land by being filled in, there was no more reason why it should not be built upon than other land adjacent to the water. It is entirely relieved of the trust attached to lands submerged by navigable waters, just as if it had become land by accretion or sudden upheaval.

The only remaining provision of the act necessary to be discussed under the facts of

this case is that giving to riparian proprietors the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel, by bill in chancery or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the state for any interference with such property. This provision is not, and was not intended as, a grant of any property right, and cannot be invoked as such. It is simply remedial in its nature, and gives nothing which would not flow to the riparian owner by implication from other parts of the statute. We must look to the rights granted by the act to ascertain what can be held to be "encroachments by another person upon all such submerged land," or "an interference with such property," as against the riparian owner. We have stated several things which would not be, and stated a class of things that might be. No such encroachments or interferences are shown by this record.

Whether we should hold the word "channel" to mean merely the "point of practical navigation," or give it an interpretation more favorable to the riparian owner, we are satisfied that the grant, construed as it is above, is valid; but we cannot admit that a disposition of the land under the entire water front of our actually navigable streams, bays, and harbors, on terms less favorable to the public, would be so.

In interpreting this statute we do not think we have given any effect to the preamble that the purview of the act does not itself sustain, (Potter, Dwar. St. 267-269,) or have ignored or treated as surplusage any of the words of the statute, nor given too much force to any of them, and thereby given the law a meaning different from the intent shown by it as a whole; and the intent and purpose which we have ascribed to the law-makers is founded upon the meaning of the words of the act considered as a whole, and with reference to its subject-matter. So considered, the act, in our judgment, does not import a broader meaning or different intent than we have given it. *Id.* 175-194, and notes.

The decisions on the Massachusetts Colonial Ordinance are worthy of consideration in this connection. The ordinance, as adopted in the year 1641, was: "Every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farre as the sea ebbs and flowes within the precincts of the towne where they dwell, unless the free men of the same towne or the general court have otherwise appropriated them; provided that this shall not be extended to give leave to any man to come upon others' propertie without there leave." In 1647 it was amended thus: "The which clearly to determine; It is declared that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flowes, the

proprietor of the land adjoining shall have propertie to the low-water mark, where the sea doth not ebbe above a hundred rods and not more wheresoever it ebbs further; provided, that such proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." Vide note to *Com. v. City of Roxbury*, 9 Gray, 465; *Com. v. Alger*, 7 Oush. 67. In *Com. v. Charlestown*, 1 Pick. 180, an indictment for a nuisance in not repairing bridges which the court of sessions had established over a navigable stream, the opinion (pages 183, 184) having observed that the government, to encourage the building of wharves, quays, and piers, and to prevent disputes and litigation, transferred its property in the shore of all creeks, coves, and other places upon the salt water, where the sea ebbs and flows, says: "Those who thus acquired the property of the shore were restricted from such a use of it as would impair the public right of passing over the water, in boats or other vessels, through any sea, creeks, or coves, to other men's houses or lands, by which it was intended to reserve a free passage over the water in such places, in the same manner as it existed before the public property in the shore was transferred. The ordinance of 1641 has therefore made no alterations in the use of places therein described while they are covered with water, and they remain free for all the citizens of the commonwealth; so that even the proprietor of the flats cannot lawfully erect anything upon them which will obstruct or hinder such passage, though he may build wharves extending towards the sea to the distance of one hundred rods, provided he do not thereby straiten or interrupt the passage over the water in such manner as to constitute a public nuisance." The case of *Com. v. Alger*, 7 Oush. 53, cited *supra*, is one where the defendant was in 1849, and had been for more than 30 years, a riparian owner fronting on the harbor of Boston. In 1837 a statute relating to encroachments upon such harbor was passed, the first and second sections of which established a line designated by local objects. The third section enacted that no wharf, pier, building, or incumbrance of any kind shall ever be extended beyond such line into or over the tide water in the harbor; and the fourth, that no person shall enlarge or extend any such structure, which is now erected on the inner side of said line, further towards such line than such structure now stands, or than the same might have been lawfully enlarged or extended before the passage of this act, without leave first obtained from the legislature; and the fifth section, that no person shall in any other part of the harbor belonging to the commonwealth erect or cause to be erected any wharf or pier, or begin to erect any wharf or pier therein, or place

any stone, wood, or other materials in said harbor, or dig down or remove any of the land covered with water at low tide, with intent to erect any wharf or pier therein, or to enlarge or extend any wharf or pier now erected: provided, however, that nothing herein contained shall be construed to restrain or control the lawful rights of the owners of any lands or flats in said harbor. The sixth section made any violation of the act a misdemeanor, punishable by fine, and provided for the removal of any such offending structure as a nuisance. Acts of 1840, 1841, and 1847 provided for changes of the line, the acts of 1840 and 1847 containing similar provisions to those of sections 3, 4, 5, and 6 of the act of 1837, except that they omitted the proviso to the fifth section. Alger was indicted under the act of 1847. In 1843 he began to build a wharf on his flats, and constructed the northerly wall thereof from his upland nearly to the channel, and then filled in and constructed the wharf, but did not complete it until the line had been established pursuant to the act of 1847, after which he built a triangular pier, complained of in the indictment, which pier forms part of the wharf as originally commenced by him. This pier was beyond the line of 1847, but on defendant's flats, and not 100 rods from the upland, nor below low-water mark, was no injury to navigation, and was not so far beyond the commissioners' line or so near the channel as the northerly wall of the wharf was built in 1843. There was verdict of guilty, and the supreme court of Massachusetts, in affirming the same, passed upon the nature and effect of the colonial ordinance, and the question of the invalidity of the statute of 1847, as impairing the rights vested by such ordinance in riparian proprietors. As to the ordinance it was held that it vested in the riparian owner the fee of the flats as land, and not as an incorporeal hereditament; and the further views on this point are best explained by the following extracts from the opinion: "Again, the construction which has been put upon this act in all the judicial decisions which have been made upon it, \* \* \* has been that, notwithstanding the act vests a fee in the soil in the riparian proprietor, analogous to the *jus privatum*, or right of property, which at the common law the crown could grant to a subject, yet that the land between high water and low water, until it was inclosed, built upon, or so occupied by the riparian proprietor, so far partook of its original character that whilst covered by the tide water the public and all persons might lawfully use it, might sail over it, anchor upon it, fish upon it, and by so doing no person should be held to commit a trespass, or dispossess the owner, or take adverse possession. The public used only a common right by so using these lands when covered with tide water. \* \* \* Looking at the terms of

this law, and the purposes for which it was intended, the object seems to have been to secure to riparian proprietors in general, without special grant, a property in the land, with full power to erect such wharves, embankments, and warehouses thereon, as would be usually required for purposes of commerce, subordinate only to a reasonable use of the same by other individual riparian proprietors and the public, for the purposes of navigation, through any sea, creeks, or coves, with their boats and vessels." As to the act of 1847, the decision was that the legislature had power to establish lines in the harbor, beyond which no wharf should be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and that statutes doing this take away the right of proprietors of flats in the harbor beyond the lines to build wharves therein, even when they would be no actual injury to navigation. That such statutes were not unconstitutional on account of making no provision for compensation to the owner, nor as impairing the obligation of the grant made by the colonial ordinance; but that such statutes could not affect wharves erected before their passage. In *Com. v. Tewksbury*, 11 Metc. (Mass.) 55, it was held that a statute which imposed a penalty on any person who should take, carry away, or remove any stones, gravel, or sand from any of the beaches in the town of Chelsea, was passed for the purpose of protecting the harbor of Boston, and extended as well to the owners of the soil as to strangers; and that the statute did not constitute such a taking of private property and appropriating it to private use, within the meaning of the usual constitutional provision, as to render the statute void, although no compensation to the owner was provided for in it. Another case illustrating the effect of this colonial ordinance is that of *Weston v. Sampson*, 8 Cush. 347, decided in the same year, yet subsequently to *Com. v. Alger*, supra. It was an action of trespass *quare clausum*, by the plaintiffs against defendants, who went in their boat upon plaintiffs' flats, between high and low water mark, and within 100 rods of the shore, and there at low water dug clams, and carried them away in their boat. It was held that the common-law right of fishing extended to shell fish, as well those embedded in the soil as those which lie on the surface. That this right of fishing extended to the people of Massachusetts, and has not been taken away by the colonial ordinance. That, though under it the riparian owner "has an interest in the soil, it is not an absolute and unqualified ownership; but so long as flats so situated are left open, unoccupied by a wharf, dock, or other inclosure, so long as the tide ebbs and flows over them, they so far retain their original character and remain public. \* \* \* The rule, es-



established by usage and judicial decision, has been that, although the ordinance transfers the fee to the riparian owner, yet, until it is so used, built upon, or occupied by the owner as to exclude boats and vessels, the right of the public to use it is not taken away, but that whilst open to the natural ebb and flow of the tide the public may use it, may sail over it, anchor upon it, fish upon it; and by so doing commit no trespass, and do not dispossess the owner." *Drake v. Curtis*, 1 Cush. 413. In *Lakeman v. Burnham*, 7 Gray, 437, the action was in tort for breaking and entering the plaintiff's close, and taking clams, and there was verdict for defendant, who pleaded the right of free fishing in all the citizens of the commonwealth. The decision sustained the verdict. A part of the testimony in this case was that for 62 years plaintiff, or his father before him, had claimed the exclusive right to dig clams on that part of the beach, including the premises, and had been in the habit every year of selling rights to other persons to do so, and had always driven away persons who came to dig without their leave, and had often prosecuted and recovered judgment against them before a justice of the peace; and that for more than 20 years plaintiff had taken pains to cultivate clams on these flats by transplanting and propagating them; and that before the publication in 1854 of the decision in *Weston v. Sampson* no one ever claimed a right to dig clams on these flats, and that since that time plaintiff had gone with a number of men and dug a ditch around the flats where he had planted clams and put down stakes, but they were pulled up by persons who came to dig. *Proctor v. Wells*, 103 Mass. 216. In *Packard v. Ryder*, 144 Mass. 440, 11 N. E. Rep. 578, the decision was that a person may, from a boat, enter upon and walk along the uninclosed flats of another, between high and low water mark, and within 100 yards of the upland, for the purpose of fishing in the sea, and may so fish while on such flats.

Limited as is the right of the riparian proprietor under the Massachusetts ordinance, construed as it has been in the light of the common law as to the right of the public in navigable waters and the lands thereunder, still we think there is a manifest distinction between that grant and our riparian act. There it was the manifest purpose to grant all that property in the shore that could be granted not inconsistent with the right of passage, navigation, and fishing referred to. The saving of the public rights there are to be found in the declaration as to free fishing, and the proviso as to the passage of boats and vessels, and the common-law principles above referred to. Here the right of the public is not founded on a mere declaration, an exception or proviso or saving clause, or application of the designated principles of law to a general grant, but in

the fact that the beneficial right granted to the riparian owner is special and limited, and carefully defined, manifesting the legislative intent that all that is not clearly carried by it should remain in the public; and to this residuum of the public interest the legal title held by the riparian proprietor is as much subject as it would be if it remained in the state, charged with the same beneficial interest in his favor which has been given to him by the statute. Granting that our riparian owners may maintain trespass against those who dig and carry away a part of the soil, as it was held in *Porter v. Shehan*, 7 Gray, 435, that the Massachusetts owner could where there was a taking of "muscle bed," it must be upon the theory that such a trespass damages or impairs the right to make improvements contemplated by the statute. Except for the purpose of such improvement, he has neither under the statute nor independent of it no more or other right of action for or in restraint of such a taking than any other citizen has.

The statute of June 7, 1887, (chapter 382B, pp. 280, 281, Pamphlet Laws of that year,) was full notice to the appellees of the policy of the state with reference to the phosphate deposits in her navigable waters, and that no one was to be permitted to take them except upon the terms therein prescribed. The provision of the first section of this statute, to the effect that the persons named in it should not in any way interfere with the free navigation of the navigable streams and waters of the state, or the private rights of any citizen residing upon or owning the lands upon the banks of said navigable rivers and waters of the state, cannot be invoked as recognizing the right of a riparian owner to take the phosphates in such waters. He had no such right, nor does this act, taken as a whole, recognize any such right as existing in him. The subsequent legislation on this subject in 1891, (chapter 4043, Rev. St. pp. 981-983; pages 74-77, Acts 1891,) as held by us in *State v. Board of Phosphate Com'rs*, 31 Fla. —, 12 South. Rep. 913, clearly asserts the right of the state to these deposits as against the riparian owner; yet there is no ground for saying that our opinion there pretends to decide anything as to the controversy between the state and the riparian owner as to the ownership of such phosphates. Parties taking phosphates during the operations of either of such acts should pay for them at the prices fixed for therein.

The oyster legislation of the years 1881, 1885, and 1887, to be found in sections 468-473, 2447, 2771, Rev. St., is not antagonistic to these conclusions. The sole extent to which it recognizes an exclusive beneficial ownership or right of use in submerged lands under public waters in the riparian proprietor is "erecting wharves, warehouses, or other permanent improvements thereon;" and the

natural construction to be given this general language, which is to be found in section 471, is that it was intended as referring to and meant to preserve the rights conferred by the riparian act as therein defined. This section, as it now stands, was passed in the year 1887 as an amendment and substitute for a section of the act of 1881, which original section was to the effect that the act of 1881 should give no exclusive right or privilege to plant oysters in front of land then owned by another person, and fronting on any of the waters of the state, without the consent of the owner of such land; and that the exclusive privilege conferred by the operation of the act should not extend beyond the purchase or entry and occupation of the land in front of which any such oyster bed may have been located. Outside of the use of the words "bays and harbors" in the amendatory section, there is practically no difference in the two sections. Each was intended to preserve riparian rights under the act of 1856, and nothing more. The later, or amendatory, section is more specific in its language, but not more effectual. As against all other rights, the right to plant in front of private riparian lands is as exclusive against the owner as against any one else, and as fully protected by the penal clauses of the statute. It may also be remarked here that it is clear from section 470 that the location of stakes and buoys to mark the beds, and the act of planting of oysters itself, were regarded by the law-making power as not being a trespass upon the riparian owner's rights, or an interference with them, if they did not actually disturb his making improvements under the riparian act; and, in our judgment, so long as he forbears to thus improve, he has no ground for complaining, and is not encroached upon or injured, although he will not, as against the oyster planter, estop himself to improve at his pleasure, except by his own consent, duly and clearly given. There is, moreover, in the act regulating the deposit of materials in tide waters, (section 936, Rev. St.) no recognition of any greater right in the riparian owner than we have conceded to him.

We find in the opinions of our own court, outside of one or two general expressions, nothing that can be regarded as hostile to the conclusion we have reached, and certainly nothing that, in view of the facts of these cases, can be taken as committing the court, as then constituted, to a contrary view. It is, moreover, a fact that in some of the opinions there are expressions which indicate a tendency to the views we have here announced; as in *Rivas v. Solary*, where it is said that the interest of the state which passed under the riparian act was "subject to the trust that it was to be used for the purposes of commerce as stated in the statute;" and in *Apalachicola Oyster Canning & Fish Co. Case*, where it was said by Judge

Maxwell that "if used at all, it must be used for the benefit of commerce in the erection of wharves, warehouses, and other buildings." And when it is said in *Rivas v. Solary* that the right to build wharves "was an incident to the proprietorship," the meaning of the court was that the right to build appertained to the ownership of the part of the submerged land on which it might be proposed to build, and could not exist independent of that ownership, or in the owner of the high land, or of any other part of the submerged land; but it was not meant that this use of the submerged land was not the use to which the statute had limited the ownership of the land granted so long as it remained submerged. It was never intended that these submerged lands should be used for the erection of hotels, or opera houses, or mere stores of trade, nor in many other ways that might be designated, but only that they, while in their natural state, should be used in the manner specially defined by that statute. No warrant or authority for any other use is to be found in the act, and the view that any other use is permissible is entirely irreconcilable with the rule controlling in all cases of public grants,—that the public cannot be held to have parted with any right that is not expressly granted, or of which a grant is clearly implied.

The facts of this case, in that the riparian owner is taking phosphate in front of its own lands, render entirely unnecessary any decision of the question which might arise if permission had been given under the phosphate act of 1891, to one not a riparian owner, and the owner claiming the benefit of the riparian act was opposing the former's exercise of the right in front of his lands. Here the riparian owner is not exercising any right given him by the riparian statute, but is doing what he is not permitted to do without the consent of the state, and is, moreover, refusing to comply with the terms prescribed by the state as a condition precedent to his doing it.

As to the contention that the lands of appellee do not extend to "low-water mark," and hence are not within the beneficial purposes of the statute, our conclusion, without further defining the last clause of the second section of the riparian act, is that these lands are dry lands, lying on the bank of the usual bed of the navigable waters of the stream, washed by the flow of its waters at their ordinary stage, and extending down to such waters at such stage; and that the company is within the statute, at least as to all such lands of which there was private ownership at the time of the approval of the riparian statute.

The view we have taken of the case relieves us from settling what is meant by the term "channel," as used in the riparian act, and from saying whether or not the statute extends its benefits simply to those who were riparian owners when it became a law, or

also includes those who have subsequently become such by acquisition from the state or United States of lands bordering on navigable waters; and from construing the term "low-water mark," used in the second section, further than is done above.

The objection that the supplemental bill, which is brought in the name of the state suing by its attorney general, as was the original bill, is not properly brought, because of certain provisions of the phosphate act of 1891, is untenable. That act gives the board of phosphate commissioners the control and management of the phosphate interests of the state in the beds of her navigable waters, and of all the phosphate therein which may be dug, mined, and removed therefrom, to the extent of the state's interest, and also, *inter alia*, authorizes the board to institute all suits and legal proceedings in the name of the state which may be necessary to protect the rights and interests of the state, and to enforce the collection of all moneys due or which may become due to it on account of phosphate dug, mined, or removed from her navigable waters, giving them authority to employ counsel at such reasonable compensation as in their opinion is right and proper. Conceding for the purposes of this case that its further enforcement became subject to the discretion of the board upon their appointment under the act of 1891, we fail to see anything in the act requiring an affirmative showing that it is continued with their consent, or according to their will, or rendering its form improper, even as an original proceeding by them. It is the state's suit, brought originally by her attorney general, and the record affirmatively shows that he and his associate counsel have been assisted in its practical procedure by the inspector of phosphates, an appointee of the board, and its "executive officer." We, moreover, do not think the supplemental bill introduces a new subject-matter of suit, but merely the continuation of the same trespassing since the commencement of the suit in the bed of Black creek.

The decree will be reversed, and the cause remanded for proceedings not inconsistent with this opinion.

MABRY, J., (dissenting.) There are views expressed in the opinion of the court prepared by the chief justice in construing the riparian act of 1856 in which I am unable to concur. The theory of construction as applied to the act does not seem to me to be the correct one. That this act is valid is conceded. It has been recognized as valid in several decisions of this court, and in one—*Rivas v. Solary*, 18 Fla. 122—it has to some extent been construed on a state of facts making a construction proper. Conceding that the respondent, the Black River Phosphate Company, is entitled to the benefit of this act,—that is, that its proprietorship of lands bordering on Black river, a naviga-

ble tide water stream, brings it within the benefits of the act,—a consideration of the act becomes proper.

It is unquestionably true that the grant should receive a strict construction as against the grantees, and nothing should be held to pass from the state that is not clearly within the meaning and terms of the grant. This is the general rule of construction applicable to the usual grants from the sovereign; and the nature of the property which is the subject of the grant under consideration, as will be further seen, makes the rule strictly applicable here. That the state of Florida, in her sovereign capacity, was, at the date of the act of 1856, the owner of the lands mentioned in the act, is beyond question. Justice Westcott says in *Sullivan v. Moreno*, 19 Fla. 200: "Anterior to the act of 1856 (chapter 791, Laws of this state) the title to the soil of navigable tide waters to the line of ordinary high tides was in the state of Florida, subject to the powers of congress in the matter of regulating commerce under the constitution of the United States. This, as a legal proposition, has been admitted as settled since the case of *Pollard's Lessee v. Hagan*, 3 How. 229." This title, it is admitted, as shown by ample authority, is not held by the same character of tenure that the state holds her ownership in the lands that constitute a part of the public domain, but it is held in trust for certain public purposes. These public purposes or uses for which the land covered by water, and the shores bounding the same, are held, so far as I can ascertain from the decisions of the courts, grow out of the use of the water. These public rights are mentioned as relating to commerce and the rights of navigation, fishing, and bathing, and they appertain to the water, and belong to the public generally without discrimination. The title to the shores and beds of navigable waters, being held in trust for the public uses mentioned, is subservient to and subordinate to such uses. The legislature cannot destroy or take away such rights by simply divesting the state of the legal title to the lands covered by water. They would still exist as long as the water of the navigable stream remained. While it is true that the title to the shores and beds of navigable waters, whether held by the state or an individual citizen, is subservient to and subordinate to the public rights of commerce, navigation, and fishing, the authorities also sustain the view that the state in her sovereign capacity can vest in the citizen absolute ownership of parcels of such trust property, and authorize him to that extent to replace the *jus publicum*, when the parcels can be granted without detriment to the public interest in the waters and lands remaining. The cases of *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643, and *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110, are decisions bearing on this point. This

reference is not made in support of the validity of the grant under consideration, for, as already stated, that is conceded, but for the purposes of stating all the existing conditions of the state's title at the time of the grant.

The title of the act is to benefit commerce. The inducements for the grant, or the ends to be accomplished by it, are expressed in a preamble to the act, and they are as follows: "Whereas it is for the benefit of commerce that wharves be built and warehouses erected for facilitating the landing and storage of goods; and whereas the state being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving their water lots: therefore" for these considerations the grant is made. Giving due consideration to all the language we find in this act, as we must do, it seems to me that the legislature had two ends in view as an inducement to the grant. These ends are clearly expressed to be the construction of wharves and warehouses to facilitate the landing and storage of goods, and to encourage riparian owners in improving their water lots. The one is as much within the legislative contemplation as the other. How these ends are to be accomplished, or the improvements are to be made, will further appear upon a consideration of the terms of the grant itself. The language of the granting part of the act contained in the first section is exceedingly broad, and indicates of itself no purpose on the part of the legislature to impose any limitations upon the title granted otherwise than by those implied limitations that attach to such a grant on account of the trust character of the land granted. The granting terms are that the people of the state "divest themselves of all right, title, and interest" to the lands mentioned, "as far as to the edge of the channel, and thereby vest the whole title to the same" in the riparian proprietors named. So far there can be no reasonable ground for contention that there is anything in the granting language itself to indicate a purpose to limit the title granted, or even the uses of the land, the title to which is vested in the riparian proprietors. The state held the lands granted, however, in trust for the public purposes of commerce and the right of navigation and fishing in the waters covered by the lands, and these rights, so long as the water remains, are superior to the title to the lands thus granted. The broad grant of the full title given by the language of the act referred to above, if nothing more was said, would then be subject to limitations, but they would be such as are implied from the nature of the estate granted, and which must not be disregarded in construing the statute. These implied limitations are referred to in this connection in order that they may never be lost sight of in construing the language of this grant. Down to the language of the

grant above quoted, including the granting words, there is nothing to show that the legislature designed to limit the grant by anything in the granting terms used; and, unless something is found in the subsequent part of the act to have this effect, the granting words must have their proper and legitimate meaning and effect, subject only to the limitations, whatever they may be, arising out of the trust nature of the estate granted.

After granting or vesting the full title in the riparian proprietors, as above stated, and in the same connection with the granting words, this further language is used: "Giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank, or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in to erect warehouses or other buildings." The right of the riparian proprietor to prevent encroachments by other persons upon the land granted, by bill in equity or at law, and to maintain trespass for any interference with such property, and the confirmation to such proprietor of all improvements which had been made before the passage of the act upon submerged lands for the purposes therein mentioned, are also provided for in the act. As to this provision, it cannot, of course, be contended that, because a remedy is given to prevent encroachments upon and interference with the land granted, this will operate as a limitation upon the grant itself. The natural inference from this language is that the legislature not only conveyed the title, but provided a remedy to protect it.

Does the above-quoted language of the grant limit of itself either the title or use of the land already granted? The vesting of the legal title to the lands covered by water in an individual, as has been stated, would not alone authorize him to replace the water, or do anything else in the water that did not belong of right to each individual of the community. The state's title was held in trust and subordinate to the public rights in the water, which we have seen are rights of commerce, navigation, and fishing, and the bare transfer of the legal title to the citizen would still leave him powerless to invade the navigable waters covering his land in such a way as to impair the rights of the public. To do this he would have to have legislative authority, and to the extent that the legislature has power to replace the *jus publicum* it may be conferred upon the citizen. It would then seem that the quoted language above, and referred to as limiting the use of the land granted, giving the grantees full right and privilege to construct wharves into the water, and to fill up from the shore as far as may be desired, not obstructing the

channel, but leaving full space for the requirements of commerce, confers additional rights than those given by the grant of the title. It authorizes the grantee of the legal title to invade the *jus publicum*, even to the extent of converting the space occupied by water into solid ground, and upon it to construct warehouses and other buildings. It seems to me that it is clear that this language was employed to confer this further right to build wharves and fill in dirt into the water, and this is the right upon which it operates. The grant of one right coupled with a grant of another and different right is not limited by the latter. But is it correct to hold that the use of the land granted is limited by the language giving the riparian owner the privilege to build wharves, and fill in into the navigable waters mentioned in the act? To construe this language as a limitation upon the title vested in the riparian owner, or his use of the land granted to him, it seems to me, would be to admit that, without this language, other uses of the lands granted equally as destructive of the *jus publicum* as those given by it would exist. If it operates as a limitation upon other uses of the lands than those given, then such uses, without the limiting terms, must exist upon which it can operate. But it is certain, I think, that, so far as the right to fill in, and thereby completely destroy the public uses in the water, is concerned, the riparian proprietor, though vested with the title to the land covered by the water, in the absence of the language giving such right, would not have it. The grant of the privilege to the riparian owner contained in the language under consideration was something in addition to the grant of the legal title, and was employed by the legislature for this purpose. So that view of the opinion that the terms of the statute other than those vesting the title were put there to limit and qualify the rights of the riparian owner, and preserve to the public every right not clearly expressed by them or necessarily implied by their meaning, is more than I am willing to accept. The effect of this grant was, I think, to vest the legal title in the riparian proprietors, subject to the public trusts attaching to such a title, coupled with the privilege of building wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes of landing and storage of goods; and also to fill up from the shore, bank, or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce. The title is given by the statute, and, when the water is replaced by the improvements authorized by the statute, the estate is absolute, and relieved of any servitude to the public. It is true, in my judgment, that the riparian owner has no more right to disturb or invade the water covering his land, ex-

cept for the purposes mentioned in the statute, than any other individual of the community; but this is not because the legislature has limited him to such rights by granting to him the privilege of building wharves into the waters of navigable streams, and filling in from the shore so far as not to interfere with commerce. It results from the nature of the estate which he holds, which, as above stated, so long as the water remains over it, is subject to the public uses of navigation, fishing, bathing, etc. My view is that, under the act of 1856 alone, the state is in no condition to call upon a riparian owner to account for phosphate taken out of the beds of navigable streams out to the edge of the channel. The legal title in the soil covered by the water to the edge of the channel is undoubtedly in the riparian owner; and, however limited may be his legitimate use of the water, or the soil thereof, so long as the full title as expressed in the act is in the abutting owner, the state is without a proper status in court, and cannot successfully claim to be the proprietor of the phosphate which is a part of the soil in the bed of the stream. The state might, on proper showing, enjoin the riparian owner from disturbing the public rights in the water in the way or for purposes not authorized by the statute; but the theory of the state's case here is that the riparian owner shall account for the phosphate taken from the entire bed of the stream in the part to the edge of the channel, as well as in the channel. We have held in the case of *State v. Board of Phosphate Com'rs*, 31 Fla. —, 12 South. Rep. 913, that by the act of 1891 (chapter 4043) the state has unmistakably asserted a right to the phosphatic deposits in the beds of navigable streams and waters of the state, even as against the riparian owner. I believe that since the act of 1891 the state can demand and collect, even from riparian owners, the tonnage required by that act for the privilege of digging for phosphate and phosphatic deposits in the entire beds of navigable streams. I do not believe the state would have such right under the act of 1887, (chapter 3828.) This is an act granting to H. S. Greeno and his associates the right to dig and remove from the beds of the navigable streams and waters in the state, for a certain period, and for a certain compensation, the phosphate rocks and phosphatic deposits therein, provided they shall not in any way interfere with the free navigation of the navigable streams, or the private rights of any citizen residing upon or owning the lands upon the banks of said streams and waters. The legislature did not, in my judgment, intend by this act to assert any such rights to the phosphate deposits in the beds of navigable streams, as against the riparian owner, as to authorize a suit for them; and the proviso in the first section of this act relieves

its language from such effect, if it would have such without the proviso.

So long as the land granted remains submerged, the trust character of the title attaches, and the governmental control over it is not lost. In the exercise of such control the legislation of 1891 over the beds of navigable streams will, I think, place the state in the position to demand the tonnage there prescribed for digging in the beds of navigable streams and waters in this state.

My view of the case calls for a consideration of what is the channel of Black river, and whether or not the appellee dug any phosphate out of it prior to the passage of the act of 1891, and also whether or not the state has any status in this case by filing the supplemental bill demanding an account for phosphate dug since the act of 1891 went into effect, but I do not deem it necessary to go into these questions. The opinion does not undertake to deal with them, and no difference of opinion would probably exist in reference to them.

(99 Ala. 180)

#### JUSTICE et al. v. STATE.

(Supreme Court of Alabama. June 22, 1892.)

HOMICIDE—VENUE—FAILURE OF EVIDENCE—GENERAL AFFIRMATIVE CHARGE—DYING DECLARATIONS.

1. In a murder case, where the venue of the offense is not proven, and there is no evidence from which it can legally be inferred, defendant may take advantage of the omission by a request for a general affirmative charge.

2. Deceased's death was caused by a blow struck on the side of the head, from which he died a few hours after. Within less than a half hour after stating the circumstances of the difficulty, giving the names of defendants as the guilty parties, he stated that "he was hurt bad; was beat to death;" that his head was killing him; that they should get the doctor, or he couldn't stand it; that his head was about to kill him, it hurt him so bad. *Held*, that these expressions did not show that he thought he was about to die, so as to warrant the admission of his statements as dying declarations.<sup>1</sup>

Appeal from circuit court, Geneva county; J. M. Carmichael, Judge.

James Justice and another were indicted for the murder of Judge Williams, and were convicted of murder in the second degree. They appeal. Reversed.

R. W. Espy and R. H. Walker, for appellants. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendants were convicted of murder in the second degree. The second charge requested by the defendants was "that, if the jury believe the evidence in this case, they must find the defendants not guilty." The bill of exceptions purports to set out all the evidence. We have looked carefully through the bill of exceptions, and, although there is a mass of evidence set out,

the venue of the offense is nowhere proven, or any evidence from which the venue could be legally inferred. When this is the condition of the evidence, the defendant may take advantage of the omission by a request for a general affirmative charge. This has been the rule too long to now depart from it. *Hubbard v. State*, 72 Ala. 164, and authorities cited. The precise question has been often decided. *Childs v. State*, 55 Ala. 28.

As the case must be reversed, and the defendants retried, we feel it our duty to consider another question, and that relates to the admission of the dying declarations of the deceased. On account of the character of this kind of evidence, the rule requires that it be received with very great caution, and that the primary facts upon which its admissibility depends should be closely scrutinized; and although it is not an indispensable prerequisite that deceased should, in so many words, express his conviction that he was in extremis, that death was impending, that there was no hope of life, yet the judicial mind should be clearly satisfied, after careful consideration of all the circumstances, that, at the time the declarations were made, such was the conviction of the mind of the declarant. Such is the strict rule required by the decisions of this court. *Kilgore v. State*, 74 Ala. 1; *Ward v. State*, 78 Ala. 441; *Hussey v. State*, 87 Ala. 121, 6 South. Rep. 420; *Young v. State*, (Ala.) 10 South. Rep. 913; *Hammil v. State*, 90 Ala. 577, 8 South. Rep. 380. The fact that deceased, at the time the declarations were made, was in extremis, and that death soon followed, are properly considered; but these facts, however clearly proven, do not alone determine their admissibility. Was declarant convinced that such was his condition? The court must determine this question, and upon it depends their admissibility. This is no part of the province of the jury. When they have been admitted by the court as evidence, the jury considers and determines their weight and credibility, in connection with the other evidence, just as if the deceased had testified to the same facts from the stand in their presence, but the jury cannot consider the credibility of the primary facts upon which their admissibility depends. This is the exclusive province of the court. Many of the charges were requested under a misapprehension of this rule of law. To show the condition of mind of deceased, it was proven that his death was caused by a blow on the side of the head, from which he died in a few hours; that within less than a half hour after stating the circumstances of the difficulty, giving the names of the defendants as the guilty parties, and the instrument with which he was stricken, and which statements were admitted in evidence, against the objection of the defendants, the deceased used the following expressions, as testified to, indicative of the condition of his mind: "He

<sup>1</sup> See note at end of case.

was hurt bad; was beat to death." "My head is killing me." "Run and tell Jim to bring the doctor. My head is killing me." "My head is killing me." After saying this, he begged to send for the doctor. He complained of being "bad off." "Get the doctor quick, or he couldn't stand it." "He said his head was broke; his head was about to kill him, it hurt him so bad." "After saying his head was killing him, he told his brother to go after the doctor; that he wanted the doctor." "There is where Henry struck me, and he's nearly killed me." "The Justice boys have killed me, or very near it." "They stopped me on the road, and nearly about killed me." "The Justice boys stopped me over on the road, and beat me nearly about to death." We have stated substantially all that was said by the deceased, and the declarations, as to his convictions of impending death. The evidence is fairly conclusive that these declarations were made from a quarter to half an hour prior to the time before he told them to go for the doctor. Applying the rule that we have declared,—that the primary facts should be closely scrutinized and carefully considered, and that such testimony must be received with great caution, and is to be rejected, unless clearly satisfactory to the judicial mind,—we are of opinion they were improperly admitted. They evince great physical suffering; a fear, perhaps, that the result would be fatal. There was no direct expression to the effect that he expected and was convinced that such would be the effect of the blow. The expressions, they had "about killed me," "nearly about beat me to death," and the subsequent request that they "get the doctor quick, or he couldn't stand it," tend to show that he was not convinced that death was certain or impending. As was said in *Young v. State*, supra: "A just and salutary administration of the law requires that courts should have due regard to the rules and limitations placed upon declarations made by a person in the absence of the defendant against whom they are offered, and in regard to which he has had no opportunity to cross-examine declarant." What we have said will probably be sufficient to guide the court upon another trial. Reversed and remanded.

## NOTE.

## DYING DECLARATIONS.

Deceased, when shot, during the afternoon, stated to his wife, "It is a dead shot this time," and that he wanted to go to heaven when he died, but did not expressly say he believed he was going to die. Deceased then stated to others that defendant shot him, and the circumstances of the shooting, but did not say anything about dying. Deceased died the following night. *Held*, that his statements were properly received as dying declarations. *Hall v. Com.*, (Va.) 15 S. E. Rep. 517.

On a murder trial, it appeared that deceased, in the evening of the day he was shot, and after being informed by a physician that a bullet had lodged in his brain, and that he would probably die, said he was "obliged to die,"

and then made a statement to persons present as to who shot him. *Held*, that such statement was admissible as a dying declaration, though deceased lived for three or four days thereafter. *State v. Banister*, (S. C.) 14 S. E. Rep. 678.

Statements of deceased made shortly before his death, when it appeared from his sending for a physician that he hoped to live, though at the same time he said that he was going to die, are inadmissible as dying declarations. *Mathewly v. Com.*, (Ky.) 19 S. W. Rep. 977.

Deceased and defendant, brothers-in-law, were on unfriendly terms, and had exchanged pistol shots, and slightly wounded each other, some time before the killing. At the time of the murder, deceased was riding towards home, when he was shot from ambush. When asked who shot him, he told several persons that he did not know; that he could not see who fired the shot. Some hours later, in response to a question from his niece as to who shot him, he said, "Your Uncle George," meaning defendant, but did not state how he knew it, or whether he knew such to be the fact. Deceased died the next morning, from the effects of the shot. There was no proof that the statement inculcating defendant was made under a belief of impending dissolution, or that deceased believed he would die, or had been advised that he could not recover. *Held*, that the court erred in admitting the declaration in evidence. *Green v. Com.*, (Ky.) 18 S. W. Rep. 515.

(100 Ala. 617)

## RICE v. MERCHANTS' &amp; PLANTERS' NAT. BANK OF MONTGOMERY.

(Supreme Court of Alabama: June 22, 1893.)

PARTNERSHIP—SURVIVING PARTNER—BANK DEPOSITS.

Since the legal title to firm assets, on the death of one partner, vests in the survivor, deceased's administrator has no action against the bank for moneys deposited and checked out by the survivor in the firm's name, and in continuance of their usual course of business, though the bank knew of the death; and it would make no difference that the survivor owned no stock, and was only a nominal partner, unless the bank were charged with notice of those facts.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

Action by Mattie J. Rice, as administratrix of D. S. Rice, against the Merchants' & Planters' National Bank of Montgomery, for money had and received. Judgment for defendant. Plaintiff appeals. Affirmed.

Moore & Finlay and A. A. Wiley, for appellant. Brickell, Semple & Gunter, for appellee.

COLEMAN, J. The plaintiff, as administratrix of D. S. Rice, sued the defendant in assumpsit for money had and received to plaintiff's use. After the evidence was closed each party requested the court for the affirmative charge. The court charged as requested for the defendant, and refused the charge for the plaintiff. The action of the court in these respects is assigned as error. The undisputed evidence shows that at the time of the death of D. S. Rice (plaintiff's intestate) he and A. Wilson were engaged in mercantile business as partners under the firm name of Rice & Wilson; that as such firm they did business and kept a regular

bank account with the defendant; that after the death of D. S. Rice, the surviving partner, A. Wilson, continued the business in the name of the old firm for about seven months, and then sold the entire stock of goods then on hand; that he collected the debts due the late firm of Rice & Wilson, and as collected the money was deposited in the bank as before, to the account of Rice & Wilson, and the deposits debited in the bank book of Rice & Wilson, and by Wilson checked out in the firm name. The evidence tends to show that the bank knew that Rice was dead. The suit was brought by the administrator of the deceased partner to recover the money from the bank, which had been thus deposited and checked out. There was evidence to show that Rice, the deceased partner, in fact owned the entire capital of the partnership, and that Wilson received a monthly salary, and was in fact but a nominal partner. There was no evidence to show that the defendant, the bank, had any knowledge of the terms of the partnership, or of the relative rights of the partners as between themselves. These facts show that plaintiff cannot maintain the action. Upon the death of one partner the legal title to the partnership assets vested in the survivor. *Houston v. Stanton*, 11 Ala. 421; *Para. Partn. § 441*; 17 *Amer. & Eng. Enc. Law*, p. 1162. In *Calvert v. Marlow*, 18 Ala. 67, it was held that the surviving partner could maintain an action against the administrator of a deceased partner for any assets or choses in action which belonged to the firm, held by such administrator. As between the administratrix and the surviving partner, the assets belonged to the administratrix; but as to all parties who had dealt or might deal with the partnership as such, and especially where there was no knowledge of the terms of the partnership, the surviving partner held the legal title, and was entitled to the assets. The facts of this case call for the application of different principles from those applied in the case of *Bank v. Rice*, 89 Ala. 201, 7 *South. Rep.* 647. The evidence is clear that as to the \$2,000 plaintiff has no claim against these respondents. There was no express promise to pay, and none raised by implication of law, on the part of the defendant. In fact plaintiff has shown no cause of action against the defendant. Affirmed.

(36 Ala. 66)

Ex parte STEWART.

(Supreme Court of Alabama. June 22, 1893.)  
CONVICTS—HARD LABOR—ILLEGAL CONFINEMENT.

Where a law requires the court of county commissioners to provide for the disposition of convicts sentenced to hard labor, and a contract is made, hiring out all except those physically incapable of performing hard labor, but no attempt is made to provide for such persons, and the company, which had bound itself to receive from the sheriff all convicts except those physically incapacitated, refuses, because

a woman sentenced to hard labor had a baby, to take her, and no effort is made to compel it to take her, her detention in jail is unlawful, and she is entitled to a discharge.

Petition of Melissa Stewart for writ of habeas corpus. Writ granted.

Eugene McCae, for petitioner. Wm. L. Martin, Atty. Gen., for defendant.

HEAD, J. Petitioner was convicted of forgery at the spring term, 1893, of the circuit court of Marengo county, and sentenced to perform hard labor for the county for a period of two years, and an additional term to cover costs, as provided by the statute. This sentence was on March 24, 1893. Under the hard-labor system adopted by the court of county commissioners, according to law, the Sloss Iron & Steel Company, a mining and manufacturing corporation of Jefferson county, Ala., had hired, and were obligated by their contract with the county, to receive from the sheriff, on conviction and sentence, and put to hard labor, all persons convicted and sentenced to hard labor for the county during the term covered by the contract, "except those who are physically incapable of performing hard labor." This contract was in force when petitioner was convicted and sentenced, and is still. By law, it is made the duty of the commissioners' court to provide for the disposition of convicts sentenced to hard labor. It does not appear from this record that they have made any provision for persons who are physically incapable of performing hard labor. On March 25, 1893, the governor, by an order to the sheriff, suspended the delivery of convicts to said Sloss Iron & Steel Company until an epidemic at their mines could be investigated. Afterwards, (but when does not appear, as the sheriff contents himself with leaving the date blank in his return,) this order of the governor was revoked, and the sheriff ordered to deliver the convicts; and thereupon all were delivered, except petitioner, whom the company refused to receive, when offered to it, because "she had an infant at the breast," and that "they had hired no babies." Neither the sheriff, the commissioners' court, nor any one else, so far as the record shows, took any steps to compel the Sloss Company to receive petitioner, nor is it made to appear that, when the application for the writ of habeas corpus was exhibited, they had any purpose to do so, and that further time was necessary to effectuate that purpose. Nor, as we have said, had any steps been taken, or purpose to do so made known, as to the disposition of convicts who were physically incapable of performing hard labor; but the sheriff retained the petitioner in his custody confining her in the county jail, under these indeterminate circumstances, which did not and could not point to or anticipate the end of such confinement, short of the entire term of hard labor which had been imposed. In



this condition of things, petitioner asked the probate judge to be discharged by writ of habeas corpus. He tried the case on the merits, and refused the prayer, remanding the petitioner to the custody of the sheriff, and she now renews the application to this court.

The probate judge seems to have acted upon a statement deposed to by the sheriff,—that he was authorized to receive convicts for the Sloss Iron & Steel Company,—and to have reached the conclusion that his (the sheriff's) custody of petitioner should be referred to that agency. This position is not sound. The sheriff was by law charged with the custody of petitioner, and it was his duty to hold her, after sentence, until the hirer had reasonable opportunity to take her away, and put her to the performance of hard labor, according to law and the sentence. He had no right to continue her custody and confinement in the county jail for an unreasonable or indefinite time, and say he was holding her as agent of the hirer, and not as sheriff. Moreover, the Sloss Iron & Steel Company had absolutely repudiated all authority or control over the convict, by refusing to receive her, on the ground that she was not included in its contract. How, then, can it be said that it had custody of her by its agent, the sheriff? But if this were not true, and if he were holding her as agent of the hirer, the detention was equally wrongful. The hirer had no authority to keep the convict confined in the county jail. Its duty was to receive her therefrom, and put her to hard labor. It could not substitute therefor another and different punishment, to wit, imprisonment in the county jail. *Kirby v. State*, 62 Ala. 51; *Ex parte Crews*, 78 Ala. 457. There is no doubt, under the facts shown by this record, that petitioner is entitled to her discharge; and the writ of habeas corpus will issue as prayed, unless, upon being certified of this opinion, she shall be content to renew her application before a judge of original jurisdiction. Habeas corpus granted.

(100 Ala. 561)

**POLLAK et al. v. JANNEY et al.**

(Supreme Court of Alabama. June 22, 1893.)

**CONTRACTS — AGREEMENT BY TRUSTEE TO TRANSFER COLLATERALS — INTEREST OF OBLIGEE — NON-PERFORMANCE BY TRUSTEE — REMEDY.**

1. C. executed to P. certain notes, payable to the latter's order, and secured by collaterals, under an agreement to raise certain money thereon, and pay certain indebtedness of C., and in case of failure to secure the money to return the notes and collaterals. P. having failed to raise the money, M. Bros., without the knowledge of C., paid his debt under an agreement with P. that he would deliver to them such collaterals, which arrangement was afterwards ratified by C., but P. refused to deliver the collaterals. *Held*, that the rights of C. in such collaterals passed to M. Bros.

2. In such case P. originally held such collaterals in trust for C., and by his agreement with M. Bros., ratified by C., he became their

trustee, to whom or their trustees equity will compel him to transfer such securities, and not leave them to pursue their remedy at law.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Bill by Janney & Cheney, as trustees of the estate of Moses Bros., insolvents, against I. Pollak and others, to compel defendant Pollak to deliver to plaintiffs certain securities of defendant W. L. Chambers, alleged to be held by Pollak in trust for Moses Bros. under a contract between him and them, which was ratified by Chambers. From a judgment overruling demurrers to and denying their motion to dismiss the bill, defendants appeal. Affirmed.

Roquemore, White & Dent and J. M. Falkner, for appellant. Tompkins & Troy and Horace Stringfellow, for appellees.

MCOLLELLAN, J. It appears from the contract executed by Moses Bros. and W. L. Chambers severally, on the one hand, and Ignatius Pollak, of January 3, 1888, that these parties, together with one Altmeyer, had some time before that made a purchase of lands which they call the "Cullman Purchase." The agreement was, as between themselves, that each of the parties named should pay a certain part of the purchase money, but what each contribution should be, whether each should pay the same or different sums, does not appear, nor does it appear whether they were jointly liable to the vendor for the whole purchase money, or severally liable each to the extent of the contribution agreed on among themselves; but on the facts shown the presumption would be, perhaps, that they were jointly liable in gross, or, at least, that the land itself was subject to a lien in gross for the whole purchase money. Pollak and Altmeyer, before January, 1888, had fully paid their respective proportions of the land debt. The balance then unpaid thereon was \$82,000, maturing February 12, 1888, of which Moses Bros. were to pay \$61,500, and Chambers was to pay \$20,500. For the purpose of raising necessary funds to make these payments, the agreement of January, 1888, above referred to, was entered into. It is as follows: "This agreement, made this the 3d day of January, 1888, by and between Ignatius Pollak, Moses Bros., and W. L. Chambers, witnesseth that for the purpose of enabling the said Pollak to negotiate loans for the other named parties amounting to \$82,000, and interest at six per cent. per annum from the 10th of February, 1887, \$61,500 of which is for and on behalf of Moses Bros., and \$20,500 of which is for and on behalf of W. L. Chambers, the said Moses Bros. have executed their sixteen promissory notes, dated —, and payable four months after date to the order of Ignatius Pollak, as follows: Fifteen notes for \$4,000 each, and one note for \$1,500,—and to secure the same have transferred to and

deposited with said Pollak certain collaterals, as shown by a separate receipt of even date herewith; and the said Chambers has executed his seven promissory notes, dated —, and payable four months after date to the order of said Pollak, as follows: Six notes, \$3,000 each, and one note, \$2,500,— and to secure the same has transferred to and deposited with said Pollak certain collaterals, as shown by a receipt of even date herewith. It is understood that the said Pollak is to be unrestricted in the disposition of said notes, and is to use them all, if practicable, for the purpose of meeting certain notes aggregating \$82,000, maturing one year from the 12th February, 1887. The said Pollak, however, obligates himself to provide for only \$50,000 of said \$82,000, and, in event not more than \$50,000 is provided for by said Pollak for the purpose aforesaid, he hereby agrees to return notes to Moses Bros. and W. L. Chambers amounting to \$32,000, and also to return them collaterals in the same proportion. It is understood and agreed between the parties hereto that said Pollak and one A. R. Altmeyer do not owe any part of the said \$82,000 of notes, they having heretofore advanced their pro rata of money towards meeting payments on the Cullman purchase." Notes were executed by Moses Bros. and Chambers, respectively, and the collaterals referred to were transferred and delivered by them respectively to Pollak under and according to the terms of this agreement; and in pursuance thereof he, Pollak, used the notes of Moses Bros. for the purpose of raising said sum of \$61,500 for them, and these notes were afterwards paid by Moses Bros. But Pollak did not use Chambers' notes to raise his share of said indebtedness, viz. \$20,500, nor did he raise that sum, or any part of it, for Chambers, and the latter has never paid said notes, or any part thereof. To the contrary, the \$20,500 which was to be raised by Pollak for Chambers with Chambers' said notes and collaterals was paid by Moses Bros. to Pollak, for Chambers, on or before February 13, 1888, with the understanding and agreement between Pollak and Moses Bros. that they, Moses Bros., should, by reason of such payment, become entitled to the collaterals deposited by Chambers with Pollak, and that the latter would forthwith deliver the same to Moses Bros., to be held by them to secure the repayment by Chambers to them of the sum so advanced and paid to Pollak for Chambers. This payment by Moses Bros. to Pollak for Chambers was made without the request or knowledge of the latter, as was also the agreement for the delivery of the collaterals by Pollak to Moses Bros. Upon subsequent information of such advance or payment for him, however, Chambers ratified and confirmed the same, and admitted the right of Moses Bros. to the collaterals, as asserted by them. The collaterals were

not delivered by Pollak to Moses Bros. at the time of said payment, and have never been so delivered, but are still in the hands of Pollak, who now asserts a right to retain them as security for an indebtedness of Chambers to him, and refuses to surrender them according to said agreement. Chambers has never paid Moses Bros. the money thus advanced, and their claim therefor, as also their rights and remedies in the premises against Pollak, growing out of his failure to deliver the collaterals to them, have passed to and are now vested in the present complainants, Janney & Cheney, through a general assignment by Moses Bros. for the benefit of creditors.

Upon the foregoing facts this bill is filed. It contains a description of the Chambers collaterals, and an averment that "by said payments to said Pollak for the said Chambers, and by virtue of said agreement and understanding of said Moses Bros. with said Pollak [with reference to the delivery of the collaterals by Pollak to Moses Bros.] a trust was fastened upon said collaterals in favor of the said Moses Bros., and that the said Pollak thereafter held the said collaterals as trustee for the said Moses Bros." And the prayer of the bill, so far as need be stated here, is that Pollak be ordered to assign and surrender the collaterals, which consisted of shares in several incorporated companies, to the complainants; that said companies, which are made defendants, be ordered to transfer said stock on their books to the complainants; and that said collaterals be sold, and the proceeds of the same be applied to the debts of said Chambers to Moses Bros., and the complainants, as assignees, etc. There is reference in the bill and prayer to the right claimed by Pollak to retain the collaterals, and apply them to some indebtedness of Chambers to him; and the prayer for a sale of the securities, etc., appears to be based on the alternative condition that the court shall find Pollak's claim to be well founded as between him and Chambers, and is that, in that event, the proceeds of sale beyond what is necessary to pay the debt of Moses Bros. shall be applied to Pollak's debt against Chambers. There is also a prayer for such other, further, and general relief as the facts of the case may require. Demurrers were interposed by Pollak, and he also entered a motion to dismiss the bill for the want of equity. The demurrers and motion were overruled and denied, and from the decree to that effect this appeal is prosecuted.

All the questions now presented properly arise on the motion to dismiss the bill, and the assignments of demurrer need not be specially considered. The contentions of appellants are that on the facts alleged no trust relation existed between Pollak and Moses Bros., with respect to this property, whereby a trust was fastened upon the collaterals in favor of the latter; that, the subject-matter of the alleged agreements between Moses

Bros. and Pollak being personally, and not held in trust by Pollak for Moses Bros., specific performance of that agreement to deliver the collaterals cannot be decreed; and that, Pollak being solvent, the complainants have a plain, adequate, and complete remedy at law for the redress of Pollak's wrong in withholding said collaterals. It is not contended, and cannot be successfully, that Moses Bros. acquired any title or equity to or in Chambers' collaterals under the contract of January 3, 1888, or by reason of what was done by Pollak in the execution of that contract. The duties and obligations of Pollak under that instrument were several in respect to Moses Bros. and Chambers. He took upon himself to raise, if practicable, \$20,500 for Chambers, and on Chambers' notes and collaterals, as a matter wholly apart from a like undertaking to raise \$61,500 for Moses Bros. on their notes and collaterals. He was not to use the notes and securities of either of these parties to provide a fund for the payment of the other's share of the \$82,000 indebtedness. He undertook absolutely to raise \$50,000 for this purpose, and in the event only that sum was raised he was to return to Moses Bros. and Chambers, respectively, their notes and collaterals in the proportion that \$32,000, the amount thereof not used by him, bore to \$82,000, the aggregate of the two sums he agreed to provide, if practicable; but it is manifest from the terms of the instrument, and from the conduct of the parties evidencing a construction in fact of it, that this proportionate return of notes and collaterals to Moses Bros. and Chambers, respectively, was contemplated and to be based on the raising of the \$50,000 in part by the use of the papers of Moses Bros., and in other part by the use of Chambers' notes and collaterals, and that in the event the paper of either one of the parties could not be so used, in whole or to any less extent, in providing whatever sum should be raised less than \$82,000, to that extent there was a failure to provide funds for that party. In other words, if by using a part of the papers of each only \$50,000, or any other sum less than the whole, was provided, each of the parties were to be entitled to that part of the fund borrowed on his or their securities; and if such part was raised solely on the notes of one of the parties, it belonged wholly to that party, because he alone was under obligation to repay it, and all his notes and securities, having been used and negotiated to evidence and secure his obligation, could not be returned to him in any amount. All of Moses Bros.' papers were thus negotiated, and none of Chambers'. Their full share of the indebtedness was raised and applied, but nothing was raised for Chambers. It was impossible for Pollak, and he was under no obligation, to return any part of Moses Bros.' papers to them. He had used all of them, according to the terms of the contract; met his obligation

to raise \$50,000, and apply it to the debt of \$82,000, and was fully discharged from all duty and obligation to Moses Bros. Whatever rights Moses Bros. have, therefore, against Pollak must arise entirely through Chambers, and the case is to be considered as if Moses Bros. had not been parties to the contract of January 3, 1888, at all, since that contract was several, and has been fully executed as concerns them.

Taking hold of the transaction at this point, we have the following case: Pollak had notes of Chambers, secured by collaterals transferred and delivered to him, for the aggregate sum of \$20,500. These notes had been executed payable to Pollak's order, to enable him, through a negotiation and indorsement of them and a transfer of the collaterals, to raise the sum stated, and apply it to a certain indebtedness of Chambers, if it was practicable for the fund to be thus realized. It was found to be impracticable. The notes were never indorsed or negotiated, and they are still in Pollak's hands. Moved by considerations which are indicated in the present bill and exhibits, but upon which no stress need now be laid, Moses Bros. volunteered to advance for Chambers to Pollak the amount of Chambers' said indebtedness, to be applied in satisfaction by Pollak. This was not done at Chambers' request, or with his knowledge or assent. Neither was the advance made on consideration of an indorsement and transfer of Chambers' notes to Moses Bros. The notes were not, as we have seen, indorsed to Moses Bros. at all, and the bill negatives any contemplation that they should be. It was agreed, however, in consideration of this voluntary payment by Moses Bros. of Chambers' debt, that Pollak should transfer, assign, and deliver Chambers' collaterals to Moses Bros.; but this agreement was between Moses Bros. and Pollak only, as has been said; not requested or assented to by Chambers, nor in consonance with any previous agreement between him and Pollak. Had Chambers' notes been efficaciously indorsed by Pollak to Moses Bros., the collaterals would have gone with them; but under the influence of section 1784 of the Code a transfer and delivery of the collaterals by Pollak to Moses Bros., unaccompanied by a transfer of the debt evidenced by Chambers' notes, would have been a discharge of the hypothecation, having the effect of restoring the right and title of Chambers. We do not think, however, that such a separate transfer of the collaterals would have been utterly void; certainly not in the sense of being incapable of efficient ratification by Chambers. To the contrary, we construe the statute to arm the person from whom the collaterals originally come in such cases with an election to affirm or disaffirm such a transfer. If he repudiates it, he, of course, has the right to recover the securi-

ties, the transfer having revested the title in him. But he equally has the right to confirm this merely voidable transaction, and thereby invest title to the securities in the transferee, as efficiently for all purposes as had he authorized it in the first instance, or the transfer had been made along with the assignment of the debt the collaterals were intended to secure. Suppose, for example, that the alleged agreement of Pollak had been executed, and the collaterals had been transferred and delivered to Moses Bros. thereunder, and, further, that upon coming to a knowledge of the transaction Chambers had ratified and confirmed it, and admitted Moses Bros.' right to the paper, could it be pretended that he could afterwards proceed either against Pollak for a breach of duty or against Moses Bros. for the securities? We think not. The Code provision is intended purely for his benefit. He alone could, before the statute, have been prejudiced by the separation of his collaterals from his debt, and the transfer of the former without the latter. Clearly he could in limine authorize this to be done. Clearly, also, after it has been done, he may waive the provision, and render the transaction entirely efficacious by a ratification of it. So, too, with respect to the agreement by Pollak to transfer the securities to Moses Bros. There was nothing in the relations presently existing between Pollak and Chambers out of which could be evolved authority on Pollak's part to enter into such arrangement. Yet, holding the collaterals for Chambers, the latter, of course, could have given such authority to Pollak; and, had he instructed Pollak to agree to turn over the collaterals, without the notes, to Moses Bros. on the payment by them to Pollak of Chambers' indebtedness, it cannot be doubted that whatever right Chambers had in the premises against Pollak would in equity have passed thereby into Moses Bros. Finding that Pollak, assuming to act for him, but without authorization to do the particular thing, had agreed to transfer and deliver the collaterals to Moses Bros., we conceive no reason why Chambers could not sanction, ratify, and confirm this agreement of Pollak, and thereby adopt it, and make it his own, to be effectuated through the holder of his collaterals; and we accordingly hold that on the averments of the bill, whatever rights Chambers had against Pollak passed by the latter's agreement and the former's ratification thereof into Moses Bros. And the sole question remaining on this part of the case is as to the character of the rights existing between Pollak and Chambers in relation to these securities, after the payment by Moses Bros. to Pollak of Chambers' share of the \$82,000 indebtedness. Under the construction we have placed on the contract of January 3, 1888, Pollak took both the possession and title of and in these

collaterals upon alternate and successive obligations. Primarily, he was to hypothecate the collaterals to secure a loan of \$20,500, evidenced by Chambers' notes aggregating that sum, to be indorsed to the lender, if it were found practicable to make the negotiation. Secondly, the negotiation being found to be impracticable, and Pollak having failed to raise the loan, the alternate obligation became operative upon him, and it then became his duty to retransfer and redeliver the securities to Chambers. It was upon the faith and confidence that Pollak would do one of these things, if practicable, and the other if the first could not be accomplished, that Chambers assigned and delivered the collaterals to him. These considerations, which the engagements of the parties fully sustain, bring the case as between Pollak and Chambers clearly within the definition of a trust, which is "an obligation upon a person arising out of a confidence reposed in him to apply property [legally vested in him] faithfully and according to such confidence;" or, as defined in other language, "a trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behalf of a third party;" or, we may add, for the behoof of the proprietor himself. 1 Perry, Trusts, § 2. One point of distinct differentiation between such a case and such other fiduciary relations as exist between principal and agent, bailor and bailee, and the like, lies in the fact that the legal title passes to and is invested in the trustee, and does not pass to the agent or bailee, and the confidence imposed in the former can therefore only be enforced in equity, while the duties incident to the latter relation, such as the surrender or redelivery of property held by an agent or bailee, can be enforced at law. Here, then, was the legal title and possession in Pollak upon trusts, and the equitable right in Chambers to have the trusts executed. The title and possession in Pollak only for the purpose of hypothecating the collaterals if he could, and, if he could not, then for the purpose of revesting that title and redelivering that possession to Chambers. He failed of the first purpose. He thereupon was under an obligation, enforceable in equity, to carry out the second. Chambers manifestly, in our opinion, had a standing in equity, after the first purpose had failed, to have a trust declared in his favor on these collaterals, and its execution enforced through a decree for transfer and delivery by Pollak to him; and this equitable right passed, on the facts alleged, into Moses Bros., and, through them, into the complainants. The bill is therefore not merely one to enforce specific performance of a contract to transfer and deliver personally, which chancery will not decree, in the

absence of special circumstances demonstrating the inadequacy of legal remedies, but there is superadded to the mere contract an element of confidence and faith reposed in the holder, and leading to the investiture of the legal title in him, and which constitutes him a trustee, whom equity will compel to pass that title according to the faith and confidence under which he received it, whether the subject-matter be personalty or realty. The bill to this end had equity, and the chancery court did not err in overruling the demurrers of the respondent Pollak, and denying his motion to dismiss. Affirmed.

(100 Ala. 545)

DAVIS v. McCARY et al.

(Supreme Court of Alabama. July 27, 1893.)

WRITS — SUMMONS — SUFFICIENCY — JUDGMENT — AMOUNT EXPRESSED IN FIGURES — VALIDITY.

1. Code, §§ 2662, 2663, provide that, when the summons is issued less than three days before the term of the court next thereafter, it must be made returnable to the next succeeding term, and that the return day of the summons is the first day of the court to which it is returnable. *Held*, that a summons to appear before the circuit court at the place of holding the same, which did not say "at the next term," according to the form of the Code, was not void, since the law fixed the term to which it was returnable.

2. It is not a valid objection to a judgment that the amount of it is expressed only in figures preceded by the dollar mark.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

Action by McCary & Dean against T. A. Davis on a promissory note. From a judgment for plaintiffs, defendant appeals. Affirmed.

This suit was brought on July 9, 1892, and on that day the following summons was issued: "You are hereby commanded to summon T. A. Davis to appear before the circuit court of Tuscaloosa county, at the place of holding the same, then and there to answer, plead, or demur to the complaint hereto annexed, of McCary & Dean. You are required to execute this process instantler, and to return the same immediately upon the execution thereof." This summons was executed on September 6, 1892, and on November 22, 1892, the following judgment entry was made: "Came the plaintiff by attorney, and the defendant, being called, came not, but made default. It is therefore considered by the court that plff. have and recover of the defendant the sum of \$156 11/100, and the costs in this behalf expended, for which execution may issue," etc.

J. J. Mayfield, for appellant.

COLEMAN, J. The judgment appealed from was rendered by default. The first assignment of error is as to the sufficiency of the summons. The defendant was summoned "to appear before the circuit court of Tuscaloosa county, at the place of holding

the same," etc. The objection is that the summons does not say "at the next term," according to the form of the Code. It is better to follow the prescribed forms, but the omission of the words "next term" does not cause a defect of such character as to wholly vitiate the summons. Section 2662 of the Code prescribes that, "when the summons is issued less than three days before the term of the court next thereafter, it must be made returnable to the next succeeding term," and by section 2663 of the Code "the return day of the summons is the first day of the court to which it is returnable." The law fixed the term to which the summons was returnable.

The second assignment of error is that the amount of the judgment was expressed in figures preceded by the dollar mark, as follows: \$135.99,—instead of being written out. At an early day, in the case of Tankersley v. Silburn, Minor, (Ala.) 185, it was said: "The mark used to denote dollars has obtained general currency, \* \* \* and conveys the idea of dollars as distinctly as the word 'dollar' itself," and a judgment rendered as the one under consideration was held not to be insufficient on this account. There is no error in the record. Affirmed.

(101 Ala. 209)

MOOG et ux. v. BARROW et al.

(Supreme Court of Alabama. July 27, 1893.)

FRAUDULENT CONVEYANCES — PLEADING — ANSWER — EVIDENCE — SUFFICIENCY — PLEADING AND PROOF — VARIANCE.

1. In an action to set aside conveyances as fraudulent, the answer must deny specifically the material facts alleged in the bill, which render the conveyances fraudulent, or they will be taken as true, though the answer denies generally "the allegations and charges" in the paragraphs which allege such facts.

2. M. conveyed his land to creditors in payment of his debt, as expressed in the deed, and they conveyed it to M.'s wife for a cash consideration of less than one-half its value. One of such creditors testified that in the settlement with M., at the time of the conveyance to the wife, he accounted for all rents collected, and charged M. with the taxes; that offers to purchase the land were always referred to M.; and that the latter, as to him, always claimed it, subject only to payment of such debt. Neither M. nor his wife testified. *Held*, that the evidence supported a decree finding the conveyances fraudulent as to other creditors of M.

3. The bill alleged that defendant M. owned the land in fee, and the proof showed that it was in M. and a person not a party to the suit. M.'s wife, the other defendant, did not claim title from her husband and such other person, but from her husband's grantees. *Held*, that there was no variance between the allegations and proof, so far as the parties to the bill were concerned.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Action by O. W. Barrow and others against Bernard Moog and wife to set aside certain conveyances on the ground that they were fraudulent as to plaintiffs, who were credit-

ors of Moog. From a decree for plaintiffs, defendants appeal. Affirmed.

Henry Chamberlain, for appellants. McIntosh & Rich, for appellees.

COLEMAN, J. Barrow et al., creditors of Bernard Moog, filed this bill, attacking certain conveyances of land as fraudulent and void, made by Bernard Moog and wife to Haas & Hemly, and subsequently by Haas & Hemly to the wife of Bernard Moog. The deeds are, in terms, absolute. The consideration, as expressed in the conveyance from Moog and wife to Haas & Hemly, was the payment of a past debt due them by Moog, and that expressed in the conveyance to the wife of Moog was a cash consideration of \$500. The bill shows that complainants were creditors at and prior to the execution of these conveyances, and avers that the deed to Haas & Hemly was intended to operate only as a mortgage to secure the indebtedness of Moog to Haas & Hemly, and that the conveyance to the wife of Moog was intended as a fraud; that the money expressed as the consideration was furnished by Moog himself, and was in fact payment of the debt, for which the conveyance was intended to operate as a mortgage security. The answer consists of only two paragraphs to these important allegations of the bill. The first is that they, and each of them, "deny the allegations and charges in each paragraph of complainants' bill of complaint, from paragraph one to paragraph six, both inclusive." This is the only response of Bernard Moog to the bill. By a second paragraph the wife answers that "she purchased the property in good faith, and parted with the value by paying money therefor, without notice of complainants' alleged equity."

The charge of complainants, that her husband conducted the entire transaction, and furnished to her the money, and that the payment was in satisfaction of the mortgage debt, is not denied or referred to in her answer. An answer is not sufficient that states a general denial of the matters charged. There should be a clear and distinct response to each averment of the bill. Story, Eq. Pl. § 852; Daniell, Ch. Pr. § 844; Savage v. Benham, 17 Ala. 131. When a material matter is charged in the bill, which, prima facie, is within the knowledge of the defendant, and he fails to deny it, it must be considered as admitted. Smille v. Siler, 35 Ala. 88; Grady v. Robinson, 28 Ala. 289.

But, aside from these principles, the proof is clear that the deed to Haas & Hemly was intended to operate only as a mortgage. The grantee Hemly testifies that on settlement with Moog, at the time of the reconveyance to Moog and wife, he accounted for all the rents collected from the land, and charged Moog with the taxes; that more than once persons offered to purchase the land from

him, and on each occasion he referred the proposition to Moog, who declined to accept the offer, and that Moog always, as to him, claimed the land, subject only to the payment of the debt due Haas & Hemly. The real value of the land, shown to be much more than double the amount of the consideration, is competent evidence to be considered in this connection. Neither Moog nor his wife were examined as witnesses in the case. We do not doubt the correctness of the conclusion of the chancellor from the facts introduced in evidence.

It is insisted that there is a variance in the probata and allegata which is fatal to any relief, in this: that the bill charges that Moog, the defendant, owned the land in fee, and the proof shows that the fee was in A. & B. Moog; and we are referred to the case of Floyd v. Ritter, 56 Ala. 356, and Webb v. Crawford, 77 Ala. 440, in support of the contention. Neither of these cases have any application to the question under consideration. Moog conveyed, by deed with warranties, the whole land to Haas & Hemly. Mrs. Moog claims only under title derived from her husband through Haas & Hemly. A. Moog is not a party to the bill. Mrs. Moog does not rely upon title from A. & B. Moog, but title from Haas & Hemly, who acquired title from B. Moog only, the husband. This is the title that is attacked as fraudulent. This is the title Mrs. Moog is called upon to defend. There is no variance in the allegata and probata, so far as the parties to the bill are concerned. There is no error in the record. Affirmed.

(69 Miss. 564)

#### THOMAS et al. v. THOMAS.

(Supreme Court of Mississippi. Oct., 1891.)

EJECTMENT—IMPROVEMENTS—MESNE PROFITS.

1. Defendant, in ejectment, to make good his claim for improvements, must show that when they were made he was claiming the premises under some deed or contract of purchase made or acquired in good faith; and a mere expectation that plaintiff's ancestor would recognize his supposed equitable rights in the premises, and give him the same, is insufficient.

2. In ejectment against a tenant holding over after the expiration of his term under a claim of ownership, plaintiffs cannot recover the stipulated rent during the time he was holding over, but only the reasonable worth of the use of the premises.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Ejectment by Agnes Thomas and others against Alexander Thomas to recover certain lands in Hinds county, described in the declaration, and for mesne profits. From the judgment, both parties appeal. Reversed.

The facts, as disclosed by the evidence, are as follows: On January 18, 1878, J. T. McAlpin entered into an agreement with Richard Thomas to convey to said Richard the lands in controversy for \$800, half to be paid cash, balance January 1, 1879. On Jan-

uary 30, 1878, J. T. McAlpin and his wife conveyed by deed these lands. This deed and the agreement was delivered to Richard Thomas, Alexander Thomas being present. Richard paid the money for the land, and executed his note for the deferred payment. Richard went into possession and cultivated the land in 1878. The land was rented after this, the rents being paid to Richard. In 1881 Alexander moved on the place, and cultivated it continuously up to the time of Richard Thomas' death, which occurred in 1890, but paid rents to Richard all the time, and made no claim to the land. Richard left a will, by which he devised these lands to his wife, Agnes Thomas, and her four minor children, plaintiffs in this suit. Alexander was a son of Richard Thomas by a former wife, and other lands were devised to him and the other children of this former wife. There is an apparent change on the face of the original deed of conveyance, which shows that the name of Alexander Thomas was in the original draft, and that Alexander was erased, and Richard written in place thereof, in a different handwriting. Whether the change was made before the deed was delivered to Richard Thomas or not is not settled by the evidence. By consent the case was tried by the court, and it was agreed that the court's findings as to facts and law should be written, and made part of the record. After hearing the evidence, the court filed the following: "(1) The court finds as a matter of fact that the original deed was made by McAlpin and wife to Alexander Thomas; that it was paid for by Richard Thomas; was made to Alexander by his direction; and was actually delivered by the vendors to him, and never was by him actually delivered to Alexander. (2) It finds that the deed was filed for record in the clerk's office of the chancery court of Hinds county; that, before it was recorded by the clerk, it was withdrawn. The deed was then altered by him, by inserting his own name in the place of Alexander's, and subsequently recorded as altered. (3) It finds as a matter of law that the original deed was thus constructively delivered to Alexander, and he was invested with title. (4) It finds as a matter of fact that Richard took possession of the land the year the deed was made to Alexander, claiming it as his own, asserting title to it openly, and occupying and controlling it till his death. (5) That Alexander acquiesced in this claim of title by his father, and first became the tenant of Williams, and afterwards of his father, attorning to his father, and paying him one bale of cotton for rent. It finds as matter of law that this adverse holding by Richard, and the acquiescence of Alexander, divested the latter of title, and barred his entry. (6) It finds as a matter of fact that said Alexander was, nevertheless, encouraged by his father to improve the land; that he expended \$250 in improving it, under the expecta-

tion in good faith that his father would recognize his right under the original deed, and give him the land; and that, finally, he would set up claim to it under the original deed, in good faith. (7) As a matter of law, it finds that he is entitled to recover the value of the improvements, and, being a tenant from year to year, without notice to quit, otherwise than by suit, is entitled to retain possession at rent he paid to his father in his lifetime. It being agreed by the parties that the value of the land is \$600, it is assessed at that, and judgment is rendered accordingly." Judgment was accordingly rendered for the plaintiff that they recover the lands in controversy and \$40 rent, this being the rent paid by defendant the previous year, and allowing \$250 for improvements to the defendant.

J. K. McNeely and M. M. McLeod, for appellants and cross appellees. H. Peyton and O. M. Williamson, for appellees and cross appellants.

WOODS, J. Not concurring in one point in the views of the learned judge who heard this case below, we are constrained to reverse the judgment. The sixth and seventh findings of the court are erroneous. The appellee Alexander Thomas was a tenant from year to year of Richard Thomas, deceased, who entered under the deed recorded December 15, 1878, and whose rights are correctly found by the court below; and in this action at law Alexander can only recover for improvements made by virtue of a claim to the premises under some deed or contract of purchase, made or acquired in good faith. That Alexander expected in good faith that Richard, his father, would recognize his right under the original deed, and expected that his father would give him the land, and that he finally set up claim to the premises under the original deed, will not meet the conditions imposed by our statute on one seeking compensation for improvements. To make good his claim to compensation for improvements, Richard should have shown that, when he made the improvements, he was claiming the premises under some deed or contract of purchase, made or acquired in good faith, and not that he expected his father would recognize his supposed title to the lands, and give him the same. Alexander was not entitled to compensation for improvements, in our opinion. Furthermore, the death of Richard, and the refusal of Alexander to pay any rent thereafter, terminated his tenancy, and for the year 1891 the plaintiffs below were entitled to recover, not the rent due under the former contract with the deceased landlord, but what the leased premises were shown to be reasonably worth. Because of these errors, unfavorable and unjust to appellants, the judgment must be reversed, and the cause remanded.

(39 Miss. 561)

**COHEA v. MAYOR, ETC., OF CITY OF COFFEEVILLE.**

(Supreme Court of Mississippi. Oct., 1891.)

**DEFECTIVE BRIDGE—NOTICE—CONTRIBUTORY NEGLIGENCE.**

1. In an action against a city for personal injuries resulting from the falling of a bridge, plaintiff must show that the defect was known to the proper authorities; and, if the defect was so hidden or concealed as not to be observable by ordinary care and attention, defendant city is not liable.

2. If plaintiff knew that the bridge was in a dangerous and unsafe condition, and yet undertook to drive over it without apparent necessity, he is guilty of contributory negligence, and cannot recover.

Appeal from circuit court, Yalobusha county; James T. Fant, Judge.

Action by S. H. Cohea against the board of mayor and aldermen of Coffeeville to recover damages for personal injuries sustained by him, and caused by the falling in of a bridge in one of the streets of the town, while plaintiff was crossing it with his wagon and team. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

Within the corporate limits on the road leading from the town there is a trestle four or five feet high, connected at its east end with a bridge over a small creek. Around and alongside this structure is a dirt road crossing the creek below the bridge. At the time the accident happened wagons frequently went this road. Plaintiff and his brother were going out of town with a loaded wagon, and while crossing this trestle the south end of one of the capstalls broke, and the structure declined on that side some two or three feet lower than the other side. The plaintiff was walking along by the side of the wagon. The team, being frightened by the falling bridge, suddenly started, and caught plaintiff between the wheels. The hind wheel, striking him in the back and side, caused the injuries, which are claimed to be permanent. The plaintiff testified that he knew the bridge was unsafe and dangerous some time before this, and that he had called the attention of one of the aldermen to the condition of the bridge, and that his father had also noticed its condition, and had notified the same alderman. Plaintiff also testified that he had gone around the bridge on the dirt road. Defendant's testimony was to the effect that the town authorities knew nothing of the unsafe condition of the bridge. The court instructed the jury for the defendant as follows: "(1) The plaintiff must prove to the satisfaction of the jury that the defect in the trestle was known to the board of mayor and aldermen, or so notorious that it was negligence in them not to know it; and if the jury believe from the evidence that the defect in the timber was so hidden or concealed as not to be observable by ordinary care and attention, they will find for the de-

fendant, even though plaintiff was hurt. (2) If the jury believe from the evidence that the plaintiff knew that the trestlework or bridge was in a dangerous and unsafe condition, and yet undertook to drive over it with his wagon without apparent necessity, he is guilty of contributory negligence, and cannot recover, no matter what injuries he may have sustained." The defendant recovered a verdict and judgment. Plaintiff appealed.

W. A. Roane, for appellant. R. H. Golladay, for appellee.

WOODS, J. The action of the trial court in giving the two instructions asked by the defendant below is assigned for error. The first instruction is brief, simple, and correct. It concedes the liability of the town if its officers had notice of the defect in the bridge, or if the defect was notorious, or if the defect was in the timber of the bridge, and was observable by the use of ordinary care and attention. It is impossible to see how the statement could be well improved, in view of the purpose of the charge. With great brevity and plainness and fairness this charge submitted the law of the case on the defendant's theory, and wisely went no word further. The second instruction given for the town submits with equal brevity and perspicuity the law applicable on the plaintiff's theory and on his own testimony. The jury was told with refreshing conciseness and clearness that the attempt to cross a known dangerous bridge, without apparent necessity, would prevent a recovery if injury befell the plaintiff in the attempt. The evidence warranted the giving of this instruction, and it states the law with as much fairness as precision. We find no reversible error anywhere in the transcript, and the judgment is affirmed.

(39 Miss. 496)

**STATE, to Use of OWEN, v. MARSHALL et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**SHERIFFS—LIABILITY FOR FAILURE TO SERVE ATTACHMENT.**

An attachment against a corporation cannot be levied on the individual property of natural persons composing it; and a sheriff is not liable on his bond for failure to make such levy, though it afterwards turns out that the individuals were liable as partners, owing to a defective organization of the corporation.

Appeal from circuit court, Monroe county; Lock E. Houston, Judge.

Action by the state, to the use of Amanda Owen, against J. Marshall and others, on defendant Marshall's bond as sheriff, for failing and refusing to levy a writ of attachment sued out by her. From a judgment in defendants' favor, plaintiff appeals. Affirmed.



The declaration sets out the bond, and alleges as a breach thereof that on the 18th day of March, 1888, she sued out her writ of attachment against the estate of Morris Gattman, Jacob Gattman, and Myer Gattman, doing business as bankers in the town of Aberdeen under the name and style of Gattman & Co., for the sum of \$800, and placed the same in the hands of J. H. Marshall, sheriff, and directed him to levy it on the homesteads and residences of the said Morris, Jacob, and Myer Gattman. That, if the said writ had been levied as directed, plaintiff would have made her money; but the sheriff willfully refused to levy her writ on said property, but kept the process in his hands, and afterwards levied writs of attachment in favor of other parties, subsequently sued out and delivered to him, upon the said homesteads, which were in due course condemned to the satisfaction of such subsequently sued out writs of attachment, whereby the said plaintiff lost her entire debt. Defendants pleaded several pleas: First. Performance in full, to which plaintiff replied. A second special plea, to which a demurrer was sustained. A third special plea, to which a demurrer was sustained. A fourth special plea, to which a demurrer was overruled, and plaintiff replied. Defendants then filed a second amended plea, to which a demurrer was overruled, and to this plaintiff replied. Defendants then demurred to the two replications of plaintiff to the second and fourth pleas. The court sustained the demurrer, and judgment final was given for defendants. The fourth plea sets out that the property alleged by the declaration to be subject to the attachment was the private property of Morris, Jacob, and Myer Gattman, and was exempt from levy and sale under the attachment, as Gattman & Co. was a corporation. The replication avers that Gattman & Co. were bankers before the suing out of this writ, and had failed, and were attached by plaintiff and a number of other creditors; and that, as there had been no election of officers under any charter, and no complete organization or corporate seal, and as the Gattmans, prior to their failure, in court proceeding and in their private dealings styled themselves sometimes as partners and at other times as a corporation, and for other reasons, there was a doubt as to whether they were a corporation or a partnership. And that, if the sheriff had levied the writ on the property as requested, plaintiff would have gotten satisfaction of her debt; but that, on account of the sheriff's failure to levy same, the property was sold for the satisfaction of other liens obtained subsequently. Plaintiff appealed.

E. H. Bristow and Calhoun & Green, for appellant. Sykes & Richardson, for appellee.

CAMPBELL, C. J. Interpreting the fourth plea as averring that the writ of attachment, for the failure to levy which this action is brought, was against the corporation Gattman & Co., and that the homesteads were the property of the individuals, it is a bar to the action; and the replication is not an answer to it, for the liability of the officer is determinable, not by what may have resulted from the chancery suit, but by the legal aspect presented by the case with which he had to deal at the time when it is alleged that he incurred liability; and it is clear that process against a corporation cannot be legally served on individual property of natural persons composing it. As the fourth plea bars the action, it is useless to say more. Affirmed.

(39 Miss. 80)

#### WYNN v. STONE, Auditor.

(Supreme Court of Mississippi. Oct., 1891.)

#### TAXES—PAYMENT IN LEVEE BONDS AND COUPONS.

Act March 5, 1884, which abolishes levee district No. 1, and permits the state auditor to receive the bonds and coupons issued by such district in payment for levee taxes accruing prior to March 17, 1883, by necessary implication prohibits such bonds and coupons from being thereafter received in payment for state and county taxes; and hence one who, after that date, purchases from the state lands held by it under tax sales, acquires no title, when he gives bonds and coupons of the levee district as payment for state and county taxes due on the land.

Appeal from circuit court, Hinds county; J. B. Harris, Special Judge.

Application for mandamus by J. H. Wynn to compel W. W. Stone, auditor of the state of Mississippi, to convey petitioner certain lands, the title to which petitioner alleges to be in the state of Mississippi. The application was denied, and petitioner appeals. Reversed.

The petitioner avers that on the 18th day of October, 1889, the lands in question were held by the state of Mississippi under sales for taxes theretofore made to the state, and to the No. 1 levee board, and on the day last named the petitioner applied to appellee, auditor, to purchase the lands from the state, and offered the amount necessary under the law to purchase same; that the auditor refused to execute a deed to the petitioner, denying that the lands were held by the state or subject to purchase therefrom. To this petition the auditor replied that all the lands in question were on the 1st day of October, 1884, held under tax sales made prior to April 11, 1876, to the state and the No. 1 levee board, respectively, when E. and S. Virden tendered the state and county taxes for the year 1884 in lawful money of the United States, and the amount of all the other unpaid taxes in the bonds and coupons of the No. 1 levee board, and received therefor a conveyance duly executed, conveying to

them the title of the state and of the levee board to all of the lands, and that none of the lands had ever been held or claimed by the state at any time since such conveyance to the Virdens. To this plea the petitioner replied (1) that the bonds and coupons of the No. 1 levee district mentioned in the plea were on their face made payable in gold coin, and for that reason void; (2) that all the lands mentioned in the plea are situated east of the Tallahatchie river, and south of McIver's creek; i. e. not in the No. 1 levee district. To plaintiff's first replication the defendant rejoined that the No. 1 levee board had made and issued \$1,000,000 of its bonds, all in accordance with the act creating the board, save only that all such bonds were on their respective faces made payable in gold coin. To plaintiff's second replication the defendant demurred, and the plaintiff demurred to defendant's rejoinder. The court sustained the demurrer to the replication, and overruled that to the rejoinder, and, plaintiff declining to plead further, judgment final was rendered, and he appealed.

J. H. Wynn, pro se. Perkins & Percy, for appellee.

CAMPBELL, C. J. After the passage of "An act to repeal an act to redeem and protect from overflow from the river Mississippi certain bottom lands herein described, approved March 17, 1871, and for other purposes," approved March 5, 1884, and found in Acts 1884, p. 184,<sup>1</sup> it was no longer lawful for the auditor of public accounts to receive, in payment for lands sold by him, bonds and coupons of district No. 1, except in payment of levee taxes accrued on such lands prior to March 17, 1883. The language of the act is express that those evidences of debt may be received by the auditor only for levee taxes accrued on those lands up to the time just mentioned; and, upon the rule that the expression of one thing is the exclusion of every other, it must be held that the auditor could no longer receive the bonds and coupons of levee district No. 1, except as authorized by this act. Its purpose is manifest, and its language explicit and free from doubt; and it repeals former laws which made the bonds and coupons of levee district No. 1 receivable for state and county taxes, because it and any former provision to that effect cannot stand together. The

<sup>1</sup>Act March 5, 1884, abolished all levee boards of the levee districts of the state of Mississippi, and provides that the auditor of public accounts, as state auditor, may receive the bonds and coupons of said former levee board of the state of Mississippi, district No. 1, in payment or purchase of lands heretofore sold for the nonpayment of district No. 1 levee taxes, to the extent that said levee taxes are now due and unpaid for all years preceding, up to and including the year ending March 17, 1883.

repugnancy is palpable and irreconcilable, and it seems strange to us that the error could have been considerably committed of supposing that, after the act of March 5, 1884, state and county taxes might be paid by the bonds and coupons mentioned. The act of March 17, 1871, which created levee district No. 1, authorized bonds to be issued, and levied taxes to redeem them for the period of 12 years. The period expired March 17, 1883, and the act of March 5, 1884, cited above, was passed, whereby the district No. 1 was abolished, and its official representatives were extinguished, and all trace of its existence as a levee district as far as possible removed; but, as taxes accrued for levee purposes during the 12 years for which they were levied were a charge on the lands on which they were imposed, it was provided by the act obliterating the district and its belongings that outstanding bonds and coupons of the district should be available in the purchase of the lands at the auditor's office to the extent that they were assumed to be a charge on the lands; that is, for the levee taxes accrued during the period of 12 years ending March 17, 1883,—that far and no further. No longer would the state receive these bonds and coupons for state and county taxes. For years they were made receivable for state and county taxes in the redemption and purchase of these lands according to the several acts on the subject; but now, that the time for which taxes to pay them had been levied had expired, they were in future to be receivable by the auditor, on sale of these lands only for levee taxes accrued under the act of March 17, 1871. This is the unmistakable meaning of the act of March 5, 1884. The mandamus should have been awarded. The court ruled correctly on the questions specifically presented by the pleadings following the plea, but it presents no bar to the petition, and the demurrer should have been extended to it and sustained. Judgment reversed, demurrer sustained to the plea, and cause remanded for defendant to answer over.

(45 La. Ann. 1115)

MOORE et al. v. RINGUET et al. (No. 1,433.)

(Supreme Court of Louisiana. July Term, 1893.)

DISMISSING APPEAL.—JURISDICTIONAL AMOUNT.

Plaintiffs' judgment is for an amount less than \$2,000. The judgment prayed for to rescind and annul the conveyance of the debtor was revocatory, and not en declaration de simulation. In a revocatory action the test of jurisdiction is the amount claimed by the creditor, and not the value of the property the sale of which the plaintiffs seek to have revoked. This court being without jurisdiction *ratione materiae*, the appeal is dismissed.

(Syllabus by the Court.)

Appeal from district court, parish of Calcasieu; G. A. Fournet, Judge.

Creditors' bill by Moore, McKinney & Co. against L. I. Ringuet and another. Defendants had judgment, and plaintiffs appealed. Defendants now move to dismiss the appeal. Motion granted.

Mitchell & Mitchell, for appellants. A. J. Pujo, for appellees.

**BREAUX, J.** The plaintiffs are the creditors of the defendant L. I. Ringuet in the sum of \$849.47, and interest thereon at the rate of 5 per cent. per annum from the 25th day of April, 1892, and for the further sum of \$12, cost of suit, for which they obtained judgment against him on the 30th day of May, 1892. The other defendant, the wife of L. I. Ringuet, after her marriage, more than 25 years since, inherited an amount from the succession of her father and a small sum from her mother's estate. In 1868 the husband, Ringuet, made a dation en paiement to his wife, and declared in the notarial act that the remainder of his indebtedness to her was \$894. In 1879 the wife sold a tract of land in Iberia parish for the sum of \$1,250. In the deed of sale she declared that it was transferred to her by her husband as a dation en paiement as per act before E. Parent, notary public, on the 20th day of August, 1879, and she and other witnesses in her behalf testify that the price was received by the husband, and expended by him. In May, 1892, Ringuet made affidavit before the clerk of the district court of indebtedness to his wife in the sum of \$2,950, which he acknowledged having received and expended for his separate use and benefit. Immediately after, he conveyed all his property, valued by him at the sum of \$2,700, leaving due her \$250. In the act the transfer declares that in the years 1870 and 1871 he made a dation en paiement to his wife of certain property consisting of about 110 acres in satisfaction of the sum of \$1,250, her paraphernal claim. In the paragraph following of the deed of sale he declares that this property conveyed to his wife in part satisfaction of her paraphernal claim was sold to one Thomas Simon for the sum of \$1,250, and appropriated by him, the vendor's husband, after the sale, to his benefit. This is the land to which we have before referred as being situated in the parish of Iberia.

#### Pleadings.

The plaintiffs in their petition allege substantially that the dation en paiement of May, 1892, was a fraudulent device in the interest of the husband to defeat the claims of his creditors; that he was not indebted to his wife, and that she participated in the fraud; that it was a mere simulation; that they will lose their claim should the said dation en paiement not be rescinded and made subject thereto; that the property conveyed for \$2,700 is worth \$5,000; that by this conveyance the husband was left with-

out property, and insolvent. Petitioners pray for judgment against Ringuet and wife revoking and rescinding the said "pretended" dation en paiement, and subjecting "the said property to the creditors of" the said Ringuet, and particularly "to the judgment of your petitioners, herein set forth." The defendant, the wife, in her answer alleges that the conveyance of her property to her by her husband was real and bona fide. She also alleges that there was error in the deed of May, 1892, which she applied to correct. The error, she avers, was in the declaration contained in the deed that her husband made a dation en paiement to her in 1870 or 1871 for the sum of \$1,250; the fact being, she alleges, that the amount was \$2,033, and the date March 20, 1868, which left a balance of \$859.55 due her, together with the \$1,250 sale to Simon, aggregating \$2,109.55. She prays to correct the error alleged, and for judgment recognizing her as owner of the property. The judgment of the district court was pronounced in favor of the defendants; plaintiffs' demand was rejected. From the judgment, plaintiffs appeal. The defendants move to dismiss the appeal on the ground that this court is without jurisdiction *ratione materiae*; that the amount involved is less than \$2,000.

#### On Motion to Dismiss.

If the action is revocatory, this court is without jurisdiction. To determine that the action is en declaration de simulation would involve a decision that no consideration passed, that the title had no element of the real, and that possession was not surrendered under the deed. Conceding for the moment that the defendants have not proven the entire consideration alleged, it does not appear, under the allegations and the proof, that the title is one which does not confer any right at all, and that it is a mere simulation. The plaintiffs judiciously chose to proceed by direct action. The conveyance could not be treated as entirely simulated, for the reason that the defendant Mrs. Ringuet is in possession under a title, and that title is based upon consideration which may not be sufficient to successfully defend against an attack to set it aside as in fraud of creditors, but is sufficiently real to compel creditors to resort to a suit to have it revoked and annulled. It is, to say the least, sufficiently real to escape from being characterized as *corpus sine anima extrinsecus apparet intrinsecus nihil habens*. The wife obviously was a creditor. It is sufficient for us to determine that there is at least an appearance of reality in her claims. The form of the action, and the allegations, taken in their entirety, sustain the conclusion that it is revocatory. The evidence establishes that she was a creditor. The amounts of the credits must be determined by the appellate court having jurisdiction, and errors corrected by it, if any were made, as alleged by defendants. Should

the sale be revoked, the rights of the creditors cannot be ignored. They must be considered and passed upon in a revocatory action. Our conclusion being that the action is revocatory, the amount claimed is the test of our jurisdiction. *Katz v. Gill*, 43 La. Ann. 1041, 10 South. Rep. 364. The supreme court is without jurisdiction of a suit on the part of a creditor, for an amount less than \$2,000, to annul a transfer of property made by his debtor as simulated and fraudulent to subject it to the payment of his claim. *Flower v. Prejean*, 42 La. Ann. 897, 8 South. Rep. 596. The counsel for plaintiffs direct our attention to *Godshaw v. Judges*, 38 La. Ann. 643. The court in that case holds that in an action by a judgment creditor to have the purchase of property declared simulated, and to be in reality for account of the debtor, the value of the property, and not the amount of the judgment, is the matter in dispute. The question in that case was purely one of simulation *vel non*. There was not an appearance of reality in the conveyance. It was charged that the purchaser was an interposed person, and nothing created the impression of reality of the sale. In the other case referred to,—that of *Chaffe v. De Moss*, 37 La. Ann. 186,—it was held that the appellees, who had moved to dismiss, could not successfully invoke the cases of *Loeb v. Arent*, 33 La. Ann. 1086, and *Zuberbier v. Morse*, 36 La. Ann. 970, for the reason that each was revocatory. These cases support defendants' contention, the action being revocatory. In the case to which we have just referred—*Chaffe v. De Moss*, 37 La. Ann. 186—the court expressly held that it is practically the action in declaration of simulation, and not the revocatory action. In the case of *State v. Judges*, 33 La. Ann. 1352,—another case referred to by plaintiffs,—the court held that the effect of "the rule was to have the mortgage canceled on the ground that it was simulated and unreal." The court is without jurisdiction *ratione materiae* to establish the amount of the consideration which is real, and not subject to successful attack on the part of the judgment creditor for an amount not within this court's jurisdiction. The appeal must be dismissed. The appeal is dismissed at the cost of appellants.

(45 La. Ann. 1113)

LANDRY v. LANDRY et al. (No. 1,442.)<sup>1</sup>

(Supreme Court of Louisiana. July Term, 1893.)

EJECTMENT—TITLE TO SUPPORT—PAROL EVIDENCE—DESTROYED RECORDS.

The plaintiff in a petitory action must recover on the strength of his own title, and not on the weakness of defendant's. A party in possession who is charged with holding possession without title will be maintained in the same against one who exhibits no title at all. Parol testimony cannot be received to establish title to immovable property; but when the rec-

ords have been exposed to fire and some destroyed, and others found in a damaged condition, the vendor's testimony can be received to supply the obliterated parts of the deed.

(Syllabus by the Court.)

Appeal from district court, parish of Vermillion; A. C. Allen, Judge.

Action by Aglae Landry against B. Philogene Landry and another to try title to land. There was judgment for defendants, and plaintiff appeals. Affirmed.

L. L. Bourges, for appellant. C. Deballon and Lestie Broussard, for appellees.

McENERY, J. This is a petitory action, the plaintiff claiming ownership of E. ½ of section 22, township 11 S., range 2 E., situated in the parish of Vermillion, and containing 321.66 acres, and valued by plaintiff at \$2,500. She alleges that she is the heir of Marguerite Azella Landry, wife of Maximillian Landry, Jr., deceased; that as such she is entitled to one-half of the succession of said Marguerite Azella Landry; that she was owner in community with Maximillian Landry, her husband, of the above-described property; that one B. Philogene Landry is now in possession of said tract of land; that he took possession of the same, without title, in 1885; that he is a trespasser; and that she is entitled to rent at the rate of \$600 a year from 1st January, 1885, to the 1st January, 1892. She prays to be decreed the owner of one undivided half of said property, and for \$3,600 for rent. The defendant demanded an exhibition of plaintiff's title. She exhibited an abstract of entries, recorded in the parish of Vermillion, certified to by the clerk of court. The abstract shows that Maximillian Landry entered the above-described property April 16, 1860. The defendant set up title by virtue of a sale from Florestin Bourque, June 11, 1881, who some time prior thereto acquired the same at tax sale, which was ratified by Marie Bertrand, widow of Maximillian Landry, Sr. The plaintiff offered in evidence a copy of judgment recognizing her as the heir of Azella Landry, wife of Maximillian Landry, Jr. This judgment decreed that the property inventoried in the succession of Maximillian Landry, Jr., should be declared community property, and the administrator of said succession was ordered to file a full and complete account of his administration on or before the next regular term of court. The inventory of this succession is not in the record. If any account was filed, it has not been offered in evidence. There is nothing in the record to show that the property which is claimed by plaintiff was ever in the succession of Maximillian Landry, Jr. The receipt does not show it, and we think the defendant might have safely rested with the clue of plaintiff's testimony.

Interrogations were propounded to several witnesses, and the answers were objected

<sup>1</sup>Rehearing denied.

to by plaintiff, as being an attempt to prove title to immovable property by parol testimony. The objection was overruled, and the testimony admitted. The answers of the witnesses were in the main an attempt to show title by parol testimony. So far as they were directed to this, they were inadmissible. But the records of the parish of Vermillion had been destroyed by fire, and among the last records was the tax deed to defendant Marie Bertrand, widow of Maximillian Landry, after the alleged tax sale, made a deed to Florestin Bourque of the property in controversy. The part of the deed remaining after its exposure to fire shows that it was made in relation to a prior tax sale. We are of the opinion that her testimony that she had executed this deed to ratify the prior tax sale is admissible, under the circumstances of this case.

The widow of Maximillian Landry, Sr., was in possession of the property in 1878, when she executed this deed. The record forces the belief upon us that Maximillian Landry, Sr., entered this land, and, in the absence of any testimony to show what was done in that succession or the succession of Maximillian Landry, Jr., we cannot presume that she illegally conveyed the land to her vendee, Bourque. The defendant, so the testimony and the record affirm, purchased in good faith from a party whom he believed to be the owner. This vendee purchased from the apparent owner and the party in possession. This title is translativ of property. He and his vendor have been in actual corporeal and civil possession for more than 10 years. The prescription pleaded must therefore prevail. But, independent of this plea on a comparison of titles, the plaintiff exhibits none, and the defendant set out an apparent valid one. The plaintiff, if the defendant's title is weak, cannot avail herself of it, but must present a stronger one. Judgment affirmed.

(32 Fla. 77)

JACKSONVILLE, S. A. & H. R. RY. CO. v. MITCHELL.

(Supreme Court of Florida. Aug. 15, 1893.)

CARRIERS OF PASSENGERS — ACTION BY HUSBAND FOR LOSS OF WIFE'S BAGGAGE.

Where husband and wife are traveling together over a railway whose business it is to carry passengers and their baggage, and the husband purchases the tickets representing the fares of himself and wife, and has his own and his wife's baggage checked to the point of their destination, himself receiving the checks representing the railway's receipts for such baggage, and the railway company loses or fails to deliver at the agreed point the trunk thus checked of the wife, containing her wearing apparel and that of her child, *held* that, under these circumstances the husband can, in his own name alone, without joining his wife, maintain an action for damages upon the contract thus made with him for the carriage of himself and wife and their baggage, for the breach thereof by the railway in failing to deliver the baggage of the wife; that in such

case, although the general ownership of the lost trunk and its contents is in the wife, the husband has such a special ownership therein as will entitle him to recover, in his own name alone, the value of such lost trunk and its contents as damages for the breach of the contract made with him for its safe carriage and delivery. *Held*, further, that a recovery by the husband in such case is a complete bar to any subsequent suit upon the same cause of action that might be instituted by the wife.

(Syllabus by the Court.)

Appeal from circuit court, St. Johns county; James M. Baker, Judge.

Action in assumpsit by Henry Mitchell against the Jacksonville, St. Augustine & Halifax River Railway Company. Plaintiff had judgment, and defendant appeals. Affirmed.

J. R. Parrott and T. M. Day, Jr., for appellant. J. W. Henderson, for appellee.

TAYLOR, J. The appellee sued the appellant in assumpsit in the circuit court for St. Johns county, the declaration being as follows: "For that the plaintiff, at the defendant's request, on or about the 5th day of December, A. D. 1885, delivered to the defendant, then being a common carrier of passengers and their baggage for hire, and for which baggage the defendant gave to the plaintiff a receipt therefor in the form of a metal check, the plaintiff being a passenger for hire at the time from Jacksonville, Fla., to St. Augustine, Fla., on a regular passenger train of the defendant, baggage of the plaintiff to be taken care of and safely and securely carried by the defendant as such common carrier from Jacksonville, Fla., to St. Augustine, Fla., and then to be delivered by the defendant to the plaintiff for reward in that behalf; yet the defendant did not take care of and safely and securely carry and deliver the said baggage, or any part thereof, for the plaintiff, but, through negligence and want of care and skill, failed to carry and deliver the same, to the plaintiff's damage of \$300, and therefore he brings suit." The bill of particulars attached to the declaration, as an exhibition of the contents of the lost trunk, showed that it contained chiefly the wearing apparel of the wife and child of plaintiff. To this declaration the defendant pleaded: (1) Nonassumpsit; (2) not guilty. The trial resulted in a judgment for the plaintiff in the sum of \$167.24, inclusive of costs. From this judgment the defendant appeals.

The errors assigned present practically but one point for decision. The suit is brought in the name of Henry Mitchell, and is in form, we think, *ex contractu*, for the breach by the defendant railway company of its undertaking, for hire, safely to carry the plaintiff's baggage from Jacksonville to St. Augustine, and, at the latter point, to deliver the same to the plaintiff as per its contract. The proof shows that the plaintiff and his wife were traveling

together from Jacksonville to St. Augustine, their baggage consisting of two trunks. At the defendant's Jacksonville depot the plaintiff bought two tickets over the defendant's road to St. Augustine, and had his two trunks checked for the latter point, the defendant's baggage master delivering to him therefor two of the metallic checks in customary use as receipts for baggage. One of the trunks was safely delivered to the plaintiff at St. Augustine, but the other never came to hand. At the trial the lost trunk and the major part of its contents, consisting chiefly of the wearing apparel of the plaintiff's wife and child, were proven to be the property of the plaintiff's wife. The substance of the defendant's contention in its motion for new trial, and in the instructions requested by it to be given to the jury and that were refused by the court, and in the argument here, is that there was such a variance between the allegations as to the ownership of the lost trunk in the declaration and the developments disclosed in the proofs that the plaintiff could not recover in a suit instituted by him alone, but that his wife, to whom the lost trunk and its contents belonged, should have been joined as a party plaintiff before recovery could be properly had upon the proofs made. As before stated, we think the suit is in form *ex contractu* for damages resulting to the plaintiff from the breach by the defendant of its contract made with the plaintiff to carry him and his wife and their baggage safely from one point on their road to another, and there safely to deliver to him such baggage. The contract, from the proofs, was made with the plaintiff. He purchased the tickets representing the fare charged by the defendant for such carriage, and had the trunks checked, and to him the defendant delivered its receipts for such baggage in the form of metallic checks. The defendant has violated its contract so made with the plaintiff, in its failure to deliver one of the trunks, as it agreed with the plaintiff to do, at the point agreed upon. For this breach the plaintiff sues. The issue presented in the case was, did the defendant so contract, and did it carry out its agreement, or did it violate it? Those were the vital issues in the cause, and, while the ownership of the goods lost, when undertaken to be carried as baggage, does, in some cases, play some part in suits brought for the loss thereof, still, in a case like this, it is of minor importance, the real issue being the breach of the contract, the goods lost and their value coming in chiefly as a guide to the admeasurement of the damage sustained in consequence of the breach of the contract. In such case, where there is a special property in the goods to be carried resting in one, although the general property therein rests in another, such special ownership therein is sufficient to warrant the former in maintaining a suit in his own name alone

for the redress of a violated contract, made with him, to carry and deliver such goods. *Railroad Co. v. Frame*, 6 Colo. 332; *Freeman v. Birch*, 3 Adol. & E. (N. S.) 835, note; *Blanchard v. Page*, 8 Gray, 281; *Dunlop v. Lambert*, 6 Clark & F. 600; *Railway Co. v. McComas*, 33 Ill. 185. And a recovery had in such case by the person having such special ownership will be a complete bar to any subsequent suit upon the same cause of action that may be instituted by the person having the general property in the goods lost. *Green v. Clarke*, 13 Barb. 57; *Railway Co. v. McComas*, *supra*; *Railroad Co. v. Frame*, *supra*; *Owners of Steamboat v. McCraw*, 26 Ala. 189.

Our statute, (section 3, p. 754. *McClell Dig.*; section 2071, *Rev. St.*.) while it permits the separate and independent ownership by the wife of all kinds of property, real and personal, expressly provides that her property shall remain in the care and management of her husband. In this case the proof shows that while the wife, with her baggage, was traveling over the defendant's road in the company and under the care of her husband, the defendant carrier contracted with the husband, he paying the fares therefor, to carry him and his wife and their baggage, and their baggage safely to deliver. It has failed to comply with its contract in not carrying and delivering the trunk of the wife. Under these circumstances the husband has such a special ownership in the lost trunk and its contents as authorizes him to maintain the action, as it has been instituted, in his own name alone. From this view of the case, there was no error in the instructions given to the jury, and none in the refusal of those discarded. From the proofs we do not think the damages found by the jury were excessive.

The judgment appealed from is affirmed.

(36 Ala. 454)

CHAMBERS et al. v. CHAMBERS et al.  
(Supreme Court of Alabama. July 27, 1893.)

TRUSTS—CONSTRUCTIVE—LARCENY.

Intestate, during his last illness, had certain money, books, and papers in a safe in his house. His daughter M., being alone with him, asked him for the combination. He told her it was in his coat pocket, but refused to let her or any one else have it before he died. While he was asleep, M. took some papers from his pocket, and, with her brother G., got the doctor to open the safe. They took from it the money, books, and papers, in the doctor's presence, and put them in a bag which M. kept. Some days after, intestate being dead, they divided the property between themselves and their sister L., M. keeping a paper in which intestate had directed how his property should be distributed. A bill against these three, by two other sons of intestate, who had taken out letters on his estate, alleged these facts, and that respondents had spent part of the money, were insolvent, or about to be, and, unless prevented, would squander the whole, to the loss of the other heirs; that complainants had no adequate remedy at law, because respondents kept the goods concealed; and, prayed

for a receiver, and that respondents surrender the property to him, and account for such as they had disposed of. *Held*, that respondents were not trustees in any sense, but mere trespassers or larcenors, and that complainants must be remitted to their remedy at law.

Appeal from chancery court, Barbour county; John A. Foster, Chancellor.

Bill in equity by J. W. Chambers and W. H. Chambers, administrators of the estate of Isaac H. Chambers, deceased, against George H. Chambers, Mary A. Chambers, and Malinda Chambers. Demurrer to bill overruled. Respondents appeal. Reversed.

Alston & Peach and A. H. Merrill, for appellants. A. A. Evans, for appellees.

MCOLLELLAN, J. This bill is exhibited by J. W. Chambers and W. H. Chambers, as the administrators of the estate of Isaac H. Chambers, deceased, against George H. Chambers, Mary A. Chambers, and Malinda Chambers, who are, as are also the complainants, heirs at law and children of the intestate. The case made by its averments is this: Isaac H. Chambers, during his last illness, had at his residence, but in a different room from that in which he lay, a fireproof combination lock safe, in which he kept a considerable sum of money,—about \$4,000,—some account books, and choses in action; a mortgage evidencing and securing an indebtedness, amounting to about \$1,200, of said George Chambers to him, being among the latter. On the forenoon of the day preceding his death, said Mary Chambers, being alone in the room with her father, “asked him for the combination to his safe, stating certain reasons for wanting it. He told her that the paper with the combination on it was in his coat pocket, but refused to let her or any one else have it before he died.” Afterwards, when he fell asleep, said Mary took some papers from said coat pocket, and complainants assert their belief that the paper containing the combination was among them. On the afternoon of the same day, the said Mary and her brother George Chambers “went into the room where the safe was, and locked all the doors by which an entrance could be obtained into said room, and, having the combination then in their possession, tried for a long time to unlock the safe;” but, failing to do so, they requested Dr. Patterson, who was about leaving the premises, to come into the room, and then asked him to “see if he could unlock the combination to said safe,” assuring him that they had permission to open it. Patterson then unlocked the safe, and the said George and Mary, in his presence, took therefrom said money, books, papers, and mortgage, and put the same in a bag of which said Mary retained possession. Four or five days after this, and three or four days after the death of Isaac H. Chambers, “the said George and Mary Chambers divided said papers and money as follows: Giving the said George Chambers

\$1,000 in money, said mortgage, and an account book; to the said Mary Chambers, \$1,480 in money; and to the said Malinda Chambers \$1,200 in money; and the said Mary Chambers kept possession of a paper which the said Isaac H. Chambers had left in the safe, directing how his property should be divided after his death.” George Chambers is wholly insolvent; Mary Chambers owns nothing, except her interest in said estate, which will not amount to more than four or five hundred dollars; and said Malinda is not worth the amount of \$1,200, and complainants express a fear that she will soon be totally insolvent. At the time of filing the bill, Mary Chambers had spent \$230 of the money apportioned to her, George had expended \$500 of his share, and Malinda had expended a small part—about \$70—of the \$1,200 which were allotted to her in the division between the three; and complainants aver that, “if they are permitted to keep possession of said money, etc., they will waste and squander the entire sum, and it will be wholly lost to the rest of the heirs of the estate.” It is further alleged that the respondents “lay pretended claims to the amounts severally held by them, all of which are entirely false and without foundation,” and that complainants have not an adequate remedy at law, for the reason that said property is kept concealed by the defendants, so that it cannot be levied upon by any means afforded by a court of law. The prayer is for the appointment of a receiver to take charge of said money, account books, mortgage, and papers pending the suit; that an order be passed requiring the respondents to immediately deliver said property into the hands of the receiver, etc.; that they be required to set forth an account of what of said property they have disposed of in any way, and a list of the persons to whom they or either of them have loaned any of said property; and that, upon final hearing, said property be decreed to belong to complainants, as such administrators, as trust funds for the purpose of administration; and that the same be delivered into their hands, etc. Answer on oath was waived. Respondents demurred to the bill, and assigned the following grounds: “(1) The bill shows a larceny or trespass in taking the money and other things out of the safe of Isaac H. Chambers in his lifetime, and, if complainants had any rights, they have an adequate and complete remedy at law. (2) The bill nowhere alleges any fraud on the part of the defendants whereby a trust might be created. (3) The bill nowhere alleges any confidence or trust reposed in the defendants by Isaac H. Chambers, deceased, to give the complainants, who have no more rights than their intestate would have had if he had lived, the remedy here invoked. (4) The bill shows on its face that, as to the money alleged to have been taken from the iron safe in the lifetime of Isaac H. Chambers, deceased, if the complainants have any rights

as to the money, they had an adequate and complete remedy at law. (5) That, on the allegations of the bill, it appears that this court has no jurisdiction of the subject-matter about which complaint is made in this bill." The court overruled this demurrer, and from the decree in that behalf this appeal is prosecuted.

It is insisted for appellees that the facts averred in the bill involve a charge of fraud against the respondents, against which equity will relieve, because of the absence of an adequate legal remedy, and also that, on the case made, the respondents are trustees *de son tort* of the money and choses in action in controversy for the estate of Isaac H. Chambers, deceased. Both these contentions are, in our opinion, unsound. The facts present no case of fraud, but wholly a case of simple trespass or larceny. There was no undue influence resorted to to get possession of the property, no overreaching, no false representations, or fraudulent concealment practiced as means of acquiring the possession and control of the money and papers. All that was done, as the facts are now stated, amounted only to the surreptitious abstraction of the property from Isaac H. Chambers' safe without his knowledge or consent; and surely this can be no more a fraud in legal contemplation than had the respondents been casual strangers to Chambers, and had unlocked his stable, and taken and carried away his horse *animo furandi*. It is equally clear that the transaction involved no element of an express trust. No trust or confidence was reposed in the respondents by Chambers in respect of this property. George and Mary Chambers secured possession of the property in the lifetime of the owner, not only without his consent or knowledge even, but against his expressed wish and purpose. He not only did not intend that they should take the property with the understanding that they should dispose of it in a certain way, or hold it for certain purposes, but he did not consent to their possession of it at all. Every material element of an express trust is lacking. Does the transaction involve a constructive trust? It is too clear for much discussion that, considered as between the respondents and Isaac H. Chambers in his lifetime, no such trust can be evolved out of the premises. Had the respondents acquired the title to this property by fraud, they would have been constructive trustees for the benefit of Isaac H. Chambers, while he lived, and for his estate now. But they clearly acquired no title to the property by fraud or otherwise. They have no title to it now, and have, as we have seen, committed no fraud, but rather a trespass or larceny. Clearly, too, if the property, when they intermeddled with and acquired the possession of it, was trust property, and they had notice of the fact that it was trust property, they would be held to have taken it subject to the trust, and thereby to have made themselves trustees in in-

vitum. But at that time the property had no semblance of a trust character. It was simply held and owned by Isaac H. Chambers in his own right, and to his own beneficial use. To hold that the respondents, by depriving him, not of his title,—for that, of course, remained in him,—but of his possession and use, became trustees for his benefit, would be to convert all wrongful possessions into trust estates, and all persons who tortiously acquire the possession of the property of another into trustees for the owner,—a result which finds no support in principle or authority. An essential element of all trusts is a use in a person other than the trustee; or rather, since the statute of uses, a trust is a use not executed into a legal estate. Not only was this element wholly wanting in the case as it stood between George and Mary Chambers, on the one hand, and Isaac H. Chambers, on the other, they, on the facts averred, holding this property, not to the use of another, but for their own benefit and behoof as joint tortfeasors, but the further essential element of a title in them to feed uses, so to speak, is not at all involved. Very clearly, they were not trustees to Isaac H. Chambers, by construction or otherwise. They simply held the possession of this property at the time of his death as the result of a purely wrongful caption made for their own benefit, and involving no other duties or obligations upon them than would have rested on any other person who had, without pretense of right or suggestion of other than ulterior selfish purposes, seized or stolen the property in question. Isaac H. Chambers had a clear right to sue them in trover, or in detinue upon identification, but he had no standing in chancery to invoke the execution of a trust; and it will not be contended that his representatives, on the facts as now averred, had any other or different rights or remedies than were his while he lived. Had what occurred taken place after his death,—had these respondents then intermeddled with the assets of his estate, and assumed to dispose of the same by way of administration on his estate,—clearly they could be proceeded against as trustees *de son tort*, for such they would have made themselves, because of the then trust character of the property, which would have continued impressed upon it in their hands; but that is not the case made by the bill. Of course, the mere fact that complainants' legal remedies would prove abortive because of the insolvency of the respondents cannot impart equity to the bill. There must be some ground of equity jurisdiction stated, and that inadequacy of legal remedies which results from the impotency of process out of courts of law can never be a basis for equitable interposition; and we are constrained to hold it to be without equity, and, of consequence, that the chancellor erred in overruling the demurrer. It may be that, if George and Mary Chambers took possession of the money and papers in the lifetime of Isaac H., not for the



purpose of conversion to their own use simply, or of making such disposition of it as they would of their own property, but for the purpose of holding it, till after his death, as his property, and then dividing and distributing it in accordance with written directions left by him, and if they held it in this way and for this purpose till a time subsequent to his death, and then assumed to divide and distribute it as assets of his estate, they and Malinda Chambers would, on these facts, be held to be trustees. We do not decide this, however, and have referred to this possible aspect of the case because there is a passing statement in the bill which leads us to infer the property may have been taken and held in this way and for this purpose; but, if so, the facts are not averred.

Reversed and remanded.

(89 Ala. 208)

REESE et al. v. NOLEN.

(Supreme Court of Alabama. July 27, 1893.)

WILLS—PROBATE AND CONTEST.

1. The contestant in probate of a will cannot object to the probate on the ground that one of the next of kin was not cited.

2. The next of kin, when cited to the probate of a will, do not, without some affirmative action on their part, become parties to the contest, so as to give them a right to appeal from the decision admitting the will to probate.

3. Code, § 1982, requires that if it appear on proof taken that the will was duly executed, the judge shall reduce the testimony of the witnesses to writing, which shall be signed by the witnesses, and recorded with the will. The record showed that the subscribing witnesses were examined on trial of the contest before the judge, and set out the substance of their testimony as to due execution, and the judge's order, based on that and other evidence, admitting the will to probate, and for its recording with all other papers on file in the case. Held a substantial compliance with the law.

Appeal from probate court, Chambers county; Lloyd Robertson, Judge.

On the 17th day of November, 1892, Richard Nolen filed for probate in the probate court of Chambers county a paper purporting to be the last will of Peggy Nolen, his deceased wife. The petitioner made known that Jack Reese, Sarah Reese, Julata Reese, and Annie Cherry, wife of Gibson Cherry, were the brother and sisters and next of kin of said Peggy Nolen, whose age and places of residence were stated. On the 10th day of December, 1892, Julata Reese, claiming to be a sister and an heir at law of the deceased, filed her grounds of contest of said will, praying that an issue be made up between said Richard Nolen and herself, and that a day be set for the trial of the question as to the validity of the paper filed. The 23d day of January, 1893, was set as the day on which to try said issue. On that day an issue was made up between the said Richard Nolen, as proponent, plaintiff, and the said Julata Reese, contestant, defendant, and a trial was had between them on

issue joined, the result of which was that the court found the issues in favor of the proponent, and established said will, and admitted the same to probate in said court. The judgment entry recites "that notice of said application, and of the time appointed for hearing the same, has been given, in pursuance of law, to all the next of kin of said Peggy Nolen, deceased, by citations personally served on said Julata Reese, Sarah Reese, and Anna Cherry, as next of kin of said Peggy Nolen, deceased." The record does not show that any of the parties who were cited as the next of kin and heirs of deceased, except Julata Reese, appeared, and were made parties to, or in any wise participated in, said trial of the contest of said will. On February 20, 1893, Julata Reese, Jack Reese, Sarah Reese, and Anna Cherry, by their attorneys, filed a paper in the probate court, stating that they "take an appeal from the decree rendered in said court on the 23d day of January, 1893, admitting to record and probate the will of Peggy Nolen, deceased, to the supreme court of Alabama," etc. These parties appear by their attorneys in this court, and assign errors together, and Jack Reese assigns the same errors separately. The errors assigned are that Jack Reese, an heir at law and one of the next of kin of testator, had no notice of the application to prove said will, and that the testimony of the witnesses proving that the will was duly executed was not reduced to writing, and signed by them, as required by section 1982 of the Code. Affirmed.

Robinson & Duke, for appellant. W. H. Thomas and J. M. Chilton, for appellees.

HARALSON, J. It appears on the face of the record in this case that the will of the testator, Peggy Nolen, deceased, was propounded for probate in the probate court of Chambers county by Richard Nolen, the husband and sole legatee and devisee of said testator; that Julata Reese, one of the next of kin and heirs of said Peggy Nolen, filed her objections in said probate court to the probate of said will; that an issue was made up under the direction of the court between said Richard Nolen as plaintiff, and the said Julata Reese, contestant, as defendant, which was tried between them in said court, which resulted in a judgment of said court in favor of the validity of said will, and the same was duly admitted to probate. To this contest none of the persons, except Julata Reese, who appear here as defendants, were parties, or, so far as appears, had anything to do with the proceedings in said court to try the validity of said will. The judgment entry recites that "notice of the said application, [to probate said will,] and of the time appointed for hearing the same, has been given, in pursuance of law, to all the next of kin of said Peggy Nolen, deceased, by citations personally served on said Julata

Reese, Sarah Reese, and Anna Cherry, as next of kin of said Peggy Nolen, deceased." The names of these persons and that of Jack Reese, together with their respective ages and residences, were given in the application of the proponent for the probate of the will; but it does not appear that the said Jack Reese ever had any notice of said application, or of the time and place for hearing the same. In *Blakey v. Blakey*, 33 Ala. 616, it was said: "When a will is propounded for probate, the proceeding is in rem. The object of the statute which requires that notice of the application shall be given to the widow and next of kin of the testator is that such persons may, if they choose, make themselves parties to the proceeding. When notified, they have the option to stand by passively or take an active part on either side. But they cannot be considered parties to the suit unless they come forward, and by some affirmative act engage in the litigation; hence, when an issue is formed in the probate court, between the proponent and persons contesting the will, the former is deemed the plaintiff and the latter are considered the defendants. They alone are parties to the suit." *Leslie v. Sims*, 39 Ala. 161. Until made parties, they cannot be heard here on appeal. *May v. Courtney*, 47 Ala. 185; *Walker v. Jones*, 23 Ala. 448. Such persons are not concluded, however, by the decree of the probate court, to which they were not parties. The practice in such cases has long been settled in this state. Though they cannot sue out an appeal without being parties, they may, by petition to the probate court, propound their interest, and, after notice to the party having an interest, have themselves made parties to such decree, so as to prosecute an appeal therefrom. *Clemens v. Patterson*, 38 Ala. 721; *Hall v. Hall*, 47 Ala. 295; *Lyons v. Hamner*, 84 Ala. 197, 4 South. Rep. 26; *Kumpe v. Coons*, 63 Ala. 455; 1 Brick. Dig. p. 92, § 129. The party to the contest in the probate court, *Julata Reese*, has no ground of complaint that Jack Reese, one of the next of kin of testator, had no notice of the application to probate the will. Its probate, upon a proper application, without notice to any of the parties entitled thereto, would not be void, but merely voidable. The failure to give such notice is merely irregularity. *Hall v. Hall*, supra; *Otis v. Dargan*, 53 Ala. 185. The provisions of section 1982 of the Code, requiring, if it appears on the proof taken before the judge of probate that the will was duly executed, that the testimony of the witnesses be reduced to writing by the judge, signed by the witnesses, and, with the will, recorded in a book provided for the purpose, are also directory, and a failure to comply therewith will not avoid the probate. In this case it appears on the face of the record that the subscribing witnesses were examined on the trial of the contest before the judge, and the substance

of their testimony is set out, showing the due execution of the will, and upon their evidence and the other evidence it was ordered that the will be admitted to probate, and declared to be duly proven as the last will and testament of said Peggy Nolen, and that said will and all other papers on file relating to the proceeding be recorded. This answers substantially the requirements of that section. It follows that the appeal must be dismissed as to all the appellants except *Julata Reese*, and as to her the judgment of the probate court admitting said will to probate is affirmed.

(101 Ala. 411)

JORDAN et ux. v. GARNER et al.

(Supreme Court of Alabama. June 22, 1893.)

TRUSTS—SUIT TO ESTABLISH—EVIDENCE.

In a suit to establish a trust in land, complainant claimed that he bought it by parol agreement; that defendant loaned him money to make the cash payment, and became security for deferred payments; and that title was taken in defendant's name to secure him, he agreeing to convey to complainant on repayment of his loan and of the balance of the price. The only evidence to establish these facts was the testimony of complainant and persons who derived their information from him. The testimony of defendant, the vendor, and the person who took the acknowledgment sustained the claim of defendant that he made the purchase himself, and that he had merely made a parol agreement to sell an interest to complainant. Moreover complainant knew of sales of parts of the land by defendant, and made no objection or claim. *Held*, that the bill was properly dismissed, as unsupported by the evidence.

Appeal from chancery court, Dale county; John A. Foster, Chancellor.

Action by E. R. Jordan and Mattie Jordan, his wife, against Bartow Garner and John McNair, to establish a parol trust in certain land, and to vest the title in plaintiffs. From a decree dismissing their bill, plaintiffs appeal. Affirmed.

Borders & Carmichael and W. D. Roberts, for appellants. H. H. Blackman, for appellees.

COLEMAN, J. The case made by complainants' bill is that they verbally contracted with one Mrs. Gray to purchase a certain lot of land from her, and, not having the means to make the cash payment required, procured Bartow Garner to advance as a loan to them the cash payment, and to become surety for the deferred payment; that, to secure Bartow Garner against loss, it was agreed that the deed be executed direct to Garner, who should reconvey to plaintiffs upon being repaid the loan or advance made by him as the cash payment. The bill then avers the payment by complainants of the deferred payment for the land, and also the payment of the loan or advance to Garner. The prayer of the bill is that the title be invested in plaintiffs. Garner sold the land

to different parties, who are made parties defendant, and who, it is charged, purchased with a knowledge of complainants' equities. The bill has equity, and, upon proof of the averments, the complainants would be entitled to relief. *Bates v. Kelly*, 80 Ala. 142. The answers deny all the material averments of the bill. *Bartow Garner*, in his answer, claims that he purchased the land for himself and on his own account; that he made the cash payment, and executed his note for the deferred payment, which he paid at maturity for himself, with his own money; that *Jordan* voluntarily offered to sign the note for the deferred payment, which offer he did not decline, but that his name added no value to the note. He further answers that he did verbally promise *Jordan* to sell him the lands, and that he held the land until *Jordan* satisfied him that he would not be able to pay him for the land and to dispose of it. *Garner's* vendee answers, and states that, before concluding his purchase, he spoke to *Jordan*, and that *Jordan* referred him to *Garner* as the proper person with whom to contract, and set up no claim to the land. The evidence shows the lots have greatly increased in value. The answers set up a complete defense to complainants' bill. There is no difficulty in the law of the case. There is no question of a legal conditional sale made by the pleadings or the evidence, and this question will not be considered. It is not pretended that there was any written memorandum of any agreement between *Garner* and the complainants, or either of them. Before a deed of conveyance of lands, absolute in its terms, will be declared a mortgage or security for a debt, or a resulting trust in the lands will be declared upon parol evidence, it must be clear and satisfactory. *Adams v. Pilcher*, 92 Ala. 474, 8 South. Rep. 757; *Peagler v. Stabler*, 91 Ala. 308, 9 South. Rep. 157; *Cosby v. Buchanan*, 81 Ala. 574, 1 South. Rep. 898; *Mitchell v. Wellman*, 80 Ala. 16. There is no evidence in the record tending to show that *Mattie Jordan*, the wife of *E. R. Jordan*, owns any interest in the lands, evidenced by any paper title, or by the payment of any part of the purchase money, or by any parol or written agreement with *Garner*. Her claim is that she and her husband were equally interested in the parol agreement for the purchase of the land from *Mrs. Gray*, and that it was understood between her and her husband that she was to be equally benefited in the cash advanced as a loan by *Bartow Garner*. It is not pretended that respondents had any notice of her claims. Unless her husband, *E. R. Jordan*, proves his case, she is not entitled to any consideration. Whether she has any enforceable right against her husband will not be considered, as this question does not concern the respondents. The testimony of *E. R. Jordan* fully sustains the averments of his bill. That of his wife, mother-in-law, and sister-in-law, on their direct ex-

amination, goes far to sustain him, but scrutinizing their testimony elicited on cross-examination, and comparing it with other testimony, it is clear that the material facts testified to by them are mere hearsay, and derived from *Jordan* himself. They were not present, and knew of no agreement, of their own knowledge, that *Garner* advanced the cash payment for the land as a loan. They were not present, and do not know, further than was told them by *E. R. Jordan*, of any payment made at any time by *E. R. Jordan*, either to *Mrs. Gray*, from whom the land was purchased, or to *Bartow Garner*. On the other hand, the evidence of *Garner*, that of the justice of the peace who was present when the cash payment was made, and who took the acknowledgment of the deed, and of *Mrs. Gray* herself, the vendor, sustains the averments of the answer. In addition, the evidence of *McNair* that *Jordan* set up no claim to the land, and referred him to *Garner* as the proper person from whom to purchase, and the further fact that *Jordan* knew of the sale of the lands by *Garner*, witnessed valuable improvements erected thereon by the purchasers without objection or claim, are conclusive facts to our minds that he is not entitled to relief. There is no error in the record, and the decree of the lower court must be affirmed.

(100 Ala. 612)

## HODGES et al. v. THOMPSON.

(Supreme Court of Alabama. June 22, 1893.)

SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — TENDER OF PRICE — EQUITY — AMENDMENT OF BILL.

1. An agreement to make a final payment on land for the vendee, and take the title, and, on repayment by him of said sum, with interest and expenses, to convey to him, is enforceable in equity, though not in writing.

2. A bill to enforce conveyance from one who has taken title to the land, as security for an advance of the final payment, is in the nature of a bill to redeem from a mortgage, and need not allege tender, but merely present readiness and willingness to pay.

3. A demurrer cannot be taken to the "amendment" of a bill, but only to "a bill as amended." The amendment need not state a cause of action apart from the rest of the bill.

Appeal from chancery court, Tuscaloosa county; *Thomas Cobbs*, Chancellor.

This is an appeal prosecuted by the respondents from a decree of the chancellor overruling their demurrers to the original bill and the amended bill. Affirmed.

*J. J. Mayfield* and *M. Amoson*, for appellants. *Wm. Cochran Fitts*, for appellee.

*McOLELLAN*, *J. James A. Thompson, Sr.*, is complainant in this bill. The administrator, *Hodges*, and the heirs of *Peter Thompson*, deceased, are the respondents. The purpose of the bill is, in brief, to have the legal title to a certain tract of land divested out of said heirs, and invested in the complainant

To this end its averments present the following case: In 1873, complainant purchased the land in question from one Palmer, at the price of \$3,000, paying \$500 in cash, and agreeing to pay the balance in five equal annual installments, with interest, and took Palmer's bond for title on payment in full. The vendor did not insist upon strict performance as to these deferred payments, but was content "so long as the interest was promptly paid and the original debt gradually reduced." Upon his death, however, in 1885, his administrator, one Baker, "soon became diligent about making collection of the balance of the purchase money, \* \* \* and about closing the matter up, and, upon a statement of the account in the fall of the year 1886, it was found that the amount remaining due and unpaid was approximately \$850; but, because of a certain misdescription and misunderstanding by which said Palmer at the time of the sale had included more land than he had a right to convey, the sum of \$500 was agreed to be fairly the amount remaining due and necessary to satisfy and extinguish both principal and interest." Complainant, who is the father of said Peter Thompson, had taken possession of the land in 1873, made a home upon it, and has continued to live there with a younger son and several daughters, who are the brother and sisters, respectively, of said Peter. Complainant was unable to pay said balance of \$500. At this juncture, Peter, for the purpose of saving the place as a home for his father and sisters, agreed to pay off said balance of \$500, take the conveyance from Palmer's representatives and heirs to himself, allow complainant and his daughters to use and occupy the place as a home, and upon complainant's "repaying to him the amount of said last payment so made and paid by said Peter Thompson, to wit, the sum of five hundred dollars, with the legal rate of interest from the date of said payment to Baker, together with all actual expenses in the matter, that, upon such sum being so paid or tendered to him by his father, the complainant, at any time, he, said Peter Thompson, would make a conveyance vesting the same absolutely in him." This agreement was carried out, except in respect of its stipulations for repayment to and conveyance by Peter. Peter Thompson paid the money (\$500) to the representatives of Palmer; complainant surrendered his title bond to them; and they conveyed the land to Peter, under and in consonance with the foregoing agreement and understanding of the parties. Complainant was unable to repay said sum of \$500, with interest and expenses, to said Peter in the lifetime of the latter, but had the necessary funds to that end at the time of filing this bill, on December 12, 1889, and the bill avers that complainant "is ready, able, and willing to make payment of said amount, and hereby makes proffer to promptly pay or repay the same when, by so doing, a proper and suffi-

cient conveyance can and will be made, reconveying and vesting the title to said place and property in your complainant, as the said Peter Thompson in his lifetime agreed should be done." By an amendment to the bill, allowed on September 28, 1891, it is averred that, in the fall of 1889, complainant, through his son and agent, John S. Thompson, offered to pay the administrator of said Peter Thompson, and make full satisfaction of the amount, with interest, due the estate of Peter Thompson, deceased, growing out of said above-described land transaction. The prayer of the bill is that, upon final hearing, a decree be passed directing the register of the court, on the payment of said sum of \$500, with the interest thereon and all expenses, promptly and according to whatever order the court might see fit, "to make, execute, and deliver to your complainant a deed and paper conveyance, vesting the title to the said premises in your complainant in fee simple;" and the bill also contains a general prayer for relief, if complainant is mistaken as to the relief specially prayed. Demurrers were interposed by Hodges, the administrator, as follows: (1) The bill shows on its face that the agreement between complainant and Peter Thompson, was not in writing, signed by said Peter Thompson, or his agent or attorney lawfully authorized thereto in writing, and said agreement was therefore void, and of no effect, and cannot be enforced. (2) The complainant does not offer to do equity as to this defendant by paying into court the money he claims to be due, with interest. (3) The bill does not show that complainant has made a tender to this defendant, or any one authorized to receive the money, of the amount he claimed to be due to the estate of Peter Thompson, deceased. (4) That the facts set up in the bill as amended fail to show that said lands are or were charged with any equity in favor of complainant. (5) That the averment of tender intended to be made in the amended bill is insufficient. The chancellor overruled these demurrers severally, and from his decree in that behalf this appeal is prosecuted.

The case made by the bill on its abstract merits is clearly within a well-established principle of equity jurisprudence often recognized and declared by this court. It is this: Where one person advances money to another by way of a loan, through a payment to a third person, for land which the borrower has purchased or is purchasing, and, to secure the loan, the lender takes the title of the land to himself, with the agreement and understanding between him and the real purchaser that he will reconvey to the latter on repayment of the money advanced, equity will declare the holder of the title a trustee thereof for the purchaser, and compel him to discharge the trust by the reconveyance stipulated for upon the repayment to him of the money to secure which the title was vested in him; and such case is not within the statute

of frauds, but the equities of the parties will be worked out and effectuated, though the contract which they have made to the end in view rests entirely in parol. *Bates v. Kelly*, 80 Ala. 142; *Olds v. Marshall*, 93 Ala. 138, 8 South. Rep. 284; *Jordan v. Garner*, 13 South. Rep. 678. On the averments to which we have adverted, Peter Thompson loaned to the complainant the sum (\$500) necessary to make the final payment for the land in question, by agreement paying it to Baker for the complainant, and taking a conveyance to himself to secure its repayment, upon the further agreement to reconvey to complainant whenever such repayment should be made. The bill is clearly not open to the objection taken to it by the first assignment of demurrer. The statute of frauds has no application to the case it presents.

The fifth assignment of demurrer is bad for its generality, and also in that it is addressed solely to the amendment to the bill allowed in September, 1891, instead of being directed against the bill as amended. It is immaterial that the facts set up in said amendment do not show that the lands are subject to the trust sought to be enforced, so long as those facts, considered along with the facts alleged in the original bill, do make a case for the relief sought. This is in the nature of a bill to redeem from a mortgage. The legal title in the heirs of Peter Thompson was for the purpose of securing the payment of the loan made by their ancestor to complainant, with interest and expenses, and they therefore bear the attitude of mortgagees to this property and to the complainant. So far as an offer to pay or a tender or an offer to do equity is concerned, the complainant is on the footing of a mortgagor praying redemption. In bills to that end, it is not necessary to relief that a tender of the sum due should be made before bill filed. It is enough if the complainant, by his bill, submit himself to the orders of the court, and offer to pay whatever may be due the mortgagee, whether principal, interest, or secured expenses, as a condition to the relief he prays. The present bill is clearly sufficient in this respect, and the assignments of demurrer which proceeded on a contrary view were well overruled. 2 Jones, *Mortg.* § 1095; *Perry v. Carr*, 41 N. H. 371; *Marvin v. Prentice*, 49 Haw. Pr. 385; *Association v. Lake*, 69 Ala. 456; *Rogers v. Torbut*, 58 Ala. 523. See, also, *McCalley v. Otey*, (Ala.) 12 South. Rep. 406. The record discloses no error, and the decree of the chancellor is affirmed.

(101 Ala. 431)

MANN et al. v. HYAMS et al.

(Supreme Court of Alabama. July 27, 1893.)

DECREE IN EQUITY—WHAT CONSTITUTES—APPEAL.

An entry in the transcript of the docket entries of a chancery cause, "April 18, 1893. Submitted for decree on demurrers to the bill, and demurrers sustained,"—does not constitute a decree, within the meaning of Code, § 3612,

authorizing an appeal from a decree sustaining or overruling a demurrer to the bill.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Bill by J. & H. Mann & Co. and others against Samuel Hyams and others to have a certain sale set aside as illegal, fraudulent, and void. From a judgment for defendants, plaintiffs appeal. Appeal dismissed.

Richardson & Reese, for appellants. Tompkins & Troy, Arrington & Graham, and A. A. Wiley, for appellees.

HARALSON, J. The statute (Code, § 3612) authorizes an appeal to be taken from a decree sustaining or overruling a demurrer to a bill in equity. The appeal in this case purports to be taken from a decree of the city court sustaining a demurrer to the bill, and errors are assigned on such an alleged decree. But, on examination, we find no such decree in the record. In the transcript of the docket entries of the chancellor appears the following entry: "April 18, 1893. Submitted for decree on demurrers to the bill, and demurrers sustained." This is no decree, and, without one, an appeal does not lie to this court. The cause must be here dismissed. *Bell v. Otts*, (Ala.) 13 South. Rep. 43; *Wagnon v. Keenan*, 77 Ala. 519; *Joyner v. State*, 78 Ala. 448; *Ayers v. State*, 71 Ala. 11.

Dismissed.

(99 Ala. 196)

PRYOR v. STATE.

(Supreme Court of Alabama. July 27, 1893.)

CRIMINAL PROSECUTION—CREDIBILITY OF DEFENDANT AS WITNESS—INSTRUCTIONS—PROVINCE OF JURY.

1. Under Code 1886, § 2766, providing that the objection that a witness has been convicted of an infamous crime goes to his credibility, and not to his competency, it is proper in a criminal case, where defendant testifies in his own behalf, to introduce evidence of a previous conviction of another crime, for the purpose, only, of attacking his credibility, if the evidence is expressly so limited by the court.

2. In a criminal prosecution, a charge that the evidence of witnesses, whose testimony stands unimpeached, that another witness is a person of bad character, and that they would not believe him on oath, is sufficient to generate a reasonable doubt of the defendant's guilt, when there is no evidence in support of such person's testimony, and a conviction is dependent on his testimony, is improper, as invading the province of the jury.

Appeal from circuit court, Pike county; John P. Hubbard, Judge.

Gus Pryor was convicted of carrying a pistol concealed about his person, and appeals. Affirmed.

The state introduced as a witness one John Dickerson, who testified that before the finding of the indictment he saw a pistol drop out of the defendant's pocket, and saw the defendant pick the pistol up and put it in his hip pocket, after which the pistol could not be seen, his coat covering the pocket.

The state also introduced as a witness one Fred Lawson, who testified that after he arrested the defendant, and when he was taking him to jail, the defendant told him that he would plead guilty; that he did have a pistol, but that John Dickerson did not see it. This witness testified that this confession was voluntary. The defendant introduced the testimony of two witnesses to the effect that they knew the character of said Dickerson in the community in which he lived, and from this knowledge of his character they would not believe said Dickerson on oath. The defendant, being introduced as a witness in his own behalf, denied the facts as testified to by said Dickerson, and denied that he had a pistol concealed about his person, or that he ever told the said Lawson that he would plead guilty. The state then introduced, against the objection and exception of the defendant, the record of the Pike county circuit court, showing that the defendant had been convicted of petit larceny. This being substantially all the evidence, the defendant requested the court to give the jury the following written charge, and duly excepted to the court's refusal to give the same: "Evidence of witnesses, whose testimony stands unimpeached, that another witness in the case is a person of bad character, and that they would not believe such person on oath in a court of justice, is sufficient to generate a reasonable doubt of the defendant's guilt, when there is no evidence in support of such person's testimony, and a conviction is dependent on such person's testimony."

Wm. L. Martin, Atty. Gen., for the State.

**HEAD, J.** Defendant, being on trial for the offense of carrying concealed weapons, testified as a witness in his own behalf. The state introduced in evidence the record of his prior conviction, and sentence thereon, of the offense of petit larceny, for the purpose, solely, of affecting his credibility as a witness. It was so expressly limited by the court. There was a general objection by the defendant to its introduction, which was overruled, and defendant excepted. The ruling of the court was proper, under the influence of section 2768 of the Code of 1886.<sup>1</sup>

The charge requested by the defendant is bad for several reasons. It invades the province of the jury. It was for the jury to determine the weight and value of the impeaching testimony, and whether impeachment of the witness Dickerson was made out or not; and, if made out, it was for them to say whether it was sufficient to generate a reasonable doubt of the defendant's guilt or not. The charge is also ab-

stract, in that it states a case in which the testimony of the witness supposed to be impeached is not supported by any other evidence. In this case there was evidence in support of Dickerson. There is no error in the record, and the judgment is affirmed.

(86 Ala. 400)

**SOUTH & NORTH ALA. R. CO. et al. v. HIGHLAND AVE. & B. R. CO. et al**

(Supreme Court of Alabama. July 27, 1893.)

**SPECIFIC PERFORMANCE — GRANT OF EASEMENTS BY RAILROAD COMPANIES — NATURE OF OBLIGATIONS — WANT OF MUTUALITY — INADEQUACY OF CONSIDERATION.**

1. Defendant railroad company and the assignor of plaintiff railroad company agreed to permit the building of tracks on the rights of way of each other, at certain designated places, and make all crossings needed by either company, such assignor binding itself to put in and maintain all such crossings. The contract also provided that if such assignor, after 30 days' notice, failed to renew such crossings, then defendant could do so at the former's cost. *Held*, that equity will not refuse to specifically enforce the provisions of such contract requiring defendant to permit plaintiff to lay its track on defendant's land, on the ground that the contract implies the performance of personal services to be exercised with special skill, judgment, and discretion, and was intended to extend through a series of years.

2. Nor will equity refuse to specifically enforce such contract, and leave plaintiff to its remedy at law, because its terms are inequitable and unjust to defendant, since parties to a contract must be the judges of the advantages to be derived from it.

3. Such contract is not wanting in mutuality, and therefore incapable of enforcement, in that defendant bound itself to permit plaintiff to construct its track, while plaintiff was not bound to construct it, on defendant's right of way, since plaintiff also granted a like easement to defendant.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Judge.

Action by the Highland Avenue & Belt Railroad Company and others against the South & North Alabama Railroad Company and others for the specific enforcement of a contract. From an order overruling their demurrer to the bill, defendants appeal. Affirmed.

Hewitt, Walker & Porter and Jones & Falkner, for appellants. Alex. T. London, for appellees.

**STONE, C. J.** In this opinion we will abbreviate the names, and designate the parties as the "South & North Company" and the "Highland & Belt Company." Each is an incorporated railroad company, in active operation, and the bill in this case was filed by the latter (the appellee) to compel the specific performance of an agreement entered into in the year 1887. The Elyton Land Company made the contract with the South & North Company, but subsequently sold out its railroad enterprise and interest in the contract to the Highland Avenue & Belt Railroad Company, which instituted this suit in November, 1889. The case comes

<sup>1</sup> Code 1886, § 2768, provides that no objection must be allowed to the competency of a witness because of his conviction for any crime, except subornation of perjury; but if he has been convicted of another infamous crime, the objection goes to his credibility.

before us on appeal from a decretal order of the chancellor, overruling a demurrer to the bill as amended. The pleadings do not question the making of the contract, nor does the South & North Company deny that it has failed to keep its contract. The defense it seeks to make is that the contract is not such a one as that chancery will enforce its specific performance, for two reasons: First, that it is not mutual, in that sense which equitably justifies its specific enforcement; and, second, that its obligations are of such a character that chancery cannot compel their performance. The track of the South & North Company extends entirely through the city of Birmingham, its general bearing being from south to north, but making considerable curves and deflections. The right of way is wide, with its main track near the center thereof. In laying out the city, a broad avenue was left for railroad tracks, with a bearing from east-northeast to west-southwest. In this avenue is the common passenger depot, and along it the South & North Company, as well as other railroads, have their main tracks. The South & North Company enters this avenue at Thirteenth street, and leaves it about Twenty-Sixth street. Along the right of way of the South & North Company, bounding it on the northwest, the Highland & Belt Company owns a strip of land 35 feet wide, which commences about Twenty-Fourth street, and extends westwardly, bordering the right of way of the South & North Company, to or beyond Eighteenth street, which is beyond the passenger depot. But the Highland & Belt Company owns no land, or strip of land, extending eastward beyond Twenty-Fourth street. A map and submaps appear to have been made exhibits to the bill, and many references are made to them, and to marks upon them. These are not furnished with the transcript before us. True, we have a map of the plan of the city, but it is without very many of the marks mentioned in the bill, and it is therefore in some respects unintelligible to us. But, as we understand the real contention in this case, it may be thus stated: The Highland & Belt Company has constructed its track, coming southwardly, until it has reached the right of way of the South & North Company, at or near Twenty-Ninth street, and claims the right to continue the construction of its track along and over the right of way of the South & North Company, until it reaches and connects with its own 35-foot strip, at or near Twenty-Fourth street; this, as it appears, for the purpose of reaching the passenger depot from that direction. The South & North Company refuses to permit it to thus lay its track on its right of way. The part of the agreement of 1887 which this bill seeks to have specifically enforced, in what it severally requires of the two corporations, so far as it bears on the question we have

stated, may be thus summarized: The South & North Company granted to the Highland & Belt Company the right to extend its track from a point near Twenty-Ninth street across the South & North Company's switch leading to Baxter Stove Works, along said right of way,  $6\frac{1}{2}$  feet distant from, east of, and parallel to the westwardly line of said right of way, to a point about 300 feet east of the east line of Twenty-Fourth street, (the beginning of Highland & Belt Company's strip,) to be located on the South & North Company's right of way, not exceeding 2,400 feet in length; the crossing of the switch leading to Baxter Stove Works to be put in and maintained at cost and expense of the Highland & Belt Company; the South & North Company to have the right to cross the tracks to be constructed on its said right of way wherever and whenever it may desire to build sidings to any manufacturing establishment, warehouse, or other industrial enterprise; the cost of putting in and maintaining the crossing of such sidings with the track of the Highland & Belt Company to be borne by the latter company. The contract further provided that the South & North Company should have the right to cross said track of the Highland & Belt Company when necessary for convenient ingress and egress to and from said sidings that may hereafter be constructed by the South & North Company to manufacturing establishments, warehouses, or other industrial enterprises. It was provided that all crossings that might be made should be constructed and maintained at the cost of the Highland & Belt Company. The South & North Company was guaranteed preferential rights over the Highland & Belt Company at all the crossings to be constructed. In consideration of these grants and concessions, the Highland & Belt Company agreed and stipulated that the several crossings above provided for and to be constructed should be constructed and maintained by it, at its exclusive cost, under the superintendence and to the satisfaction of the South & North Company, which was to be the judge of when and where crossings should need renewals and repairs; and the Highland & Belt Company agreed that the renewals or repairs would be made promptly, and, if they failed to make them within 30 days from the time of notification from the South & North Company, then the latter company should have the right to make them at the expense of the Highland & Belt Company; and the Highland & Belt Company granted to the South & North Company the right and privilege to cross its right of way, and all tracks that were then constructed, or might thereafter be constructed, thereon, south or west of Twenty-Fourth street, whenever it might become necessary for the South & North Company to construct switches to gain access to manufacturing establishments, warehouses, or other in-

dustrial enterprises that then were, or might thereafter be, constructed on adjacent property.

It is contended for appellants that this contract is not just and equitable in all its parts, and that, therefore, the chancery court should not compel its specific performance, but should leave the Highland & Belt Company to its action at law, for the recovery of damages for the breach of the contract by the South & North Company. It may be that the contract does not secure precisely equal benefits to the two corporations. It may be that the concessions made to the Highland & Belt Company are more valuable, when viewed from the standpoint of the present time, than are the grants made by it to the South & North Company. Of this, however, when the contract, as in this case, furnishes no standard or measure for estimating the relative advantages, it would be extremely hazardous for the court to attempt a solution. Any conclusion we might reach would be the merest conjecture. We cannot be presumed to know what prospective profit the construction and maintenance of the Highland & Belt Company would be to the South & North Company. Nor can we know the value of the privilege of crossing the 35-foot strip whenever and wherever the South & North Company might choose to do so, accompanied by the obligation of the Highland & Belt Company to construct and maintain the crossings. These relative advantages might, and probably would, vary with changing time. In *Waterman on Specific Performance* (section 179) is this language: "Although inadequacy of consideration in contracts of sale, either in the price or property sold, may be a ground of defense, yet the facility of contracting and the free exercise of the judgment and will of the parties require that, as a general rule, they should be sole judges of the value of the benefits to be derived from their bargains. It is therefore manifestly just and expedient that mere inadequacy of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract or a cause to set it aside. And such is now the rule; for courts of equity, as well as courts of law, act upon the ground that every person who is not, from the peculiar condition and circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon. The reason of this is to be sought in the extreme difficulty of judging as to the feelings and motives which may have actuated the parties, and the corresponding variety of opinions which may be formed with reference to the sufficiency of the consideration." To this the author cites many authorities; and

to the same effect are the following authorities, which show it is the modern, and, we may add, the more reasonable, rule: 3 Pom. Eq. Jur. § 1406, and notes; Fry, Spec. Perf. § 275 et seq.; *Osgood v. Franklin*, 2 Johns. Ch. 1.

It is objected to the relief prayed in this case that there was a want of mutuality when the contract was made, in this: that, while the South & North Company bound itself to permit the Highland & Belt Company to construct its track on the former's right of way, this was a mere unilateral permission, and did not bind the Highland & Belt Company to so construct its track. If this were the only purpose and provision of the contract, the rule invoked would not apply. When "the contract is originally binding on the one, and not on the other, the latter may by suit waive that want of mutuality, and enforce the specific performance of the contract." Fry, Spec. Perf. §§ 294, 297; Wat. Spec. Perf. § 200; *Fallon v. Railroad Co.*, 1 Dill. 121; *Alabama G. S. R. Co. v. South & N. A. R. Co.*, 84 Ala. 570, 3 South. Rep. 236. The contract, however, is not of the class mentioned. Each party bound itself to grant to the other a use or easement in what had been the exclusive property and right of the party granting. Each right and interest granted became the consideration for the right and benefit secured in return. There is nothing in the objection based on the alleged want of mutuality.

A graver question remains to be considered: Is the contract sought to have enforced in this case one that the chancery court will order the specific execution of, or must redress be sought in an action at law for damages? It evidently contemplates that it is to extend through a series of years. Does it imply the performance of personal services, exercised with special skill, judgment, and discretion? If so, the chancery court cannot grant the relief prayed. *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. Rep. 449; *Marble Co. v. Ripley*, 10 Wall. 339; *Danforth v. Railway Co.*, 30 N. J. Eq. 12. The case we have in hand does not present any of the difficulties that were encountered in the cases cited. The South & North Company simply bound itself to permit the Highland & Belt Company to construct and operate a track on a part of its right of way, and to make certain crossings; and the Highland & Belt Company bound itself to construct and maintain all the crossings which the exercise of the privilege granted might render necessary. In return for this, the Highland & Belt Company bound itself to permit the South & North Company to cross its 35-foot strip of land, extending from Twenty-Fourth to Eighteenth street, and to cross its track at other named places, "wherever and whenever" it might elect to exercise this privilege; and it bound itself to construct and maintain the proper crossings, which might be rendered necessary if



the South & North Company exercised this granted privilege. If the agreement had stopped here, possibly it would have left the Highland & Belt Company under the contract obligation to personally construct and repair the necessary crossings,—a service in its nature personal, "involving the exercise of personal skill, judgment, and discretion," and of indefinite duration. So interpreted, the chancery court possibly would not and could not undertake to administer and specifically enforce such contract. But the agreement did not stop there. Its provisions are that if the Highland & Belt Company, after 30 days' notice, failed to renew or repair such crossings, then the South & North Company could do so, at the cost and expense of the Highland & Belt Company. This, upon each recurrence, could only entail a money liability, and would not impose on the chancery court the duty of retaining the case for continuous administration. The rights, duties, and liabilities of the parties being defined and settled by the decree of the court, all else would follow, as any other transaction inter partes which is continuous in its nature. In what is declared above, we think we are fully sustained by the drift of modern authorities. When a right of way is disturbed or withheld, damages may be recovered in an action at law; hence, where easements or servitudes are annexed to private estates, "the due enjoyment of them will be protected against encroachment by injunction," notwithstanding an action at law could be maintained for the recovery of damages. *Lide v. Hadley*, 36 Ala. 627, 635; 1 High. Inj. § 848; *Washb. Easem.* 575. In the case of *Lytton v. Railway Co.*, 2 Kay & J. 394, it was held that where a railway company had agreed with a landowner, through whose estate the railway would pass, to construct and maintain a siding connected with their railway at B., together with all necessary approaches thereto for public use, for the reception and delivery of goods, "specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made." In *Sanderson v. Railway Co.*, 11 Beav. 497, a railway company, being about to sever the plaintiff's land by their railroad, agreed to purchase the necessary portion of land "subject to the making such roads, ways, and slips for cattle as might be necessary." Held that, although it was very difficult to execute an agreement thus expressed, yet the plaintiff was entitled to a specific performance, and that the word "necessary" must receive a reasonable interpretation. In the great case of *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, the Wabash, St. Louis & Pacific Railway Company had bound itself to permit the St. Louis, Kansas City & Colorado Railroad Company to use its right of way from the north line of Forest park, through the park, to the terminus of the Wabash Com-

pany's road, in the city of St. Louis, for a fair and reasonable compensation. The question was whether the chancery court would specifically enforce this contract. It was ruled that the court had power to enforce the specific performance of the agreement by enjoining the appellants from preventing the Colorado Company from using the right of way, and that a remedy at law would be wholly inadequate. Following this case as a precedent, it was said in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. O. A. 174, 51 Fed. Rep. 309, that the specific performance of a contract whereby one railroad lets another into the joint use of its bridge and terminals will not be refused because the acts to be performed are numerous and complicated, and are to extend through a long term of years. In a note to *Conger v. Railroad Co.*, [23 N. E. Rep. 983,] 43 Amer. & Eng. R. Cas. 643, 651, is this expression, supported by many citations: "Specific performance will be decreed to enforce contracts of a permanent nature between railroad corporations for running on and use of each other's tracks, or of the track of one corporation by the trains of another." See, also, *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. Rep. 15; 2 Chit. Cont. (11th Amer. Ed.) 1429; *Wilson v. Railway Co.*, 2 De Gex, J. & S. 475. The foregoing principles and authorities are not at war with *McBryde v. Sayre*, 86 Ala. 458, 5 South. Rep. 791; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. Rep. 449; *Elyton Land Co. v. South & N. A. R. Co.*, (Ala.) 10 South. Rep. 270. Nor does it conflict, when properly applied, with *Windham Cotton Manuf'g Co. v. Hartford, P. & F. R. Co.*, 23 Conn. 373; *Cooper v. Pena*, 21 Cal. 404; *Conger v. Railroad Co.*, 120 N. Y. 29, 23 N. E. Rep. 983; *Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846. See, also, *Wat. Spec. Perf.* § 49. The decretal order of the chancellor is affirmed.

(100 Ala. 530)

# COOK v. NEW YORK CONDENSED MILK CO. et al.

(Supreme Court of Alabama. July 27, 1893.)

## CONSTITUTIONAL LAW—BILL OF DISCOVERY—TRIAL BY JURY.

Code 1886, § 3546, relating to bills of discovery, as amended by Sess. Acts 1888-89, p. 96, providing that any number of judgment or other creditors may join as complainants in such bill, is not in conflict with Const. art. 1, § 12, "preserving the right of trial by jury," because it does not provide for a jury trial to determine the amounts due the several complainants.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Bill by the New York Condensed Milk Company and others against George W. Cook for a discovery. From an order overruling his demurrer to the bill, defendant appeals. Affirmed.

The appellees, who were simple contract creditors, file the present bill against George W. Cook, who was alleged in said bill to be insolvent; and after alleging that the said defendant had property, real and personal, which was unknown to the complainants, and secreted by the defendant, prayed for a discovery of all of the property owned by the defendant, and that the same be subjected for the payment of his debts to the complainants, and also prayed for an injunction restraining the defendant from collecting, selling, or otherwise disposing of any of his assets or property. Upon the execution of a bond, the chancellor ordered an injunction issued. The defendant moved to dissolve the injunction, and demurred to the bill of complaint, and moved to dissolve the same, for the want of equity. The cause being submitted on these motions and the demurrer, the same were overruled.

A. A. Wiley and W. S. Thorington, for appellant. Arrington & Graham and T. Scott Sayre, for appellees.

STONE, C. J. Since the decision in *Railway Co. v. McKenzie*, 85 Ala. 546, 5 South. Rep. 322, the statute under which that proceeding was instituted (Code 1886, § 3546) has been amended, (Sess. Acts 1888-89, p. 96.) As the law now stands, "any number of judgment creditors upon whose judgments executions have been issued and returned 'No property found,' or creditors without liens or judgments, may join as complainants in such bill." That amendment authorized the joining as cocomplainants in the present suit of the several complainants who did unite in bringing it, although their several claims are charged to be due and owing separately to the persons and partnerships who are made complainants. The case comes before us on demurrer to the bill, which the chancellor overruled. The precise question raised is that the statute under which this bill is sought to be maintained is violative of article 1, § 12, of our state constitution, which declares "that the right of trial by jury shall remain inviolate." The contention is that, inasmuch as no provision is made in the statute for a jury trial to ascertain and determine the amounts due the several complainants, the statute is unconstitutional. This precise question has been argued before us many times, and ably, and we gave it thorough consideration. We were aware that other courts, on a statute not distinguishable in principle from ours, had sustained the constitutional objection, and had ruled that in such conditions a jury trial must be provided for. Following many older rulings of this court on a statute presenting a similar question, we sustained the constitutionality of the statute. *Railway Co. v. McKenzie*, 85 Ala. 546, 5 South. Rep. 322; *Smith's Ex'r v. Cockrell*, 66 Ala. 64. The decision then pronounced, though several times assailed, has never been departed from, but has been uniformly followed in our later

rulings. *Lawson v. Warren*, 89 Ala. 584, 8 South. Rep. 141; *Manufacturing Co. v. Thompson*, 90 Ala. 129, 7 South. Rep. 530; *McCullough v. Jones*, 91 Ala. 186, 8 South. Rep. 696; *Williams v. Stoutz*, 92 Ala. 516, 9 South. Rep. 156; *Construction Co. v. McKenzie*, (Ala.) 11 South. Rep. 367. We adhere to our former rulings. Affirmed.

(100 Ala. 582)

#### COOK v. SCHMIDT et al.

(Supreme Court of Alabama. July 27, 1893.)

CONSTITUTIONAL LAW—RIGHT TO TRIAL BY JURY—BILL FOR DISCOVERY—ASSETS OF DEBTOR.

Code 1886, § 3545, providing that a creditor without a lien or judgment may maintain a bill for the discovery of the assets of the debtor, does not violate Const. art. 1, § 12, providing that the right of trial by jury shall remain inviolate.

Appeal from chancery court, Montgomery county; Honorable John A. Foster, Chancellor.

Bill by Schmidt & Ziegler against George W. Cook. From a decree for plaintiffs, defendant appeals. Affirmed.

A. A. Wiley and W. S. Thorington, for appellant. Richardson & Reese, for appellees.

COLEMAN, J. The bill was filed under section 3545 of the Code, which authorizes a creditor without a lien or judgment to file a bill in a court of chancery for the discovery of the assets of the debtor, subject to the payment of debts. The constitutionality of the act, and the right of a creditor to relief under its provisions, have been thoroughly considered by this court, and should be regarded as settled law in this state. If we understand the argument of appellant's counsel, it concedes the constitutionality of the act which authorizes such a creditor to file a bill to reach assets which have been conveyed by his debtor to hinder, delay, and defraud his creditors. As was said in the case of *Railroad Co. v. McKenzie*, (Ala.) 5 South. Rep. 322: "We are not able to draw the distinction." The grantor, in the one case, as well as in the other, has the right to demand a jury to determine the question of indebtedness vel non. If there is no debt due complainant, there is no fraud as against him in either case, and, whatever may be the proof of fraud, he is not entitled to relief, until his debt has been established and determined by a decree of the court. The same argument, with as much propriety and force, could be made in every case where the controversy involves both legal and equitable questions, and both must be settled to administer complete justice between the parties; and yet it is not denied that, when a court of equity acquires jurisdiction for one purpose, it will retain the case "and administer complete justice, although in doing so it decides questions of purely legal cognizance." A vendor's lien is a claim of purely equitable cognizance, and it may exist and be enforced, although there

is no written evidence of the indebtedness. Why is not the vendee entitled to a trial by jury to determine, first, whether he owes the debt? "Indebitatus vel non" is a question purely of law. Equity alone has jurisdiction of the lien, but, having jurisdiction for the purpose of the lien, it determines the law question of indebtedness, and decrees the debt, and then condemns, not equitable assets, but land, which is subject to execution from a court of law. It is upon this principle that the constitutionality of the act rests. Why is not a debtor who "secretes"—"hides out"—his assets which are liable for his debts, to prevent his creditor from reaching them, guilty of as much fraud as one who puts them in the name of a third person for the same purpose, where they are discovered by the creditor? The facts averred in the present bill, if true, show not only fraud in the defendant, which would give the court of chancery jurisdiction, but the necessity of a discovery is also shown. We are content with the conclusion reached by this court, although there are courts of very high standing which hold the contrary. We will cite the following decisions of our own court, and the authorities referred to in them: *Railroad Co. v. McKenzie*, 85 Ala. 546, 5 South. Rep. 322; *Id.*, 11 South. Rep. 367; *Lawson v. Warren*, 89 Ala. 585, 8 South. Rep. 141; *Sweetzer v. Buchanan*, (Ala.) 10 South. Rep. 552. A receiver was prayed for, but none seems to have been appointed, and we need not consider any question in reference to the appointment of a receiver. We are of opinion there is nothing in the statute which forbids the issue of an injunction before answer filed. To delay the order until the defendant saw proper to file an answer would, no doubt, in many cases, defeat the purpose for which the bill was filed. We find no error in the record. Affirmed.

(99 Ala. 197)

**TENNESSEE MUT. BLDG. & LOAN ASS'N v. STATE.**

(Supreme Court of Alabama. July 27, 1893.)

**SOLICITOR OF CITY COURT — POWERS AND DUTIES — CONSTRUCTION OF STATUTES — ACTION FOR PENALTY.**

1. Act Feb. 28, 1887, provides that the penalty imposed thereby on any foreign corporation which shall do business in the state without first complying with the provisions of the act shall be sued for and recovered "by the solicitor of the circuit in which the offense is committed." Act Feb. 18, 1891, creating the city court of Gadsden, gives that court the same jurisdiction as the circuit courts of the state, and provides for the election of a solicitor of said court, who "shall be charged with the performance of the same duties in the said city court \* \* \* as are by law imposed upon circuit solicitors in like cases in the circuit courts." *Held*, that the solicitor of said city court had power to sue for the penalty imposed by the act of 1887.

2. In a suit for a statutory penalty, a writ of inquiry to assess damages is unnecessary on a judgment by default.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by the state of Alabama against the Tennessee Mutual Building & Loan Association to recover a statutory penalty. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Bilbro, for appellant. Wm. L. Martin, Atty. Gen., for the State.

**HARALSON, J.** The act of the legislature to give force and effect to section 4, art. 14, of the constitution of the state of Alabama, approved February 28, 1887, (Acts 1886-87, p. 102,) provides that it shall be unlawful for any company, corporation, or association, not organized under the laws of this state, to engage in or transact any business in the state before complying with the provisions of section 1 of that act, and any such company, corporation, or association violating the provisions of the act shall, for each offense, forfeit and pay to the state the sum of \$1,000. Section 5 of the act provides "that every penalty provided for in this act shall be sued for and recovered in the name of the state of Alabama by the solicitor of the circuit in which the offense is committed, and, when sued for and collected, must be paid by the solicitor into the state treasury, less 25 per cent., to be retained by said solicitor for his services," etc. Benjamin F. Pope, as the solicitor of the city court of Gadsden, commenced this proceeding in said city court, in the name of the state, against the defendant, (alleged to be a corporation not organized under the laws of this state, and which was alleged to have violated section 4 of said act,) to recover of it the penalty of \$1,000, as there prescribed. There are several counts in the complaint, and it is noticeable that in none of them is it stated what business the defendant did carry on in the state in violation of said act. This may have been good ground of demurrer, if it had been interposed for that reason; but we do not now pass on that point, as it is not before us. The summons and complaint purport to have been executed by the sheriff on the 10th November, 1891, on J. E. Whaley, as agent of the defendant corporation, and the judgment entry recites that proof was made that J. E. Whaley was the agent of the defendant at the time of the service of the summons and complaint on him. The defendant made default, and on the 7th March, 1892, the court rendered a judgment against it, without the intervention of a jury, for \$1,000 damages and costs, upon no other proof, so far as the record shows, than the proof of service, as above stated. There is no bill of exceptions in the record.

The act creating the city court of Gadsden, approved February 18, 1891, (Acts 1890-91, p. 1092,) provides in its first section that the "court shall have and exercise all the juris-

diction and powers which now are or may hereafter be by law conferred on the several circuit courts of this state." The act of February 28, 1887, does not provide in terms in what court the suit for the penalties therein provided shall be brought. Its language is "that every penalty provided for in this act shall be sued for and recovered, in the name of the state of Alabama, by the solicitor of the circuit." These words imply, plainly enough, that the circuit court is referred to, but they are not exclusive of the city courts of the state, having, and authorized to exercise, the same jurisdiction and powers, in all respects, as the circuit courts. In respect to the power of the judge of the city court of Selma, it was provided in the charter creating that court that its judge should have power and jurisdiction co-extensive with that which is exercised by judges of the circuit court and chancellors, and declared, specially, that this power and jurisdiction should include "the authority to issue writs of injunction, mandamus, certiorari, prohibition, ne exeat, and all other remedial writs;" and, under this grant of power, we held that the judge of that court had, in respect of such writs, the same power and authority to issue them, returnable in any part of the state, as any other judge or chancellor had. *East & West R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala. 279; *Stevenson v. O'Hara*, 27 Ala. 362; *Matthews v. Sands*, 29 Ala. 136. The statute creating said city court of Gadsden, in its eleventh section, provides for the election, by the general assembly, of a solicitor of said court, who "shall be charged with the performance of the same duties in the said city court, and subject to the same liabilities and penalties in respect thereto, as are by law imposed upon circuit solicitors in like cases in the circuit courts of this state." It appears, therefore, that the city court of Gadsden had jurisdiction of this cause, and its solicitor the authority to institute and prosecute this suit in the name of the state. The authority to institute the proceeding, conferred by the first statute referred to—that of 28th February, 1887—on the circuit solicitors, it may be fairly inferred, was designed by the legislature to be extended by the later enactments to the solicitor of the city court of Gadsden, which court has like jurisdiction with the circuit court of causes for the violation of said penal law. The power to institute such proceedings was not special, and designed to be confined to the circuit court solicitors, to the exclusion of the city court and county solicitors, if the same duties and responsibilities are imposed upon them as upon the former class. Authorities *supra*. There was no necessity for a writ of inquiry to assess the damages in this case. The suit was for a statutory penalty, and judgment had to be rendered for the amount of the penalty, if for anything, against the defend-

ant. Such a recovery followed, necessarily, the rendition of a judgment by default. We find no error in the record, and the judgment must be affirmed.

(38 Ala. 254)

WOLF, Judge, v. TAYLOR, Treasurer.  
(Supreme Court of Alabama. July 27, 1893.)  
CONSTITUTIONAL LAW—TITLES OF ACTS—APPROPRIATION.

1. Act Feb. 7, 1893, entitled "An act to amend 'An act to establish a new charter for the city of Demopolis,'" provides in section 26 that all funds arising under the general laws for liquor licenses issued to dealers within the city shall be paid over by the probate judge of the county to the city treasurer, for the support of the public schools of the city. *Held*, that the subject of said section was not "clearly expressed in the title," as required by Const. art. 4, § 2, the support of public schools not being a matter germane to municipal organization.

2. Under Const. art. 4, § 32, requiring all other than general appropriations to be by separate bills, Act Feb. 7, 1893, establishing a new charter for the city of Demopolis, is vicious as to section 26, which provides that the funds arising under the general laws for liquor licenses within the city shall be turned over to the city for its public schools.

Appeal from circuit court, Marengo county; James T. Jones, Judge.

Mandamus by James W. Taylor, treasurer of the city of Demopolis, against Samuel G. Wolf, judge of probate of Marengo county, to pay over to relator certain moneys in his hands. Writ granted. Defendant appeals. Reversed.

Wm. L. Martin, Atty. Gen., for appellant.  
Taylor & Elmore, for appellee.

HARALSON, J. This is a proceeding by mandamus by the appellee, against the appellant, to compel him to pay to appellee certain license moneys derived from the sale of state and county licenses to sell liquor within the corporate limits of the city of Demopolis. It was commenced by petition to the judge of the first judicial circuit. The defendant accepted service of the petition, filed his answer, and waived issuance and notice of a rule nisi. The judge granted the prayer of the petition, and commanded the defendant to pay over to the petitioner, as treasurer of the city of Demopolis, the sum of \$1,837.50, the same being the total amount of money collected by him, as probate judge of Marengo county, for the state and county, for liquor licenses issued by him as such judge of probate to liquor dealers in the city of Demopolis, and to accept the receipt of the petitioner therefor. This appeal by the defendant is to reverse that order.

The claim of said city to said moneys is based on the provisions of section 26 of an act of the general assembly approved February 7, 1893, entitled "An act to amend 'An act to establish a new charter for the city of Demopolis,'" (Acts 1892-93, p. 272.) Said section 26 reads as follows: "That all funds

arising under the general revenue law of the state for liquor licenses issued to parties carrying on business within the police jurisdiction and limits of said city shall be paid over by the probate judge of Marengo county to the treasurer of said city of Demopolis to be held and used exclusively for the maintenance and support of the public schools in said Demopolis school district; and the auditor of the state shall accept from said probate judge the receipt of said treasurer for such fund as a full and satisfactory voucher in payment of such license." The appellant insists that said section of said act is violative of section 2, art. 4, of the constitution, in two particulars, namely, of that part of section 2 which provides that "each law shall contain but one subject, which shall be clearly expressed in its title," and of that part of section 32 of said article 4 which provides that all other than general appropriations shall be made by separate bills.

1. The act of which said section 26 is a part, with the caption above quoted, relates to but one subject,—that of amending the act to establish a new charter for said city. Under this caption the act proceeds to establish an entirely new charter for the city, as complete in all its provisions as if one had never existed before, containing much that was in the old charter, and many provisions besides, and repeals all in the old which is in conflict with the new charter. The scope given to the amendatory act, in so far as it did not offend constitutional requirements, was legitimate, though its title would have been more apposite if it had been to create a new charter for said city. Under either title, the subject could be but one and the same, and under either could be comprehended all the powers ordinarily conferred on municipalities, giving the necessary legislative taxing, judicial, and police powers. The intention of the constitutional provision that "each law shall contain but one subject, which shall be clearly expressed in its title," has been repeatedly declared to be that the title to the act or bill should inform the members of the legislature and the public of the subject on which the former were invited to vote and legislate. In *Ballentyne v. Wickersham*, 75 Ala. 536, we laid down the rules on this subject so plainly that, for the purposes of this case, we need but to repeat them. We there said "that the clause is mandatory; that its requirements are not to be exactly enforced, or in such a manner as to cripple legislation; that the title to a bill may be very general, and need not specify every clause in the statute; that it is sufficient if they are all referable and cognate to the subject expressed; and that, when the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in and authorized by it." *Cooley*, Const. Lim. pp. 170, 171; 1 Dill. Mun. Corp. v.1380.no.17—44

§ 51; *Ex parte Cowert*, 92 Ala. 94, 9 South. Rep. 225; *Ex parte Reynolds*, 87 Ala. 138, 6 South. Rep. 335; *People v. Mahaney*, 13 Mich. 481. Under an act the title to which is the same as this one, when read by its title, one would suppose its object was to do no more than give to the city government some complete and better-adjusted legislative, judicial, and police powers, such as commonly appertain to municipal governments; but he would gather therefrom no intimation or suspicion of a purpose to incorporate into the act an entirely new provision, making an appropriation by the state, out of its revenues, to support and maintain the public schools of the city. Such educational institutions are not regarded as necessarily belonging to municipal government. They are important, and contribute greatly to the well-being and prosperity of any town or city, as do public buildings, charitable institutions for taking care of the sick, and other like institutions; but all such are of a class and constitute subjects not germane to municipal organization, and this section 26, in the new charter of Demopolis, even if otherwise unobjectionable, was essentially violative of that part of section 2, art. 4, of the constitution, we are considering.

2. But that section is opposed to another constitutional prohibition. It is nothing more nor less than an attempted special appropriation by the state of \$1,225 out of its revenues, and of \$612.50 out of the revenues of the county of Marengo, to support and maintain the public schools of the city of Demopolis, which could be done, if at all, by a special bill for that, and for no other, purpose. Const. art. 4, § 32. The judge of the circuit court erred in granting the writ of mandamus. His ruling is reversed, and an order will be here entered dismissing the petition therefor, at the cost of appellee. Reversed and dismissed.

(99 Ala. 179)

#### HEATH v. STATE.

(Supreme Court of Alabama. July 27, 1893.)

##### CRIMINAL LAW—INSTRUCTIONS.

A charge that, if the jury believe the evidence, they must find defendant guilty is error, as not requiring them to believe it beyond a reasonable doubt.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Indictment of William Heath for illegally selling or giving liquor to a certain minor, Albert Smith. Verdict and judgment of conviction. Defendant appeals.

Wm. L. Martin, Atty. Gen., for the State.

MCOLLELLAN, J. The indictment charges that the defendant, "a person other than the parent or guardian or person having the management and control of Albert Smith, a minor, did sell or give spirituous, vinous, or malt liquors to Albert Smith, a minor,

without the consent of the parent or guardian or person having the management and control of said Albert Smith, a minor, and not upon the prescription of a physician," etc. The only evidence adduced on the trial was that of said Albert Smith, who testified, in effect, that, within 12 months before the finding of the indictment, the defendant, in Dale county, gave him whisky, and that at that time he (the witness) was only 18 years of age. Upon this the court, at the request of the solicitor, in writing, charged the jury that, if they believed the evidence, they must find the defendant guilty. This charge was erroneous. It authorized and required a verdict of guilty if the jury believed the evidence, though they may not have believed it beyond a reasonable doubt. *Pierson v. State*, (Ala.) 13 South. Rep. 550. It was not necessary for the indictment in this case to negative the consent of the minor's parent, guardian, etc., or to aver that the gift of the liquor was not made on the prescription of a physician. These are matters of defense, the burden of proving which is upon the defendant. *Atkins v. State*, 60 Ala. 45. But, these unnecessary averments being in the indictment, it would, to say the least, be the safer course to prove them on another trial. *Gilmore v. State*, (Ala.) 13 South. Rep. 536. See, also, *McGehee v. State*, 52 Ala. 224. Reversed and remanded.

(98 Ala. 657)

**DYKES et al. v. CLARK.**

(Supreme Court of Alabama. July 27, 1893.)

**DETINUE—ASSESSMENT OF VALUE.**

Code 1886, § 2717 et seq., provide that in detinue, on plaintiff's affidavit of title and bond for costs and damages, the clerk shall direct the sheriff to take the property unless defendants give bond in double its value, conditioned to deliver it to plaintiff if he win the suit, and to pay all costs and damages; if defendants fail to give such bond, the property shall be delivered to plaintiff on his giving a similar bond; on the trial the jury must assess the value of each article and damages for its detention if any. A sheriff's return was "property released by defendants to plaintiff without bond." Plaintiff recovered judgment by default. *Held*, that the default was rightly granted, without assessment of value by a jury.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

This was a statutory action of detinue brought by A. S. Clark against Mattie O. and Thomas A. Dykes, and sought to recover certain personal property. There was judgment for the plaintiff, and defendants appeal. *Affirmed*.

Thomas & Bailey, for appellants.

**HARALSON, J.** This was a suit in detinue for personal property described in the complaint. The plaintiff made affidavit and gave bond in the manner required by statute for the precept of the clerk to the sheriff to take the possession of the property, unless bonded

by the defendants. The sheriff executed the summons and complaint on defendants, and took possession of the property on the 18th of February, 1892. The defendants appear not to have given bond, for the sheriff makes return on the writ, four days after it was executed, that the "property [was] released by defendants to plaintiff without bond, February 22, 1892." At the ensuing term of the court, a judgment was rendered by default in favor of plaintiff against the defendants, for the property sued for, without damages for its detention, and without assessment of the value of the separate articles. The defendants prosecute this appeal, and assign as ground of error the rendition of said judgment by default, without referring the matter to a jury to ascertain the value of the property sued for. The rule under section 2719 of the Code unquestionably is that, where there is a trial of a detinue suit, and the jury find for the plaintiff or defendant, they must assess the value of each article separately, if practicable, and it is error to render judgment without such an assessment of values; but we have held that, if the defendant neglects or fails to give bond under the statute for the delivery of the property, if cast in the suit, and the plaintiff gives bond under section 2718 of the Code, and receives the possession of the property sued for, and, being in possession when the cause is tried, succeeds in the action, there can be no reason for assessing the value of the property, that it could accomplish no result whatever, and the defendant would be in no sense injured by the failure. *Jones v. Pullen*, 66 Ala. 306. Here the defendants failed to make the replevy bond, and the plaintiff acquired possession of the property from the sheriff by the release of the defendants, from which we are to understand it went into plaintiff's possession, without bond, by the direction of the defendants. There was, then, no need for a jury, nor for an assessment of the values of the property, and defendants were in no way injured in the judgment by default, which was rendered against them. *Affirmed*.

(100 Ala. 696)

**JACKSON v. ELLIOTT.**

(Supreme Court of Alabama. July 27, 1893.)

**INJUNCTION—DISSOLUTION—REFUNDING BOND.**

Complainant, being in possession of land, bought from respondent, under a bond for title, and, having paid part of the price, discovered that defendant was only a cotenant with four others, and refused to pay the next deferred payment note that came due. Defendant recovered judgment against him, and complainant sued to enjoin its collection, alleging the above facts, and that, if four-fifths of the title should be lost to him, defendant was financially unable to respond in damages. Defendant's ability to make title was still in question, his possession not having been necessarily adverse to his cotenants. He produced evidence of his title to two of the four fifths, but asserted that the deeds to the other two had been lost. *Held*, that the injunction was

properly granted, and came within Code 1886, § 3531, which provides that, on dissolving an injunction to stay proceedings on a judgment at law, the chancellor must require of the defendant bond in double the amount of the sum enjoined, to refund the money he may collect on the judgment, if the same is enjoined perpetually by final decree.

Appeal from chancery court, Shelby county; S. K. McSpedden, Chancellor.

The bill in this case was filed by John S. Jackson against Jefferson B. Elliott, and prayed to have the defendant enjoined from the collection of a judgment against the complainant. This appeal is taken by the complainant from the decree dissolving the temporary injunction. Corrected and affirmed.

In addition to the facts stated in the opinion, the bill avers that John S. Jackson, the complainant, purchased from Jefferson B. Elliott, the defendant, certain tracts of land, making a cash payment for the same, and giving his notes for the deferred payments; that this purchase was made upon the faith of the representations of Jefferson B. Elliott that he owned the lands purchased, and that the purchaser, the complainant in this case, would get a bona fide fee-simple title thereto; and that, upon the cash payment and the execution of the notes for the deferred payment, the said Jefferson B. Elliott gave the plaintiff his bond for title, in which he agreed, on payment of the purchase money by the complainant, to convey to him by warranty deed a fee-simple title to the property so purchased. The bill then avers that at the time of making the sale the said Jefferson B. Elliott was not the owner in fee simple of the lands so purchased by the complainant, but, on the contrary, was only the cotenant of said lands, owning an undivided one-fifth interest therein; that, after he had paid some of the purchase-money notes at maturity, the complainant discovered the falsity of the representations of said Elliott, and, upon his being unable to comply with his contract, did not pay the next note as it fell due, whereupon the said Elliott brought an action at law on the complainant's promissory note; but, on the said Elliott's agreeing with the said complainant not to enforce the collection of the judgment recovered in said cause if he, the said John S. Jackson, would not interpose a defense thereto, at the same time promising the said Jackson that he would secure the fee-simple title to the property purchased for him, by conveyances from the other parties in interest, the said Jackson did not make any defense to said action, whereupon the said Elliott recovered judgment therein, and had issued an execution on said judgment, which was to be levied upon the personal property of the said Jackson; whereupon the complainant filed the present appeal to enjoin the levying of this execution, or the sale of the property thereunder, or the collection of any of the other notes as they fell due,

and prayed that on the final hearing the chancellor would decree a rescission of said contract, and order such relief as, the premises considered, the complainant was entitled to. The defendant, in his answer, denied the material allegations of the bill, and moved the court to dissolve the injunction, on the ground that there was no equity in the bill, and on the denials of the answer. On the submission of the cause, the chancellor sustained their motion to dissolve the injunction, and decreed "that, before defendant proceeds to further execute and enforce his said judgment, he must execute a refunding bond with good security, approved by the register, in double the amount of the sum enjoined, payable and conditioned as required by section 3531 of the Code of 1886." It is from this decree that the present appeal is prosecuted, and the same is assigned as error.

Longshore & Beavers and Peters, Wilson & Lyman, for appellant. W. B. Browne, for appellee.

STONE, C. J. The bill in this case is drawn with more than average care, and sets forth that Elliott, the vendor, did not own the entire title to the lands he contracted to sell and convey to Jackson. According to the averments of the bill, he was only a tenant in common with four others, his brothers, under the will of their father. The bill further avers that Elliott owned but little property—very little, if any—in excess of his exemptions, and that, if four-fifths of the title should be lost to Jackson by virtue of said ownership of the cotenants, Elliott was financially unable to respond in damages. Jackson was in possession under his purchase, had been sued to judgment on his purchase-money note, and the present bill was filed to enjoin its collection, because of the alleged defect in Elliott's title. The bill makes a case for equitable relief. *Kelly v. Allen*, 34 Ala. 663; *Blanks v. Walker*, 54 Ala. 117; *Sivoly v. Scott*, 56 Ala. 555; *Lindsey v. Veasey*, 62 Ala. 421; *Wilkinson v. Searcy*, 74 Ala. 243. The answer, if true, shows that, long before the sale to Jackson, Jefferson B. Elliott had become the owner of the entire title to the property he sold to him, (Jackson.) He (Elliott) furnishes the evidence of his ownership of two of the four fifths, but, as to the other two, he avers the conveyances have been lost. This will possibly cast on him the duty of making, or attempting to make, other proof as to those other two-fifths, the result of which we cannot with certainty anticipate. We hold that the chancellor rightly required of the defendant, Elliott, a refunding bond, but think he did not fix the penalty at a sufficiently large sum. Two fifths of the title are, in one aspect of the case, somewhat in uncertainty, and a possibility of its failure calls for a greater indemnity. We fix the amount

of the refunding bond to be given by Elliott at \$1,500, and, when given and approved by the register, the injunction shall be dissolved. We make the foregoing ruling because the possession of a tenant in common, without more, is not adverse to that of his cotenants. 3 Brick. Dig. 16. We need not and do not decide what would be the effect of 20 years' continued, individual possession by one tenant in common, against his cotenants, who have for all that time neither taken nor claimed possession. That question is not raised by this record in such form that we feel it our duty to consider it. *McArthur v. Carrie*, 32 Ala. 75; *Marston v. Rowe*, 39 Ala. 722; *Worley v. High*, 40 Ala. 171; *White v. Hutchings*, Id. 253; *McCartney v. Bone*, Id. 533; *Harrison v. Heflin*, 54 Ala. 552; *Goodwyn v. Baldwin*, 59 Ala. 127; *Barksdale v. Garrett*, 64 Ala. 277; *Goodman v. Winter*, Id. 410; *Baker v. Prewitt*, Id. 551; *Nettles v. Nettles*, 67 Ala. 599; *Garrett v. Garrett*, 69 Ala. 429; *Mathews v. McDade*, 72 Ala. 377; *Kelly v. Hancock*, 75 Ala. 229; *Long v. Parmer*, 81 Ala. 384, 1 South. Rep. 900; *Solomon's Heirs v. Solomon's Adm'r*, 81 Ala. 505, 1 South. Rep. 82; *Bozeman v. Bozeman*, 82 Ala. 339, 2 South. Rep. 732; *Davis v. Railroad Co.*, 87 Ala. 633, 6 South. Rep. 140; *Knabe v. Burden*, 88 Ala. 436, 7 South. Rep. 92; *Duncan v. Williams*, 89 Ala. 341, 7 South. Rep. 416; *Semple v. Glenn*, 91 Ala. 245, 6 South. Rep. 46, and 9 South. Rep. 265. The decretal order of the chancellor, with the amendment as noted, is affirmed. Let the costs of appeal be paid one-half by each party. Corrected and affirmed.

#### SUMPTER v. STATE.

(Supreme Court of Mississippi. May 8, 1893.)

Appeal from circuit court, Sharkey county; John D. Gilliland, Judge.

S. A. Sumpter was convicted under Code, § 1068, of enticing away a servant, and appealed. Judgment affirmed. No opinion filed. Suggestion of error. Reargument denied.

McLaurin & McLaurin, for appellant.  
Frank Johnston, Atty. Gen., for the State.

COOPER, J., delivered the opinion of the court, in response to suggestion of error.

Counsel for appellant may rest assured that the record in this case received, as does every record passed on by this court, the consideration of each and every member of the court. How far the suggestion that the judges to whom the record was not assigned were not familiar with it before the decision was rendered is from the facts attending its consideration may be best illustrated by a brief statement thereof: The record was read and considered by the judge who delivered the opinion of the court, and from that examination he was inclined to hold that a

new trial should be awarded. Upon consultation the other judges were inclined to the contrary. The whole record was then read to the whole bench, and, after discussing the case fully, it was again read by another judge, and upon another consultation the conclusion was reached that no error had been committed by the trial court, in which all the judges concurred. We are yet of the same opinion, and a reargument is denied.

(70 Miss. 304)

#### EDWARDS et al. v. HILLIER et al.

(Supreme Court of Mississippi. April 17, 1893.)

##### BONA FIDE PURCHASER—NOTICE—ESTOPPEL— AFTER-ACQUIRED TITLE.

1. Notice to the attorney of a purchaser of land on paying for the same that the wife of the grantor claimed the property is notice to the purchaser.

2. The fact that the husband, on receiving the money, used part of it to discharge an incumbrance on it executed by the wife, does not estop her to claim the land.

3. Where a grantor conveyed a tract of land in which he in fact had only a half interest, and afterwards acquired the remaining interest, the title so acquired passed eo instanti under his former conveyance.

Appeal from chancery court, Webster county; Baxter McFarland, Judge.

On August 4, 1891, Mrs. D. E. Edwards and E. A. Hubbard, as her trustee, filed their bill against Joe Denton, J. M. Hays, and William Hillier to remove a cloud on title. From the decree both parties appealed. Modified.

They alleged that said D. E. Edwards is the real and true owner of S. E.  $\frac{1}{4}$ , section 31, township 20, range 10; that it was conveyed to E. A. Hubbard, as trustee for her, for a valuable consideration, by her husband, G. W. Edwards, who was the real and true owner, on August 20, 1874; that the defendants are in possession, trespassing, and claim to have some title to said land from said G. W. Edwards, made after deed to complainant, but really have no title, and that their claim of title casts a cloud, doubt, and suspicion on the title of complainants. The prayer of the bill is that "all claims asserted by defendants, or either of them, be canceled; that the title of complainant be quieted; that defendants be held to pay a reasonable sum for the use and occupation of the land, and for the value of trees cut from same; that they be enjoined from further trespassing; and that a writ of possession issue to put complainant in possession. The defendant Denton disclaimed any claim, and the suit was dismissed as to him. The answer of Hillier and Hays alleges that Hillier is the true owner; that he had been in adverse possession of same for over 10 years; that he entered into possession under a contract of purchase from G. W. Edwards; that on the 20th day of January, 1890, G. W. Edwards gave Hillier a deed to the land in consideration of \$350 cash, and that the money was paid to Mrs. D. E. Edwards; that Hillier borrowed



this money from one Thorp; that he gave Thorp a deed of trust, which deed of trust was assigned to defendant J. W. Hays, who is the owner of it; and that said land was not embraced in the original deed from G. W. Edwards to his wife. The answers do not deny that said defendants have cut 500 trees off the land, nor that the deed from G. W. Edwards to Hillier was made subsequent to his deed to his wife, nor that defendants claim title through G. W. Edwards as a common source. The deed from G. W. Edwards to his wife describes the land as "S. E.  $\frac{1}{4}$ , sec. 31, T. 20, R. 9;" but on May 7, 1889, a bill was filed to correct and reform this deed, so as to make it read, "S. E.  $\frac{1}{4}$ , sec. 31, T. 20, R. 10," and there was final decree making the correction. The deed from G. W. Edwards to Hillier, and the trust deed from Hillier to Thorp, assigned to Hays, were each made January, 1890. The answer sets up that Hillier went into possession in 1879. Hillier gave rent notes in 1888 and in 1889. A bill by Hillier, under oath, introduced by defendants in this cause, shows that he bought the land on December 25, 1888, from G. W. Edwards, and had not paid for it. Under the original deed from G. W. Edwards to his wife, E. A. Hubbard was made trustee to protect and defend the estate. Hubbard made G. W. Edwards his agent and attorney in fact. Mrs. Edwards states in her deposition that Hillier tried to buy the land from her in 1889, and that she did not authorize her husband to sell the land. The defendants introduced the will of D. E. Edwards, Sr., to show that he devised this land to G. W. Edwards and E. D. Edwards, two of his sons, jointly; then a deed from the sheriff to one J. M. Leverett under an execution against Fannie Allen and E. D. Edwards, made October 3, 1887; and a deed from Leverett to G. W. Edwards. The chancellor in his final decree decided that Mrs. D. E. Edwards only had a half interest in the land, and confirmed and quieted her title to that extent, and that the other half interest should remain unaffected by the decree. He did not decree any amount for use and occupation, nor for the timber cut off by defendants, nor make any order for a writ of assistance.

Leverette & Gare and R. O. Beckett, for complainants. Fox & Roan, for defendants.

COOPER, J. The evidence is insufficient to establish adverse possession by the defendant Hillier for the time required by law to perfect his title, and so the chancellor held, in which conclusion we concur. We also concur with him in the view that no sufficient evidence appears by reason of which Mrs. Edwards should be estopped from asserting her title to the land sued for. The attorney for Hillier, to whom the settlement of the controversy between Hillier and G. W. Edwards was intrusted, and who paid the purchase money for the lands, and received

the conveyance from G. W. Edwards, testified in this cause that he knew that Mrs. Edwards then claimed to own the land. Why, under such circumstances, he accepted a conveyance from G. W. Edwards, is not explained. But Hillier is certainly bound by the notice which was given to his agent and attorney. The mere fact that a part of the purchase money went to discharge an incumbrance on the land, executed by her, the payment being made by her husband, does not estop her to claim the land. The extent of the right of the purchaser, Hillier, if any, would be to secure subrogation to the claim of the mortgagor whose debt was paid; but this relief is affirmative in its nature, and there is no cross bill in the cause under which it could have been awarded by the court. Upon the appeal of Mrs. Edwards the decree must be reversed. By his conveyance to Hubbard, the trustee for Mrs. Edwards, G. W. Edwards attempted to convey the entire interest in the land. There was a misdescription as to the range in which the land lies, but this was corrected by a decree of the chancery court before G. W. Edwards conveyed the land to Hillier. If it be true that when he made the conveyance to Hubbard he only owned an undivided one-half interest in the land, and afterwards acquired the other interest under execution sale against the owner, his brother, the title so secured passed eo instanti under his former conveyance. *Kaiser v. Earhart*, 64 Miss. 492, 1 South. Rep. 635; *McInnis v. Pickett*, 65 Miss. 354, 3 South. Rep. 660; *Bramlett v. Roberts*, 68 Miss. 325, 10 South. Rep. 58. There was, therefore, no title to any interest in that land in him at the date of the conveyance to Hillier. The decree is affirmed on the appeal of the defendants, and reversed upon that of the complainant.

(69 Miss. 444)

#### ALABAMA & V. RY. CO. v. DAVIS.

(Supreme Court of Mississippi. Oct., 1891.)

ACCIDENT AT RAILROAD CROSSING—NEGLECT—IMPUTED—CONTRIBUTORY—REMITTITUR OF DAMAGES.

1. Plaintiff, at the time she was run into by defendant's train, was being driven in a private carriage, by invitation of its owner, the driver being the owner's son. *Held*, that no such relationship existed between plaintiff and the driver that the negligence of the driver could be imputed to plaintiff.

2. A verdict for plaintiff, under proper instructions as to the plaintiff's contributory negligence, will not be disturbed on the ground that she might have saved herself, where the train was not discovered till the team was within a few feet of the railroad, and it is doubtful if she had time to disincumber herself of her sister, who was sitting on her lap, and leap from the carriage, and the jury may have been of the opinion that she had not time for deliberation and action, and was for the moment paralyzed with fear.

3. Where plaintiff consents to a remittitur of part of the damages on the statement of the court that, if she does not, the verdict will be set aside, and a new trial granted, her action will be held voluntary, and she will have no ground for appeal.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by Nettie M. Davis against the Alabama & Vicksburg Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

The congregation of a country church, near Bolton, an incorporated town, requested Miss Nettie Davis to play the organ for them during a protracted meeting. She consented, if they would send for her. On the Saturday preceding the accident, Miss Davis was informed by Mr. Tom McAlpin, a young man, nearly grown, the son of Mrs. McAlpin, who made the arrangement, that the meeting would be held the next day. Miss Davis testified that there was no engagement with Tom McAlpin to drive her out. In pursuance of the previous arrangement with Mrs. McAlpin, Tom, on Sunday morning, came to Bolton in a buggy for Miss Davis. He went to the depot, and there saw on the bulletin board that the mail train, which was due at 10:10 A. M., was one hour and forty minutes late. He then drove to Miss Davis' residence for her. She knew when the mail train was due, but had been informed that it was late one hour and forty minutes. She got into the buggy, and took her little sister in her lap, and started, McAlpin driving. The only route to go was across appellant's railroad, at the public crossing or streets of Bolton. The proof shows that, at the time of the accident, a train approaching from the east could only be seen at one point, about 50 yards from the crossing, by reason of a crop of cotton, intervening buildings, and the cut through which the street approaches the crossing. This cut was so narrow that you could not turn in it, and its mouth was right upon a side track, which was approached by a little bridge over the ditch. After coming out of the cut, it was impossible to turn down or around without driving upon the main track. Neither McAlpin nor Miss Davis heard any train approaching until the horse was on this little bridge. When about 15 feet from the main track, they heard the train whistle. Miss Davis exclaimed, "You are surely not going to try to cross!" McAlpin replied, "I think I can make it." Miss Davis then grabbed McAlpin's arm, and immediately the train struck them. The engine was approaching down grade, with steam shut off. Some of the witnesses say it whistled twice, and some three times. The first whistle was about a half mile east of the crossing; the second was about 160 feet east of the crossing, and was the one heard by Miss Davis and McAlpin. The speed of the train was variously estimated from 8 to 20 miles per hour. The engineer saw the buggy about two car lengths west of the switch. When he saw them he blew the whistle. He also applied the air brakes, and slightly reversed the engine. He did not fully reverse it,

nor did he apply steam to his engine while so reversed. The engine struck the buggy, throwing the occupants out. The effect of the accident was to scalp Miss Davis, from which she suffered a great deal, being confined to her bed for three weeks, and had a severe contused wound above the ankle, which has so injured her that she cannot perform her daily duties. The injury is apparently permanent, for which she brought this action, claiming that the damages were caused by the negligence of defendant's servants in charge of the train, and claiming \$10,000 damages. The jury found for the plaintiff \$4,000, and judgment was entered therefor. Defendant moved for a new trial, and among the grounds assigned was excessiveness of the verdict. The court ruled that it was of opinion that the verdict was excessive in the sum of \$2,000, and that on this ground alone, unless remitted to that sum, he would grant the motion. Plaintiff requested the court to direct the remittitur. The court declined to do this. Plaintiff then requested the court to let the verdict stand on the main issue, and award a writ of inquiry to ascertain the damages. The court refused this. Thereupon plaintiff, being compelled to have the whole verdict set aside or remit, remitted \$2,000. The motion for a new trial was then overruled, and a judgment for \$2,000 was entered for the plaintiff. From this defendant appealed, and plaintiff prosecutes a cross appeal, the action of the court as to the remittitur being assigned for error.

Nugent & McWille, for appellant. Calhoun & Green, for appellee.

WOODS, J. From all the evidence in the record before us, it is certain that McAlpin was guilty of contributory negligence, and, from the same evidence, the negligence of appellant is also indisputable. By imputation, was McAlpin's negligence a bar to appellee's recovery? Was McAlpin the servant of appellee? Did the relation of master and servant, or principal and agent, subsist between them? The appellee was, by invitation, being transported in a private conveyance on the occasion of the injury complained of. She was being driven in this private conveyance at the invitation of McAlpin or McAlpin's mother. The team and vehicle were either furnished by McAlpin or McAlpin's mother, and the appellee was, by invitation, being driven by McAlpin from appellee's residence to a church in the country, not far away. The team was gentle, and there was nothing to lead the appellee to believe that McAlpin was not a prudent and safe driver. The appellee was not the owner or hirer of the team, vehicle, or driver. She had no control, or right of control, over the team, and none over the driver, other than that moral control which one human being may be supposed to have over another when the two are brought into close

association. We cannot agree that the temporary occupancy of a seat in the vehicle, under the conditions and circumstances shown to exist in this case, created such relationship between the appellee and McAlpin as made McAlpin's negligence imputable to appellee, or would have rendered her liable for McAlpin's negligence if he had injured a third person without appellee's connivance or direction. We do not think that McAlpin was the servant or agent of appellee, and his negligence is not therefore imputable to her.

Was appellee negligent herself? We cannot disturb the finding of the jury on this point. Though appellee never saw the train at all, yet, when, at the foot of the cut, she was made aware of the near approach of a train, and discovered the purpose of McAlpin to attempt to cross, while there was still ample time and space in which to stop if McAlpin had heeded her wish, appellee did cry out to McAlpin, "Surely, you do not intend to cross!" And, on his replying he thought he could do so, appellee instantly screamed, and caught him, but the train was by that time upon them. It is to be remembered that appellee had seated upon her lap her sister, aged 10 or 12 years, and that, if she had desired to spring from the conveyance on seeing McAlpin's recklessness, she could not have done so without first throwing out the girl, or constraining her to jump out, and, that done, she would have had no time for determining the probability of securing her own safety by springing out. It is doubtful if there was time for her to disincumber herself of her sister, and spring from the carriage; but, if it is possible that she might have flung out her sister, and have made the effort to save herself, still, if the jury was of opinion that she had no sufficient time for deliberation and action, but, paralyzed with fear, she, for the instant, did nothing, the verdict might have yet been properly for her on this issue. She was not bound to exercise that care and caution and take such prudent action as it may now appear would or might have produced a different result. She was only required to behave herself as the average woman of reason would have done, situated as she then was. The jury, under proper instructions, has passed upon the question, and we are not disposed to disagree with the jury on its finding.

The cross appeal is not maintainable. The consent to a remittitur was not compulsorily obtained. The appellee might have declined to yield to what she thought the arbitrary course of the court, and, if the court had persisted, and had actually set aside the verdict and awarded a new trial, by taking appropriate steps the appellee might have had this court rectify the arbitrary action complained of, if, indeed, it had been ascertained to be wrongful. The appellee prudently chose not to take the hazard of

that heroic course, and must be held to have voluntarily consented to the remittitur. She made her election to take the sure sum of \$2,000, rather than incur the chances of total loss, and we are not prepared to say she did not act wisely in making that election. Affirmed.

(60 Miss. 473)

YATES v. MEAD et al.

(Supreme Court of Mississippi. Oct., 1891.)

INJUNCTION BOND—BREACH OF CONDITION—ACTION.

Sale of land under execution on judgment against D. was enjoined by M., who claimed title from D. through S. The latter was also made a party, and a balance due him from M. on the purchase price was paid into court. Under the injunction suit, there was a contest between S. and the judgment creditor as to the right to the fund paid into court, and a decree was rendered for the judgment creditor, but the injunction was not dissolved. *Held*, that the judgment creditor could not maintain an action against M. on the injunction bond, as there had been no breach of it.

Appeal from circuit court, Jackson county; S. H. Terral, Judge.

Action by Mary L. Yates against W. K. Mead and J. W. Mead. Judgment for defendants. Plaintiff appeals. Affirmed.

This is an action on an injunction bond to recover damages sustained by appellant in defending the suit under which the writ of injunction was issued. In 1887 appellant had execution issued and levied on certain lands claimed by appellees. Mrs. Yates claimed to be the assignee of a judgment against one G. M. Dees, through whom appellees claim title, by several successive conveyances, enrolled before said Dees sold the land. The Meads, appellees, enjoined the sale of the land, and executed a bond, according to law, interpleading those who had conflicting claims. J. C. Strong, who was the immediate vendor of the Meads, and Mrs. Yates, were made parties to the bill, and a balance due on the land by the Meads was paid into court. The proceedings under this injunction were had in the chancery court of Jackson county, and, upon final hearing, the chancellor sustained the allegations of the bill, entered a decree in favor of Strong, and made the injunction perpetual. Mrs. Yates appealed from this decree, and the supreme court reversed it, and entered a decree in the supreme court giving the funds to Mrs. Yates. Mrs. Yates then entered this suit in justice of the peace court on the injunction bond, to recover the damages sustained in defending the chancery suit. She recovered a judgment in that court. Appellees appealed to the circuit court, and the case was tried before the court, without a jury. The court held that the action was not maintainable, and rendered a judgment for appellees. Mrs. Yates appealed.

T. W. Brame, for appellant. Horace Bloomfield, for appellees.

CAMPBELL, C. J. This case was decided correctly by the circuit court. There was no breach of the condition of the bond, for the injunction was never dissolved, formally or in effect. On the contrary, the suit of the appellees, in which the bond was given, was maintained so far as to result in a contest between Mrs. Yates and Strong as to which was entitled to the money brought into court by the appellees with their bill in that case. *Yates v. Mead*, 68 Miss. 787, 10 South. Rep. 75.

Affirmed.

(69 Miss. 469)

### WATKINS v. GREGORY.

(Supreme Court of Mississippi. Oct., 1891.)

COVENANT OF WARRANTY—BREACH—ACCRUAL OF RIGHT OF ACTION.

While, as between a grantee of land to whom title had been conveyed and a subsequent grantee of the same land from the same grantor, their mixed possession would be that of the first grantee, breach of covenant of warranty in the second grantee's deed would not occur till there was an interruption of his enjoyment of possession, and, consequently, his right of action would not accrue till then.

Appeal from circuit court, Monroe county; G. J. Buchanan, Special Judge.

Action by D. S. Gregory against W. W. Watkins. Judgment for plaintiff. Defendant appeals. Affirmed.

Gregory sued Watkins for a breach of warranty of title to 20 acres of land. W. W. Watkins and his wife conveyed to D. S. Gregory the S. W.  $\frac{1}{4}$  of section 14, township 13, range 19, in Monroe county, by deed containing a warranty. It was agreed at the trial in the court below that one W. B. Thompson conveyed this entire quarter section of land to Nabors & Gholson, and that Gregory, by several successive conveyances, holds title under them. It is also agreed that said W. B. Thompson conveyed 20 acres in the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of said section in 1850, prior to the deed to Nabors & Gholson, to one James Kelly, and in 1884 Kelly sold this land to T. J. Calahan, and in 1885 Calahan sold it to Mrs. Delano, the present owner. By agreement, the case was tried before the court, without a jury. Defendant pleaded the statute of limitation. The evidence tended to show that of the 20 acres there were 8 acres separated from Gregory's other land by a creek, and cultivated by Mrs. Delano, which Gregory did not know were included in his deed, and which were never claimed by him. Gregory testified that he did not know of any adverse claim to the remainder of the land across and on the north side of the creek; that he thought it belonged to him; and that he and his tenants frequently cut firewood and timber from it; and that he knew nothing of Mrs. Delano's claim until in 1888, when she had a survey made. He told the surveyor at the time that he was running on his land, and the surveyor then showed him Mrs. De-

lano's deeds, and he then for the first time learned that she had title to the 20 acres, and claimed the land north of the creek. Gregory then had his land surveyed, and verified Mrs. Delano's survey, and examined her title, when he found that she had a paramount title, and he then surrendered all claim to the land. The evidence also shows that Mrs. Delano knew nothing of Gregory's claim to the 20 acres. In November, 1890, Gregory, after discovering that Mrs. Delano had a superior title, and relinquishing his claim, began this suit to recover the value of the 20 acres. Plaintiff, on the trial, abandoned his claim of damages in respect to the 8 acres of which he had never had possession, as he was clearly barred as to that. There was a verdict and judgment for the plaintiff for \$76.92, and interest from December 1, 1888, being the price of 12 acres of the land. Defendant appealed.

Gilleylen & Leftwich, for appellant. E. H. Bristow, for appellee.

CAMPBELL, C. J. While, as between the two holders of title to the land, their mixed possession would cause the possession to be adjudged as that of the holder of the better title, the breach of the covenant of warranty did not occur until 1888, when, for the first time, there was an interruption of the enjoyment of the possession of the covenantee, and his right of action then accrued. Affirmed.

(69 Miss. 432)

### MILLSAPS v. LOUISVILLE, N. O. & T. RY. CO.

(Supreme Court of Mississippi. Oct., 1891.)

FELLOW SERVANTS—WHEAT CONSTITUTES—RELATION—RAILROAD EMPLOYEES.

One working as fireman on a locomotive, with the permission of the railroad company, for the purpose of learning the business, is a fellow servant of a train dispatcher employed by such company.

Appeal from circuit court, Franklin county; W. P. Cassedy, Judge.

Action by Elijah Millsaps against the Louisville, New Orleans & Texas Railway Company for the wrongful death of his son. From a judgment for defendant, plaintiff appeals. Affirmed.

The declaration alleges that the intestate, Sidney Millsaps, while working on one of defendant's engines, acting as fireman, with the permission of defendant, for the purpose of learning the business, was killed in a collision, caused by the negligence of defendant's train dispatcher, who was charged with the duty of directing the movement of the trains. Defendant demurred to the declaration because it showed that the negligence alleged was that of a fellow servant, and the demurrer was sustained.

H. Cassedy, for appellant. Mayes & Harris, for appellee.

COOPER, J. Under the facts stated in the declaration, the plaintiff's intestate was the servant of the defendant corporation. *Degg v. Railway Co.*, 1 Hurl. & N. 773; *Barstow v. Railroad Co.*, 143 Mass. 535, 10 N. E. Rep. 255; *Osborne v. Railroad Co.*, 68 Me. 49; *McKln. Fel. Serv.* § 19. The train dispatcher was the fellow servant of the intestate. *Railway Co. v. Petty*, 67 Miss. 255, 7 South. Rep. 351; *Railroad Co. v. Hughes*, 49 Miss. 258; *Lagrone v. Railroad Co.*, 67 Miss. 592, 7 South. Rep. 432. Judgment affirmed.

(69 Miss. 421)

LOUISVILLE, N. O. & T. RY. CO. v. PATTERSON.

(Supreme Court of Mississippi. Oct., 1891.)

CARRIERS—REFUSAL TO FURNISH SEAT TO PASSENGER—RESULTING LIABILITY.

A railroad company is liable to a passenger for the refusal and failure of the conductor to furnish him with such a seat as he has paid for, when there are more of such seats than there are passengers, but there are none vacant, owing to the fact that some of the passengers occupy more seats than they are entitled to.

Appeal from circuit court, Claiborne county; J. D. Gilland, Judge.

Action by J. F. Patterson against the Louisville, New Orleans & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, a white man, purchased a first-class ticket over defendant's road, and got on its train at Vickburg, Miss., and went into the coach provided for white passengers having first-class tickets. The train consisted of three coaches for passengers, the one in front being the smoker, the second for the colored passengers, and the third for white passengers. When plaintiff went into the coach to get a seat, he found that they were all occupied, and the conductor told him that he could not get a seat in that car. Some of the passengers were asleep, and occupied two seats, and some of the seats were filled with baggage, but none of the seats were vacant. The plaintiff insisted that the conductor should get him a seat, but he refused to do so, and told plaintiff to get a seat in the next coach. He went into the next coach, and got a seat, but the conductor, coming in soon after, required him to leave that coach, as it was the car set apart for the colored passengers. Plaintiff then went into the smoker, but soon left it, because the smoke nauseated him, and went to the conductor, and insisted that he would get him a seat, and threatened to sue the railroad if he did not. The conductor replied in an angry tone that he could get no seat in there, and he "could sue, and be d—d." Plaintiff then went out on the platform, and remained there until he reached a station, when he got off the train. Patterson then brought this suit in a justice's court to recover \$150 damages. In the justice's court there was a judgment by

default for plaintiff. Defendant appealed to the circuit court, where it introduced the conductor as a witness, and he denied the facts above stated. Plaintiff had a verdict and judgment for \$75. Defendant's motion for a new trial was overruled, and it appealed.

Mayes & Harris, for appellant. T. D. Marshall, for appellee.

WOODS, J. The appellee paid for a seat in a first-class coach, and was entitled, as matter of right, to have the servants of the railway company who were in charge of the train furnish him such seat, unless a sudden and unusual influx of passengers rendered this impracticable. It is perfectly clear from all the evidence in this case that the conductor in charge of the train could and should have made provision for seating the appellee. It is equally certain that a proper application of the appellee to that effect provoked not only a refusal from the conductor, but subjected the audacious passenger to an explosion of profane and contemptuous wrath from that official. That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God, and take courage. Affirmed.

(69 Miss. 439)

LOUISVILLE, N. O. & T. RY. CO. v. DURFREE.

(Supreme Court of Mississippi. Oct., 1891.)

RAILROAD COMPANIES—OBSTRUCTION OF HIGHWAY CROSSING—LIABILITY FOR RESULTING INJURIES.

In an action against a railroad company for failure to uncouple its cars so as not to obstruct a highway crossing for more than five minutes, as required by Code 1880, § 1049, plaintiff may recover for injuries resulting from exposure to the weather while awaiting an opportunity to cross defendant's track, though there were houses near by in which he could have obtained shelter.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Action by one Durfree against the Louisville, New Orleans & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The action in this case is brought to recover damages alleged to have been sustained by appellee because of the failure of defendant to remove or uncouple one of its freight trains from a crossing on a highway, as required by Code 1880, § 1049. The declaration does not state the day on which the occurrence took place. The suit was filed in March, 1890. At the October, 1890, term, defendant moved to require the plaintiff to amend the declaration, in order that the time of injury and the nature of the damages might appear, and because the declaration was otherwise indefinite, and so framed as to prejudice, embarrass, and delay a fair trial. The court overruled this motion. Defendant then filed the plea of general issue, and gave notice that on the

trial it would introduce evidence to show that plaintiff contributed to his injury by his own culpable negligence. On the trial, plaintiff testified that he arrived at the town of Lulu on defendant's road from Memphis. His home was about two miles in the country. His most convenient route was across the railroad track at a crossing about 1,200 yards from the depot, and it was about the same distance to the public houses in the town. The day was cold and damp. Plaintiff rode to the crossing, which he found obstructed by a freight train of defendant. After he had waited about a half hour for the passage to be opened, it began to rain. He continued to wait in the rain, and said, after he had been there in the rain for about a half hour, he began to feel the effects of the rain, and had a chill, but continued to stand in the rain, waiting for the train to pass, for three-quarters of an hour longer. He went home, and went to bed, and was sick for about two weeks. He testified that he sustained losses, besides his suffering, to the amount of several hundred dollars in the management of his farm. No explanation was given by defendant as to the failure to remove or uncouple the train. After the evidence was all in, defendant moved to exclude all the evidence for the plaintiff. This motion was overruled. Defendant then asked for a peremptory instruction, which was refused. Defendant also asked an instruction to the effect that, if the plaintiff recovered, he was only entitled to nominal damages, which was refused. Plaintiff recovered a verdict and judgment for \$225. Defendant appealed.

Mayes & Harris, for appellant. Outrer & Outrer, for appellee.

COOPER, J. The appellant company should congratulate itself upon the very fortunate escape it has secured from a verdict for substantial punitive damages, which, on the facts, might well have been awarded by the jury. Mr. Dufree was justified in momentarily expecting that the servants of the company would remove the obstructing train from across the highway, so that he might pursue his journey home; and it does not lie with the company to say that he should have yielded to its unlawful and arrogant conduct, and sought shelter against the inclemency of the weather. The judgment is affirmed.

(69 Miss., 418)

ILLINOIS CENT. R. CO. v. SCRUGGS.

(Supreme Court of Mississippi. Oct., 1891.)

LIVE-STOCK SHIPMENTS—LIMITING LIABILITY—RIGHTS OF CARRIER.

1. Where horses are shipped under a special contract relieving the carrier from its common-law liability, and are injured, an instruction, in an action for damages, that nothing would relieve the carrier from liability but the

act of God, the public enemy, or the conduct of the owner, is erroneous.

2. Where the injuries to horses shipped result from self-inflicted wounds, the carrier is not liable.

Appeal from circuit court, Montgomery county; O. H. Campbell, Judge.

Action by John T. Scruggs against the Illinois Central Railroad. Judgment for plaintiff. Defendant appeals. Reversed.

Plaintiff purchased a car load of horses, mares, and colts, and shipped them from San Antonio, Tex., to Winona, Miss., under a special contract made with the Harrisburg & San Antonio Railroad Company, via New Orleans, over the Southern Railroad. At New Orleans the car was taken by the Illinois Central Railroad, and transferred to Winona. Under this special contract, the plaintiff accepted the car as being sufficient, and agreed to travel with and look after the stock, to feed and water them on the road, and to load and reload at his risk. When the stock reached New Orleans, some of the horses were down, but they were unloaded there, watered, and fed. When they reached Winona, some of the horses were dead, and others were injured, and Scruggs brought this suit to recover of the defendant the sum of \$170 damages for injuries alleged to have been done to these horses between New Orleans and Winona. On the trial, plaintiff testified that several of the horses were down at different times along the route, and he requested the conductor once to stop, and get them up, but the conductor told him that he could not do so, as it would put him behind, and he could not make the schedule time. He also testified that he made complaint to the agent of the Illinois Central at New Orleans that the car was not suitable, on account of the slats being too wide apart. Plaintiff recovered a judgment for \$75, and costs.

The instructions given for the plaintiff in the court below, and mentioned in the opinion, are as follows: "(1) Where property is delivered to a common carrier, the law implies that it shall be delivered at the place of destination within a reasonable time, and in as good condition as received. Nothing relieves from his obligation, except the act of God, the public enemy, or the act or conduct of the owners." "(4) Where goods shipped over connecting lines are delivered to the consignee in a damaged condition, and it is proven they started on their journey in good condition, the carrier thus delivering them to the consignee will be liable for the damage, unless it is shown that the injury did not occur through its fault."

Mayes & Harris, for appellant.

COOPER, J. The court erred in giving the first instruction for the plaintiff, and the fourth is of doubtful application, under the circumstances of this case. The horses of the plaintiff were being carried under a spe-

dial contract, by which the common-law liability of the carrier as an insurer was stipulated against, as might lawfully be done. Notwithstanding this, the jury was told by the first instruction that nothing would relieve the carrier from his obligation to carry and deliver safely except the act of God, the public enemy, or the act or conduct of the owner. This instruction denied to the carrier the immunity stipulated for by the contract of shipment, for injuries arising "in consequence of any of them [the horses] being wild, unruly, or weak, or of different ages or classes, or maiming each other or themselves." It is manifest from the evidence that the injuries sustained by the animals resulted from self-inflicted wounds, and the carrier fully exonerated itself from liability, under the decision in the case of *Railroad Co. v. Abels*, 60 Miss. 1017.

The car in which the horses were transported was the same in which they had been carried by the connecting line, and, so far as the record discloses, was a safe and suitable one. It is true the plaintiff testified that he made some objection to the car, because the slats were too far apart, but it is not shown or suggested that this supposed defect contributed at all to the injury of the animals. The question is not whether the plaintiff said that the slats were too far apart, but whether, in fact, they were, and, because they were, that the injuries were, or might have been, inflicted. The transportation is shown to have been prudently and speedily made, with all reasonable opportunity for feeding and resting the animals, which opportunities were fully availed of. The first instruction should not have been given, and the verdict, when rendered, should have been set aside, as opposed to the clear preponderance of the evidence. Judgment reversed.

(45 La. Ann. 1065)

**BROUSSARD v. BROUSSARD.** (No 1,441.)<sup>1</sup>

(Supreme Court of Louisiana. July Term, 1893.)

**SALE BY MARRIED WOMAN — RIGHTS OF BONA FIDE PURCHASER — SECRET EQUITIES.**

1. Whatever the secret equities between a vendor and vendee, and whatever their rights as between themselves, the former, who has placed on the public records a title valid on its face, cannot urge such equities against a bona fide purchaser for value from the vendee, who acted on the faith of such recorded title.

2. This principle applies to married women who, in the exercise of powers conferred by law, have executed apparently valid sales of their paraphernal property.

3. The fact that the vendor has retained possession of the property sold might, in some cases, suffice to put the subsequent purchaser on his guard and impugn his good faith; but such fact loses all significance when his purchase has been made with the full knowledge and approval of the vendor, and under her as-

surance that the vendee had the full right to dispose of the property.

4. The protection accorded by the law to married women cannot be distorted into a means of defrauding innocent persons who have acted upon the faith of titles passed by them apparently valid, and fully warranted by law and of their own representations to the same effect.

(Syllabus by the Court.)

Appeal from district court, parish of Vermillion; A. C. Allen, Judge.

Action by M. O. Broussard against Felix Broussard. From a judgment for defendant, plaintiff appeals. Affirmed.

L. L. Bourges, for appellant. W. W. Edwards, W. A. White, and Estilette & Dupre, for appellee and warrantor.

FENNER, J. This is a petitory action wherein plaintiff claims the ownership and delivery of certain lands which, she alleges, are in the possession of defendant as a mere trespasser. The defendant denies plaintiff's ownership, and sets up title in himself. A statement of the admitted or indisputable facts presented by the record subjects the case to the application of clear principles of law, which leave little difficulty in its decision. It is not denied that, in 1868, plaintiff, a married woman, separated in property from her husband, acquired the property in controversy, with other property, by valid title, and held the same as her paraphernal property. On the 1st of January, 1879, she executed an act of sale, in authentic form, of the property thus acquired, to her brother-in-law Joseph S. Nunez, which purported to convey the property to him with full warranty, and for a definite price, which, she declares in the act, was then and there paid to her, partly in cash and partly in notes. She was properly authorized and assisted by her husband, and the act was duly recorded. On June 28, 1883, Joseph S. Nunez executed an act of mortgage on a part of the property in favor of Manade and Pedare, to secure the payment of a note given for advances made and to be made during the year to J. S. Nunez, to enable him "to cultivate his sugar plantation, under the superintendence and management of his brother Demosthene Nunez," plaintiff's husband. The plaintiff, authorized by her husband, was a party to the mortgage, and signed the note as solidary surety. In 1886, Manade and Pedare, who were aliens, brought suit, *via ordinaria*, in the United States circuit court, on this note, against both J. S. Nunez and the plaintiff. Both were personally cited, and, making no appearance, judgment by default was duly entered and confirmed, whereby both were condemned in solido, and the mortgage was recognized and ordered to be enforced. On this judgment a writ of *fi. fa.* was issued in January, 1887, under which the mortgaged property was seized, notice of seizure was served on plaintiff and her husband, as well as on J. S. Nunez, person-

<sup>1</sup> Rehearing denied.

ally, the property was duly advertised, appraised, and sold, and was adjudicated to M. Manade, one of the judgment creditors. Shortly thereafter, on July 6, 1887, Manade sold the property thus acquired to Felix Broussard, the present defendant, who received and has held possession, without objection or interference by plaintiff, up to the date of the institution of this suit. On the same day, Joseph S. Nunez transferred to defendant the remainder of the property sued for in this action, by an act of exchange, by which defendant, in consideration for the same, transferred to Nunez a valuable plantation belonging to him. The plaintiff and her husband were both cognizant of this exchange, approved and encouraged it, and plaintiff advised defendant to make it. After the exchange, plaintiff removed from the property to the plantation received from defendant, and lived upon the same, until it was seized and sold in satisfaction of debts of Joseph S. Nunez. Such are the titles propounded by defendant in opposition to the plaintiff's demand.

The present action is, doubtless, prompted by the judgments rendered by this court in the case of *Broussard v. Le Blanc*, 44 La. Ann. 881, 11 South. Rep. 460, and 43 La. Ann. 880, 9 South. Rep. 908. Those were actions brought by the present plaintiff to restrain the sale by creditors of J. S. Nunez of certain property, different from that herein involved, but covered by the same sale of January 1, 1879, from plaintiff to said Nunez, herein alone referred to, and to have said sale pronounced a nullity, on the ground that the sale was simulated and fraudulent, and executed, under the influence of her husband, merely as a pignorative contract, intended as security for his debt, in violation of a prohibitory law, and therefore null and void. Our judgment annulled that sale, and perpetuated the injunction. But in those cases we were dealing with simple judgment creditors of Joseph S. Nunez, who were seeking to subject to the payment of their debts property which, though apparently belonging to their debtor, did not really belong to him, but to another. They had paid no value and parted with no consideration on the faith of the apparent title. In this case we are dealing with the rights of a purchaser for value and in good faith, who acquired on the strength of the apparent title, valid on its face, and with the full knowledge, approval, and participation of the very party who now sets up its nullity. In the very case above referred to, (44 La. Ann. 833, 11 South. Rep. 460,) we said: "It is quite true, as a matter of equity,—and this court has repeatedly maintained the principle,—that in case a party in possession under a recorded title execute a special mortgage thereon in favor of a third and innocent mortgagee, who advances money upon it, he nor his vendor can successfully attack and defeat

it, on making proof of secret equities and latent ambiguities in the title." It is true it appears that J. S. Nunez did not take physical possession under the conveyance from plaintiff to him, but that fact loses all significance in view of the facts in this case. Plaintiff was herself a party to the act of mortgage from Nunez to Manade and Pedare, and a joint obligor on the note secured. She recited therein that the plantation belonged to Nunez, and was only "under the administration and management of her husband." Moreover, she was a party to the suit, enforcing the judgment, and, if she had any defense thereto, she should have urged it, and not having done so, is bound by the judgment and by the execution and sale thereunder, of which she had full notice, and which she recognized by promptly and peaceably delivering possession to the adjudicatee and his vendee. The verity and full consideration of the mortgage, and the perfect good faith of Manade and Pedare, the binding effect of their judgment, obtained contradictorily with plaintiff, and the validity of Manade's title as adjudicatee at a sale of which plaintiff had the fullest notice, do not and cannot admit of question, and defendant's acquisition from Manade is entitled to like protection. The same principles apply to the exchange between Nunez and defendant. Plaintiff actively participated in promoting and bringing about said exchange, and she also participated in its execution by delivering possession of the property now claimed to defendant, and by actually removing to, and taking possession of, the property received from defendant. A feeble attempt was made to impugn the good faith of defendant in this transaction, and to bring home to him notice of the unreality of Nunez's title. This attempt is a failure. It rested exclusively on the testimony of Nunez, which is contradicted by defendant, and was not believed by the judge a quo. Whatever suspicion might have been aroused by the fact of plaintiff's continued possession of the property was entirely removed by plaintiff's own assurances as to Nunez's right to dispose of the property, and by her voluntary participation in the execution of the exchange. We consider that defendant has fully established his position as a purchaser in good faith and for value on the faith of apparently valid recorded titles.

It is settled in this court, by a jurisprudence too inveterate to admit of question, that, "whatever the secret equities between a vendor and vendee, the former cannot claim them against a subsequent purchaser in good faith. Having placed on the public records the title on the faith of which such purchaser acquired, the vendor must bear the consequences of having presented the vendee's rights in a false aspect." *Hen. Dig. tit. "Sale," V., a, par. 1*, and numerous authorities there quoted. Plaintiff had full



power and authority to make the sale to Nunez, and, upon its face, it was as valid a title as if made by a man or a feme sole. The doctrine above quoted has been applied to a married woman in such case, and it was held that "threats and undue influence of the husband to induce his wife to sign an act of sale of her paraphernal property to B. cannot affect the rights of C., a bona fide purchaser from B." *Blanchard v. Castille*, 19 La. 362. The equity of the doctrine is well expounded by Chief Justice Marshall in the following language: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law. He is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned." *Fletcher v. Peck*, 6 Cranch, 133. Married women can claim no exemption from the application of these principles when acting within the powers conferred upon them by law. The principle heretofore announced by this court fully applies: "While the law and the jurisprudence have at all times favored married women in the assertion and vindication of their rights, they have never intended, and do not contemplate, to protect them in the perpetration of fraudulent practices, for the accomplishment of villainous objects, by which to enrich themselves gratuitously at the expense of their unguarded and trusting neighbor, on whom equity keeps a watchful eye." *Henry v. Gauthreaux*, 32 La. Ann. 1108. There are other principles of law equally antagonistic to plaintiff's claims in this case, but we deem the above conclusive and sufficient. Judgment affirmed.

(45 La. Ann. 1109)

**LAMBERT v. CRAIG. (No. 1,437.)**

(Supreme Court of Louisiana. July Term, 1893.)

**EMPTMENT—TITLE TO SUPPORT—TAX SALES—VALIDITY OF.**

A plaintiff in a petitory action against a party in possession of the property, exhibiting title, must recover on the strength of his title. Resting his title on a tax deed, he must not

only show a prima facie title, but one absolutely good. The recital in a tax deed that all the requisites of law were complied with will not excuse the production of proof aliunde that the essentials prerequisite to the sale were complied with. The effort of plaintiff in a petitory action to sustain his title by a plea of prescription against an attack thereon by defendant cannot be countenanced. Where two parties claim the same property under different conveyances, and one of them leases the property from the other, he abandons his title, and cannot afterwards set up the same title against the party from whom he leased the property. In tax sales under the revenue laws, as they formerly existed, notice to the taxpayers was an essential prerequisite to the seizure and sale. When the law provided that a curator ad hoc must be appointed to the nonresident taxpayers, upon whom notice was to be served, the failure to have such curator ad hoc appointed renders the sale absolutely null and void.

(Syllabus by the Court.)

Appeal from district court, parish of Acadia; W. C. Perrault, Judge.

Action by Bernice M. Lambert against Mary Craig to try title to land. Plaintiff had judgment, and defendant appeals. Reversed.

Kenneth Baillio, for appellant. M. L. Wells, for appellee.

McENERY, J. This is a petitory action instituted for the recovery of the S.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$ , sec. 27, township 10 S., range 1 W. Plaintiff claims title through a tax sale made to one D. Webster in 1876 by the tax collector of the parish of St. Landry, and the defendant claims by purchase from John Craig, Robert Craig, and John Craig, Jr., who purchased from the state of Louisiana in 1871 and in 1872, and she also claims through tax sale to Thomas Rice, September 3, 1881. The tax sale to Rice was in fact to the defendant, Miss Mary Craig, as she paid the amount for which the property was adjudicated, and at her request the deed was made to Thomas Rice. Prescription was pleaded by both parties.

The plaintiff attacking the title of a party in possession cannot sustain his title by a plea of prescription. As stated in *Waddill v. Walton*, 42 La. Ann. 766, 7 South. Rep. 737: "The effort of the plaintiff in a petitory action to sustain his title by a plea of prescription against an attack thereon by the defendant in possession cannot be countenanced. The plaintiff has cited no precedent for such a reversal of the ordinary principles of pleading and of prescription, and we shall not establish one." The defendant's actual and corporeal possession of the property, first dating from the time she leased the property to one Richard, has not been sufficient to maintain the plea.

There are several other preliminary questions, which it is not necessary to notice. The defendant is in possession, and the plaintiff must show a better title than the defendant, and being the attacking party, setting up a tax sale as the basis of his title, it must not only be prima facie good, but

Rehearing denied.

absolutely good. *Waddill v. Walton*, 42 La. Ann. 766, 7 South. Rep. 737. The question, then, is as to the validity of the tax deed to Webster, in 1876, under which the plaintiff claims, and, if this is valid, whether the plaintiff, who purchased from Richard, the lessee of the defendant, is estopped from disputing the title of defendant to the property. The many questions presented and discussed with exhaustiveness by the district judge need not, therefore, be considered under this view of the issues presented. There was judgment for plaintiff, and the defendant appealed.

The tax deed to D. Webster, the basis of plaintiff's title, is radically defective, and the statement in the deed that "by virtue of the power in me vested by law, and strictly in accordance with all the legal possession in such case made and provided, I, J. L. Morris, collector of state and parish taxes for the aforesaid parish, did seize and advertise for sale," etc., will not cure the omissions of acts necessary for the validity of the sale of said property. There was no notice of the delinquent tax, and, as the law then existed, no curator ad hoc was appointed to represent the absent owner. Attempts were made by plaintiff to prove that all necessary acts were done, and the curator ad hoc appointed, but the proof fails to establish the fact of the existence of these essentials. There is no recital that a curator ad hoc had been appointed, and no proof aliunde that one had been appointed, as was required by the revenue act, under and by virtue of which the property was sold. The tax sale was therefore absolutely null and void, for this reason. *Rapp v. Lowry*, 30 La. Ann. 1275.

No notice was served on the tax debtor. The law required a written or printed notice to the agent or owner of the assessed property, and after the expiration of 10 days, if the tax was not paid, the tax collector was authorized to seize and sell. The notice was an essential prerequisite to the seizure, and this could only be served on the owner personally, or on his agent, or by service on a curator ad hoc to represent him.

It is elementary, and this court has frequently held, that noncompliance with the statutory requirements and preliminary acts as to tax sales operates to vitiate such sales. *Villey v. Jarreau*, 33 La. Ann. 296. If the deed even exhibited a prima facie title to Webster, through whom plaintiff claims, the plaintiff, suing for title against one in possession, exhibiting title, must show more than this. He must exhibit a title absolutely good, upon the strength of which he must succeed, and not the weakness of defendant's title. *Waddill v. Walton*, 42 La. Ann. 763, 7 South. Rep. 737.

This case was before this court at its session, July, 1892, and is reported in 44 La. Ann. 885, 11 South. Rep. 464. The present

defendant was then plaintiff, suing for title; the present plaintiff being the defendant setting up tax title, as in this suit. The facts are stated in the opinion of the court. The inquiry in the lower court had been exclusively directed to one of possession, and this court considered only the fact of possession, and remanded the case for a trial as to title. Mary Craig, the then plaintiff, was maintained in possession, and the defendant, now plaintiff, instituted this petitory action against her. All questions, therefore, in this suit, as to the fact of possession, are eliminated from the issues involved.

Richard, who purchased from W. W. Duson, as the agent of D. Webster, who held the tax deed of 1876, leased—after the purchase—the property from Mary Craig. In fact, the tax deed to Webster seems to have been ignored by W. W. Duson and by the vendee of Webster. W. W. Duson, in 1894, was corresponding with the present plaintiff, advising her as to the danger she ran by permitting the property to be assessed to Thomas Rice instead of being assessed in her own name; and he also received money from her to pay taxes, or at least, he knew of the amount being forwarded, as in one of his letters he inquired why she forwarded so large an amount to pay the taxes, when only a tax of \$10 was due. He acknowledged her title to said property by an offer to purchase from her. There was, as it appears, a double payment of taxes on the property. C. C. Duson, sheriff, says Webster paid the taxes to the time of sale of the property to Richard, and it is certain, from the tax receipts in the record, that Mary Craig promptly paid the taxes to the tax collector, and it would seem, at times, through C. C. Duson, sheriff. Richard, when he abandoned the title he had received from Webster by leasing the property from Mary Craig, who asserted ownership to it, adversely to his title, was forever estopped from asserting title through the tax sale, which he abandoned. As between Richard and Mary Craig, her title was as absolutely fixed as though he had deeded to her the land. When Richard sold to Duson,—that is, returned the property, and the note he had given for it, to him,—Duson was the purchaser of property of another, and received no title, and could convey none to his vendees. But the testimony in the record forces the conviction upon us that W. W. Duson, who had acknowledged Mary Craig as the owner of the property, had actual knowledge of the lease of Mary Craig to Richard, and that Williams and Lambert—the latter, the plaintiff—were parties interposed for the real purchaser from Richard,—W. W. Duson. It is unnecessary to review the testimony on this point. It is sufficient to say the correspondence between the parties, between Duson and Mary Craig, the business rela-

tions between Duson and Lambert, lead to this conviction. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered and decreed that plaintiff's suit be dismissed, with costs.

(45 La. Ann. 1881)

**STATE v. JACKSON. (No. 1429.)**

(Supreme Court of Louisiana. July Term, 1893.)

**HOMICIDE — REFUSAL OF SPECIAL INSTRUCTIONS — HARMLESS ERROR.**

Although special charges tendered by an accused may contain correct exposition of law, the court cannot be called upon to submit them when there is no evidence in the case to which they are applicable; and, on the other hand, even though a single sentence of a judge's charge may have stated too broadly a proposition of law, that fact would not justify a setting aside of the verdict where there is reason to believe that the jury was not misled, and that, as applied to the facts of the particular case, it was correct.

(Syllabus by the Court.)

Appeal from district court, parish of Terre Bonne; L. P. Caillonet, Judge.

Frank Jackson was convicted of murder, and appeals. Affirmed.

J. C. Briant and H. M. Wallis, Jr., for appellant. E. B. Dubuisson, for the State.

NICHOLLS, C. J. The defendant, indicted for murder, having been tried and convicted of the crime, and sentenced to be hung, has appealed. His hope of reversal rests on two bills of exception. The first is as follows: "Be it remembered that on the trial of the above entitled and numbered cause, evidence having been admitted to show that, just previous to the homicide, accused had been violently struck over the head by a person other than the deceased, and that thereupon accused went quickly to his house, some three or four acres from where this assault took place, and, arming himself with a gun, was returning to where he was assaulted, and that on his way, deceased attempting, by friendly means, to prevent him from going there, accused having warned deceased not to approach him, and deceased, in disregard of this warning, having continued towards the deceased, the latter shot and killed him, H. M. Wallis, Jr., and J. C. Briant, of counsel for defendant, asked the court to issue the following special charges to the jury: '(1) That an illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offense to manslaughter. This holds where a man is injuriously restrained of his liberty; as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping, while he sent for a bailiff to arrest him; or where a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and upon the trial the articles of war were not produced, nor

any evidence given of the usage of the army; and so no authority in the sergeant appeared. (2) Where the defendant, having been violently beaten and abused, made his escape, ran to his house, eighty yards off, got a knife, ran back, and, on meeting with the deceased, stabbed him, it was held but manslaughter." And the court having refused to give such special charges, on the ground that he would thereby comment upon the facts of the case, the said H. M. Wallis, Jr., and J. C. Briant, of counsel for defendant, did thereupon reserve this bill of exception to the ruling of the court, which bill, being submitted to opposite counsel, and found correct, was duly granted and signed in open court."

The court stated as to this bill that "both charges were refused, because, even if absolutely correct in point of law, the facts of the case did not warrant either of them. The evidence bearing on the killing of the deceased, George Bisland, was that the accused had some difficulty with one Labit at a plantation store. As to the origin of this difficulty, there was contradictory evidence, some witnesses testifying that Labit and the accused began tussling in fun; that Labit requested the accused to desist and behave; that accused did not desist, and in their tussling they both fell down on the gallery of the store; that Labit claimed the accused had struck him first; after they fell off the gallery, some of the accused's friends started to take him (accused) away from the store; Labit came up with a friend, both armed with axe handles; that some of the accused's friends requested them to go away; that Labit said he would strike him (the accused's friend) if he did not look out; that thereupon accused's friends turned the accused loose, and Labit began striking the accused over the head with the axe handle, whereupon a struggle ensued, in which the accused succeeded in wresting from Labit the axe handle, when Labit ran back towards the store, the accused pursuing. Labit secured himself in the store, and accused threw down the axe handle, and started towards his house in the quarters, some three or four acres off. Some witnesses say he walked fast; others, that he went in a dog trot. He was covered with mud and blood, which flowed from gashes in his head. His wife followed, screaming, and calling out for some one to go into the accused's house, and take his gun from there, so the accused could not get it. One or two men went into the house, ahead of the accused, and looked for the gun, but, not finding it, came out again. The accused went into the house, and came out with the gun, and started along the road in the quarters of the plantation towards the store. His wife and others called out to the men in the quarters to stop the accused, to prevent him from going to the store, as he would shoot Labit with his gun. As he neared George Bisland's house, George Bisland stepped off his gallery, and walked towards the accused, say-

ing to him: 'Brother Frank, don't do that. Listen to me, and go back with your gun.' The accused ordered him to stand back, saying he would kill any son of a bitch who laid his hand on him. George Bisland (the deceased) walked towards him, talking to him in a persuasive way, and trying to dissuade him from proceeding further with his gun. When they got within three or four feet of each other, the accused again told him to stand back, and he snapped one barrel of his gun on him. George Bisland kept talking to him in a persuasive manner, and advancing on him, when accused stepped back a step or two, and fired a fatal shot into the lower abdomen of George Bisland. George Bisland then grabbed the barrel of the gun, and continued entreating the accused to desist from his intention of going to the store with his gun. The accused called out to him to let go the gun, and a struggle ensued for the gun, in which the accused struck the deceased on the forehead. At this time a woman came to George Bisland's assistance, and the accused (the gun having been freed from the hold of Bisland) struck her with the gun, and kicked at her. At this time it was discovered that George Bisland's clothes were on fire, and that he was shot and wounded. The accused then went back to his house, and, coming out, was seen to go through motions as if reloading the gun, (a breech-loading gun,) and he went back to the front of the store where he had been beaten with the axe handle, and inquired for 'the man,' evidently meaning Labit. Under the above state of facts, the court refused to give the first special charge asked, because there had been no restraint used by the deceased, who was, on the contrary, peaceably engaged in the laudable attempt to dissuade a friend from committing a felony; and the second special charge, for the reason, also, that it had no application to facts of the case, as the accused never had any difficulty with the deceased; much less had he beaten him. The evidence showed that at no time the accused carried the stock of his gun to his shoulder, either when he snapped or when he fired." The second bill declares "that on the trial of the cause, the court having charged the jury that the provocation, in order to reduce the homicide from murder to manslaughter, must come from the party with whom the accused had the difficulty, and that provocation from any one else would not be sufficient for that purpose, whereupon counsel for defendant did reserve this bill of exception." The statement of the district judge is as follows: "The facts of the case are detailed in another bill of exceptions filed with this, and I refer to them in connection with this bill as explanatory of the charge given and complained of, which was to the effect that if one, in the heat of blood and passion, upon due and adequate provocation, killed another, it would reduce the crime from murder to manslaughter, but, in order to reduce the homicide to manslaugh-

ter, the just and adequate provocation giving rise to the heat of blood and passion must have been given by the deceased; that provocation given by one person to the accused, giving rise to heat of blood and passion, did not authorize the accused to attack and kill another person, and claim that he was acting in the heat of blood and passion, in order to reduce the homicide to manslaughter, unless the excitement and passion were of such a nature as to utterly dethrone reason. What is adequate provocation had been previously defined, and from the statement of facts given in the other bill it appeared that deceased had not given any provocation to accused to cause heat of blood and passion. In the same connection the jury had been charged on insanity."

The entire evidence in this case went without objection to the jury. The facts are known to us only in so far as we find them stated in the bills of exception. Taking these recitals as true, the judge's action in ruling adversely upon the special charges submitted to him was clearly correct. There was no attempt on the part of the deceased to illegally restrain the accused of his liberty, either under color of legal process or otherwise, and therefore a charge based, as was defendant's first proposition, on the hypothesis of such an attempt, would have been totally unsupported and unwarranted. What is called the "second special charge" was nothing more than a request that the judge should announce to the jury that on some occasion, not particularized, where a defendant, who had been violently beaten and abused, made his escape, ran to his house, 80 yards off, ran back, and, meeting with the accused, stabbed him, his act had been declared to be, not murder, but manslaughter. Assuming that such a decision had been at some time rendered, the judge very properly refused to refer to it. It must have rested on special, exceptional circumstances, and fixed and announced no principle. If any was deducible from it, the principle, and not the decision, should have been advanced and urged. There was, however, nothing in the case at bar under the statement of facts as given upon which the court could have been called upon to charge upon the law of manslaughter, and to make his failure to do so ground of reversible error. There was no evidence in the case tending to reduce the crime below the grade of murder. The judge was not requested to deliver a written charge. The only portion of it objected to by defendant's counsel is a simple sentence, wrenched from the whole. Though the particular sentences brought to our notice might, under some circumstances, be found to be too broadly stated, we have no reason to believe that, when taken in connection with other portions and the evidence to which it was to be applied, the jury was misled, and we are of the opinion that the accused was not prejudiced. Judgment affirmed.

(32 Fla. 139)

STATE ex rel. ROBERT v. MURPHY,  
County Treasurer.In re COMMISSIONERS OF DUVAL  
COUNTY.

(Supreme Court of Florida. Aug. 7, 1893.)

COUNTY COMMISSIONERS—WHEN TERM EXPIRES—  
POWER OF GOVERNOR TO FILL VACANCY—DE  
FACTO COMMISSIONERS.

1. The fourteenth section of article 16 of the constitution of 1885, providing that all state, county, and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified, is not a limitation upon the power of the governor to fill vacancies. Its purpose is to prevent an hiatus in government until the appointing power acts, and the appointee qualifies, wherever there is a vacancy, and an incumbent of a former term to hold over until such qualification.

2. County commissioners are appointed by the governor by and with the advice and consent of the senate, and their term of office is two years. The governor recommended to the senate certain persons for county commissioners, and the senate adjourned sine die, without taking action on the nominations. The terms of the former incumbents appointed by the governor by and with the advice and consent of the senate having expired, the governor made appointments to hold until the end of the next ensuing session of the senate, unless appointments should be sooner made and confirmed by the senate. *Held*, that the right of the former incumbents to continue in office ceased when the appointees of the governor qualified and were commissioned. Mabry, J., dissenting.

3. A mere de facto officer is one who is without lawful right to exercise the functions of the office which he is exercising. To constitute a de facto officer it must be shown that he is acting under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumes to be. One official act does not show that the persons doing such act are de facto officers, when it also appears that other persons have been commissioned, and have met and organized as occupants of the same office.

4. There cannot be two de facto officers, or sets of officers, in one office at the same time.

(Syllabus by the Court.)

Original proceeding in the name of the state on the relation of A. C. Robert for mandamus to Timothy Murphy, treasurer of Duval county, and to determine who are county commissioners. Heard on demurrer. Demurrer overruled.

The other facts fully appear in the following statement by RANEY, C. J.:

On the calling of the above cause in mandamus upon the relation of Robert, counsel reported herein as appearing for the Marvin board of county commissioners announced that they desired to argue the question of the right of such board to the offices claimed by the members thereof. The court stated that under its impressions of the law the decision of the mandamus case would not involve an inquiry into the de jure right of even the Powell board, which board authorized the drawing of the warrant sued on by Robert; but, upon further colloquy and consideration, stated that, as the public interests in Duval county demanded a

prompt settlement of the contest between the two boards of county commissioners, although it was entirely irregular, the court would, if both of such boards so desired, adjudicate the matter, upon the members of each board filing a written agreement, signed by them individually, that the court should do so, and thereby becoming parties to the proceedings for the purposes of such decision. Counsel upon both sides having accepted the suggestion, the argument proceeded upon the understanding that such agreement should be filed; and subsequently agreements, signed by all the parties individually, binding themselves to abide the decision of the court as fully as if the issue were raised by information in the nature of a quo warranto, to which they should be parties, were filed.

A. W. Cockrell & Son, for plaintiff. F. P. Fleming, J. E. Hartridge, and W. B. Young, for defendant.

RANEY, C. J., (after stating the facts.) In this cause Benjamin B. Powell, George A. De Cottes, and B. M. Baer were, with J. D. Kelly and W. S. Pickett, nominated by the governor and confirmed as county commissioners of Duval county by the senate at the session of the legislature which met on the first Tuesday after the first Monday of April, 1891, and adjourned June 5th of the same year, and they were commissioned by the governor on the 12th day of the latter month. At the session of the legislature convening on the corresponding Tuesday in April of the present year, and adjourning on the 2d day of June, the governor nominated for county commissioners of that county Charles Marvin, T. V. Porter, E. F. De Cottes, J. D. Kelly, and W. S. Pickett, but the senate adjourned without taking any action on the nomination; and subsequently, on the 16th day of June, the governor commissioned the last-named parties, each for a separate district, to be county commissioners "until the end of the next ensuing session of the senate, unless an appointment be sooner made and confirmed by the senate." Powell, George A. De Cottes, and Baer claim they continue to be the lawful county commissioners by virtue of their former appointment; whereas the others are asserting their claim under the later commissions.

The constitution (section 5, art. 8) ordains that there shall be appointed by the governor, by and with the consent of the senate, in and for each county, five county commissioners, and that "their terms of office shall be two years," and that one commissioner shall be selected from each of five districts of a county. The fourteenth section of article 16 of the constitution is that "all state, county and municipal officers shall continue in office after the expiration of their official terms until their successors

are duly qualified." The contention of the Powell board is that they are continued in office by this section until the qualification of successors who may be nominated by the governor and confirmed by the senate at some ensuing session of the legislature, and that the governor's action in the appointment of the new or Marvin board was without authority of law.

There has been no decision of the precise point by this court. At the general election held November 6, 1888, persons were elected to fill severally certain county offices in Duval county, but they failed to give bond and qualify within 60 days after their election; and it was held in an advisory opinion, rendered January 16, 1889, (5 South. Rep. 613,) to the then recently installed governor, that the terms of such county officers beginning on the first Tuesday after the first Monday in January, 1889, had become vacant on account of the omission stated, and that he was authorized to fill such vacancies by appointments, which would expire on the qualification of successors to be chosen at the general election in 1890. In this opinion several provisions of the constitution are referred to, the controlling ones as to the power and its limitations being the seventh section of article 8, providing that, "if any person elected or appointed to any county office shall fail to give bond and qualify within sixty days after his election, the said office shall become vacant;" and sections 6, 7, and 9 of article 18, of which the first is that "the term of office of all appointees to fill vacancies in any of the elective offices under this constitution shall extend only to the election and qualification of a successor at the ensuing general election;" and the second, that "in all cases of elections to fill vacancies in offices the election shall be for the unexpired term;" and the last fixing the first Tuesday after the first Monday in November, 1888, and every two years thereafter, as the days for the election of all elective state and county officers "whose terms are about to expire, or for any office that shall have become vacant." As is mentioned in that opinion, the seventh section of the fourth or executive article provides that "when any office, from any cause, shall become vacant, and no mode is provided by this constitution or by the laws of the state for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission for the unexpired term;" but it was held that the term of the executive appointment was limited, not by this, but by the sixth section of the eighteenth article, *supra*. It was not thought then that the power and duty of the incumbents of the preceding terms to hold over under section 14 of article 18, *supra*, (State v. Saxon, 25 Fla. 792, 796, 797, 6 South. Rep. 858; *Id.*, 30 Fla. 668, 700, 12 South. Rep. 218,) was a limitation upon the power of the executive to appoint to fill

the vacancies recognized by section 7 of article 8 to exist; nor is it so contended now; but, on the contrary, we understand the correctness of the conclusion reached in the advisory opinion to be conceded.

The primary question presented by the case before us is whether or not there was a vacancy in the office of county commissioner of Duval county when the governor commissioned the Marvin board. The position of counsel for the Powell board is that there was not a vacancy, and for the reason that the constitution contemplates that the old commissioners, shall continue in office until new commissioners, confirmed by the senate on the nomination of the governor, have "duly qualified;" that such commissioners, and no others, as long as the old remain in office, are the "successors" of the latter, within the meaning of section 14 of article 16. Of course, it is not to be denied that it was the duty of the governor to send to the senate nominations for confirmation, as he did at the last session of the legislature; and we deem it entirely immaterial to the decision of this case to consider whether the terms of such nominees, had they been confirmed, would have begun at the time of such confirmation, or not until the 12th of June, the day succeeding the expiration of the two years named in the commissions of the Powell board, or at a still different time. Passing, as not meriting discussion, when the term actually began, there was still a term, either begun or about to begin, which the law required to be filled by the action of the governor, with the consent of the senate. That it was the duty of the senate to act on these nominations, giving or refusing consent thereto, can never be seriously denied, except upon the hypothesis that the terms of the old commissioners had not expired in fact, and that consequently there were not yet any new terms to fill. No such contention as this is presented. Assuming—what is not denied—that the nominations were lawfully made, there was at least a prospective vacancy in office, which the constitution contemplated should be filled by the governor, with the consent of the senate; and we are fully satisfied, even assuming that the two years for which the old board were confirmed had actually expired, that, pending the session of the senate, there was no power in the governor alone to appoint to fill a vacancy. Pending such session the old commissioners continued in office under section 14 of article 16. They did not hold over, however, as furnishing the "mode" provided by the constitution for filling the new term, but simply as filling a part of the new term temporarily, and, at least, until the governor and senate, both of whom were in a position to act, should do so. The governor and senate, while in a position of present capacity to act, were the "mode" provided by the constitution for filling the new term,

and until they should do so the organic law contemplated that the old commissioners should hold over "after the expiration of their official terms;" not as holding a part of the official term, but simply as the lawful occupants of a part of another term until the appointing power capable of filling it, whatever that power may be, should act, and the appointee qualify. This holding over is necessarily not a limitation on the power of the governor and senate. It could not be, because, if it were, there could be no appointment to the new terms of offices after the expiration of the "official terms," or during such post-official holding; nor, if the advisory opinion is correct, was it a limitation upon the power of the governor in the case covered by it, though, of course, as a matter of fact, the old officers there held over into the new terms, by virtue of the stated fourteenth section, until the appointees of the governor qualified.

Of course it is not to be lost sight of that in the cases covered by the advisory opinion the people had acted at the time and in the manner provided by the constitution for selecting the persons to fill the new terms, and the vacancy recognized to exist there had grown entirely out of the default of the persons selected to do their part in qualifying for their positions; and, such default having extended beyond the period allowed by section 7 of article 8 for qualifying, they forfeited the right which their election by the people gave them to hold the office, and it became "vacant," as declared by the constitution in section 7 of article 8; and this, too, notwithstanding the provisions of section 14 of article 16 as to the holding over of former incumbents. In the case before us the omission of a filling of the new term is, on the contrary, attributable solely to the fact that the senate has failed to take any action on nominations sent to it by the governor. It, however, notwithstanding this difference in the cases, cannot be denied that the advisory opinion is entirely inconsistent with the idea that the fourteenth section of article 16 was intended by the constitution as the "mode \* \* \* provided" by the constitution for filling the new office, or as a limitation upon the power of the governor to appoint. The conclusion of that opinion is predicated upon the theory that that section was not intended to continue the incumbent of the former term, chosen by the people themselves, in the new office until the people should act at the next "ensuing general election," (section 6, art. 18.) and the subject of their choice at such election should qualify, but that it was intended to supply an incumbent until the governor should act, and thereby prevent an hiatus in government.

If the stated fourteenth section can be given the effect of having been intended to fill the new terms of offices with former incumbents until the original power authorized

to fill them does so, there is no room for doubting the illegality of Gov. Mitchell's action in the appointment of the Marvin board, or for questioning the right and duty of the Powell board to hold over till the senate shall confirm successors to them, no matter how long that may be. Was that section intended to have this effect? There was no such general provision in the constitution of 1868, of which the present organic law is a revision, yet in the case of cabinet officers the provision was that they should hold their offices "the same time as the governor, or until their successors shall be qualified;" and in that of a county judge it was that he should hold his office for "four years from the date of his commission, or until his successor is appointed and qualified;" and in the cases of state attorneys it was the same, substituting "and" for "or." Each of these officers was appointed by the governor upon the advice and consent of the senate. The sole provision in that constitution as to appointments to fill vacancies was the seventh section of article 5, which section corresponds to the seventh section of article 4 of the present organic law, set out supra, the only difference being that the words "which shall expire at the next election" appear in the old instrument in place of the words "for the unexpired term" in the new one. The first legislature assembled under that constitution passed an act relating to vacancies in offices, approved August 6, 1868, which, after defining certain vacancies, enacted that "in all such cases, and in all other cases in which a vacancy may occur, if the office be a state, district or county office, other than a member or officer of the legislature, it shall be the duty of the governor to fill such office by an appointment; \* \* \* and in cases requiring the confirmation, or the advice and consent of the senate, the person so appointed may hold until the end of the next ensuing session of the senate, unless an appointment be sooner made and confirmed or consented to by the senate." Section 217, Rev. St. In the advisory opinion of February 1, 1872, (14 Fla. 277.) the validity of this statute was recognized in connection with the office of attorney general, where a vacancy other than at the commencement of a term occurred in the office during the recess of the legislature. There is no doubt that the practical construction placed upon the constitution of 1868 from January, 1877, till it was supplanted in January, 1887, by the present revision, to say nothing of the prior eight or nine years of its operation, was that the old incumbent in the offices of county judge and state attorney should not hold over until the qualification of successors confirmed by the senate, but, on the expiration of their terms or commissions, in the absence of the senate, new appointments were made by the governor, to hold, as provided by the above act of 1868, (section 217, Rev. St., supra.) There is noth-

ing in the practical working of the government as to the office of attorney general that is inconsistent with that as to the other two offices mentioned.

The position taken in behalf of the relator and the Powell board is based on authorities requiring careful consideration. In Pennsylvania, in the case of *Com. v. Hanley*, 9 Pa. St. 513, where the newly-elected officer died before his term began, and without having qualified, the provision of the constitution was that the officers "shall hold their offices for three years if they shall so long behave themselves well, and until their successors shall be duly qualified. Vacancies in any of said offices shall be filled by appointments, to be made by the governor, to continue until the next general election, and until successors shall be elected and qualified as aforesaid." It is said in the opinion that the fundamental error that lay at the foot of the relator's case, he having been appointed by the governor on the theory that there was a vacancy, consisted in the assumption that, according to the spirit of the constitution, the tenure of county offices is strictly limited as to time, and that he was elected and commissioned only for this time, viz. three years, and that any extension of the time arises solely from the exigency of the case, and must be strictly construed, and that this was plausible only by obliterating from the constitution several important words. The meaning of the constitution was held to be that regular incumbents could not hold office less than three years if they behaved, although, on the happening of certain contingencies, they might hold for a longer period; and that former incumbents, duly elected and qualified, should hold until successors were "duly qualified," and that "duly qualified" included an election by the people, but that the election did not of itself fill the office or make a successor, but the party elected must also give bond, and be sworn and commissioned, to be a "duly-qualified" successor; that the governor could appoint only where there was a vacancy, and there could not be a vacancy in an office where there was a person in possession, having a perfect right to exercise its functions and receive its emoluments; and, further, that the primary object of the framers of the amended constitution was to diminish as far as practicable executive patronage; and in accordance with this policy it was thought proper to confine the power of appointment to the single case where there was no one authorized to perform its functions. The decision was that the appointment by the governor was illegal, and that the defendant held over until some one should be elected by the people, and duly qualified. In *Missouri*, in the case of *State v. Lusk*, 18 Mo. 333, the statute provided that the state printer to be elected at each session of the legislature should hold his office "for two years, commencing the

first day of May next thereafter, and until his successor shall be elected and qualified." The legislature of 1852 failing to elect a printer at one session, the governor made an appointment, and it was decided, one of the three judges dissenting, that the incumbent elected in 1850 held over. The sole question was held to be whether or not the office became vacant on May 1, 1852, and it was said that the public printer was a statutory office, and that it was to be taken as the clear intent of the statute that he should be the appointee of the assembly, except in those cases arising after a person has been legally in office, where it becomes vacant by death or resignation or like casualty, in which cases the governor was authorized to fill the vacancy; that under the express terms of the act, then, the former incumbent was in office when the governor issued the commission to the relator, and was in under an election by the assembly; that the statute intended to continue him in office until a successor was elected by the body having power to appoint such successor, and the failure of that body to make the appointment when it should have been made did not vacate his office. In California, in *People v. Reid*, 6 Cal. 288, where a statute provided that the legislature should elect a designated officer, and that he should hold "his office for two years, and until his successor is appointed and qualified," and the legislature failed at one of its sessions to elect, it was held that the office became de jure vacant at the expiration of the incumbent's term, and the governor might appoint to the vacancy, under the eighth section of the fifth article of the constitution of that state, which was the same as the seventh section of our fifth article, substituting for the expression, "for the unexpired term," in the latter, the words, "which shall expire at the end of the next session of the legislature, or at the next election by the people." In the opinion in this case the *Pennsylvania* case and the former of the *Missouri* cases are referred to and disapproved; and it was said that the words, "and until his successor is appointed and qualified," were only incorporated to prevent an hiatus or interregnum occurring between the date of the termination of the office and the date of the successor's entry upon his duties, and that in this interval he was a mere locum tenens. In *People v. Mizner*, 7 Cal. 519, that of *Reid*, supra, and that of *Mott*, 3 Cal. 504, where a judicial district was created, and, the legislature failing to provide a judge, the governor appointed one, were recognized as holding properly, that a vacancy arose from the failure of the appointing power to act. In *People v. Whitman*, 10 Cal. 38, the party elected comptroller did not qualify, and the governor appointed the relator to the new term, but the old incumbent refused to surrender the office. The provision of the constitution was that he "should hold his office



for two years from the time of his installation, and until his successor shall be qualified." Of this language it was said by the court that the term of the office is fixed at two years certain, with a contingent extension, and that when the contingency happens the extension is as much a part of the entire term as any portion of the two years; that the language was just as clear and express that he should hold it until his successor was qualified as for the two years; that both provisions relate to the term for which he should hold his office; and, in effect, that the failure of the comptroller-elect to qualify created no vacancy in the office, but a mere extension of the term of the particular incumbent. The decision of the court, Judge Field dissenting, was that the prior incumbent continued in office till the election and qualification of a successor. It is said in the opinion that the executive officers were elected by the people, and that under an elective system it is more proper that the officers should hold over than that the duties should devolve upon those in whose selection the people have no choice, and that it was only in cases where there is no incumbent of the particular office to hold over that the system would allow the appointment of the executive to fill the office; and, citing the Case of Mizner, *supra*, where, we may remark, it is said that the secretary of state is the only officer created by the constitution in which the executive constitutes any part of the appointing power, it is observed that the constitution had studiously restricted the patronage of the governor. *People v. Tilton*, 87 Cal. 614, is a case in which the officer was to be elected by the legislature in joint session, and was to hold "his office for the term of four years, and until his successor is elected, commissioned, and qualified as in this act provided." The legislature failed to elect, and the governor, holding there was a vacancy, appointed and commissioned the relator to the office. It was held that the next legislature might elect, and that until there was such an election the defendant, the old incumbent, held over. Two of the five judges dissented. The reasoning is about the same as that in the Case of Whitman, it being also said, *inter alia*: "It was evidently intended by the legislature that the commissioners elected by the legislature should hold till another should be elected, notwithstanding one legislature might fail to act. It is provided in the fifteenth section that when vacancies occur in certain modes the governor shall appoint to hold until it can be regularly filled in the appointed mode. But in all these cases there is no incumbent, *locum tenens*, or party in any way authorized to discharge the duties of the office. The fifteenth section enumerates the cases in which it was intended that the governor should appoint, and it must be presumed that it enumerates all such cases. It seems mani-

festly the intention of the legislature not to authorize the governor to appoint in any case where there is a party authorized to discharge the duties of the office. Although the term has expired, and the old incumbent only holds over till his successor is duly qualified, although he is not entitled to hold as the regular incumbent of the term, he is still a temporary incumbent, and authorized to discharge the duties of the position until a regular incumbent of the term, duly qualified, presents himself. He is not merely acting *de facto*, but *de jure*, under the express authority of the law. \* \* \* The provision is not that the old incumbent shall hold till the electing body has an opportunity of electing a successor, but till 'his successor is elected, commissioned, and qualified as in this act provided,' \* \* \* by a joint convention of the legislature, and not by appointment by the governor." In *People v. Bissell*, 49 Cal. 407, the defendant's term of office, the office being one for appointment by the governor and confirmation by the senate, and the term being for four years, would have expired on November 29, 1875. In July, 1874, the governor, the legislature not being in session, appointed relator. In the opinion the views of the majority of the court in the Case of Tilton are affirmed by at least two of the judges, a third concurring "specially." In *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. Rep. 261, the opinion was expressed—*People v. Tilton* and *People v. Bissell*, *supra*, and *Stratton v. Oulton*, 28 Cal. 51, being cited, one of the judges not concurring therein—that a public office does not become vacant in that state except upon the happening of one of the events enumerated in the statute. In *Indiana, Stewart v. State*, 4 Ind. 396, no election was held for school trustee, who was to be chosen annually and continue in office till his successor should be elected and qualified, and *State v. Harrison*, 113 Ind. 494, 16 N. E. Rep. 384, the legislature failed to elect a successor of the incumbent president of a board of benevolent institutions, and decided under a section of the organic law, to the effect that the provision that an office should be held "for any given term should be construed to mean that such officer should hold for such term, and until his successor shall have been elected and qualified," the view expressed being that all officers to which it applied were held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor, chosen by the same electoral body, attaches, as before and during such term. In *Ohio, State v. Howe*, 25 Ohio St. 588, where a statute continued former officers, and then provided that their "successors" should be appointed by the governor with the advice and consent of the senate, "to hold their offices for three years from the date of their appointment, and until their successors are appoint-

ed and qualified, unless vacancies occur from death, resignation, or removal for cause, as herein provided," and the defendant was thus appointed on April 18, 1872, and the governor appointed relator April 9, 1875, the legislature not being in session, to hold for three years from April 18, 1875. The act also provided that "vacancies in" such offices "shall be filled as the original appointments are made, except when the general assembly is not in session, and then by the governor, until the twentieth day of the next session of the general assembly;" section 3 of article 7 of the constitution also providing as to such officers that the governor should have power to fill all vacancies that might occur, until the next session of the general assembly, and until a successor to his appointee should be confirmed and qualified. In North Carolina, *People v. McIver*, 68 N. C. 467, where the provision was that the "terms" of the officers were "to commence on the first day in January after their election, and continue until their successors are elected and qualified," (section 1, art. 3, and section 13 of the same article,) it was also provided that "if the office of any such officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the governor to appoint another until the disability be removed, or his successor be elected and qualified." In Michigan, *People v. Lord*, 9 Mich. 227, the officer was to hold his office for four years, and "until a successor is elected and qualified." In Maryland, *Smoot v. Somerville*, 59 Md. 84, the constitution provided, as to all officers appointed by the governor and senate, that they should be nominated to the senate within 50 days of the commencement of the session, their terms of office should commence on a stated day, "and continue for two years, and until their successors respectively qualify according to law;" and that in case of any vacancy during a recess of the senate in any office which the governor had power to fill he should make an appointment, to last till the end of the next session, or until some other person should be appointed to the same office, such nomination to be sent to the senate within 30 days after its meeting; and if a vacancy should occur during a session of the senate in any office which the governor and senate have power to fill, he should nominate to the senate, before its final adjournment, a proper person to fill the vacancy, unless such vacancy should occur within 10 days before such adjournment. Here the governor nominated a person for successor to an existing incumbent, and the senate rejected him, and then he nominated another, and the senate adjourned the same day, without taking any action on it, and after the adjournment the governor appointed the last-named person. One of the judges dissented.

There are, however, authorities of a contrary effect. In the case of *State v. Cocke*,

54 Tex. 482, where an assessor of taxes was elected at a general election, and failed to qualify within the time allowed, and some days after resigned, and thereupon the defendant was appointed and qualified. The person elected at the previous election, Bickford, had duly qualified, and entered upon the duties of his office. Bickford, claiming to hold over, sued for the office. The constitution provided for an election of an assessor, who should "hold his office for two years, and until his successor is elected and qualified." A statute gave authority to the commissioners' court to fill a vacancy for the unexpired term only, and until the election and qualification of an assessor at the next general election. In the opinion it is said: "Under what circumstances an incumbent who is entitled to hold office until his successor is elected or appointed and qualified can lawfully hold over has frequently been the subject of judicial investigation, and has given occasion to disagreement of opinion. The primary object of this provision that the incumbent is entitled to hold until his successor is elected or qualified is simply to prevent, on grounds of public necessity, a vacancy in fact in office until the newly elected or appointed officer can have a reasonable time within which to qualify. The right of the officer who thus holds over is by sufferance, rather than by any intrinsic title to the office. This view accords with the settled policy of our state constitution restricting the duration of the terms of office." It was held that the appointment was valid. In the opinion of Judge Field in *People v. Whitman*, *supra*, cited with approval in the Texas case just mentioned, it is said: "The existence of an incumbent and a vacancy in the same office at the same time is only impossible where the office is of the same term. There is one office, but there are different terms in which it is to be held. It may be filled for one term and vacant for the succeeding term. \* \* \* The constitution limits the term of the office of comptroller to two years; but that there may be no interregnum between the expiration of his term and the entry of his successor it also provides that he shall hold till his successor is qualified. The successor is to be designated in one of two ways: In the first instance, the designation is to be made by the people; but, if that fails to fill the office, then the designation is to be made by the governor. There is no difference between a vacancy occasioned by the failure of the person elected to qualify and a vacancy occasioned by his resignation immediately upon qualifying. If any other view could be sustained it would follow that 'the old incumbent' would hold for the entire term for which 'the person failing to qualify' was elected." And in the dissenting opinion in *Tilton's Case*, *supra*, it was held that the legislature had no power to continue the old incumbent in office beyond four years, the constitutional limit of terms of statutory offices, without a re-elec-

tion, except as a mere *locum tenens*, to avoid an interregnum in office; and that the office would be vacant, nevertheless, and subject to be filled by the governor in the absence of other method designated by law. In *Attorney General v. Burnham*, 61 N. H. 594, the statute made it the duty of the incumbent prudential committee, a district school officer, to issue his warrant for the annual election by the voters of the district, and, if he neglected to do so, a justice might do so on application, and, if the officers were not chosen before a stated day, a vacancy should be deemed to exist. The prudential committee and certain other officers were to hold their offices for one year, or until others are elected or appointed and qualified in their stead; and the provision of another section of the statute was that whenever a vacancy occurs from any cause the selectmen, upon application, are required to fill the vacancy, and the officers appointed hold their offices until new ones are legally chosen and qualified. *Burnham*, the defendant, was the old incumbent, and claimed to have been re-elected at a meeting held under a notice which he had put up, but which had been torn down at once, through a conspiracy to which he was a party, which meeting was attended by less than one-tenth of the voters, and was not known of except by those who were privately informed. This election was held to be illegal, but it was further held that it was the intention of the statute that, if the district failed to hold its annual meeting before April 20th, the offices should be deemed so far vacant that the selectmen might, upon application, appoint persons to perform the duties, but that, in default of such appointment or of an election, the incumbents of the preceding year should hold over, in order that there might be no interruption in the management of the affairs of the district; that after April 19th they were to be regarded rather as temporary occupants of the offices, liable at any moment to be displaced by the appointees of the selectmen, or at the next annual meeting, if none were appointed.

It may be specially remarked of the *Pennsylvania* case that a failure to qualify, which was held there not to constitute a vacancy, has, at least in the case of all elective county offices, been made by an express provision of our constitution to create a vacancy; and our statute extends as well to the cases of appointments in offices, (Rev. St. §§ 214-217;) and of this decision, and of all the others reaching the same conclusion, it may be safely affirmed that the purpose attributed by them to the constitution or statute under consideration, that the old incumbent should hold over to the exclusion of any appointment by the governor, is to be found in the effect of the language of the provision, and the fact of limiting the appointing power to cases of vacancy, coupled with the further idea that there can be no vacancy in an office where there is any person who has

the legal right to exercise its functions and receive its emoluments. The disposition shown by the people in their organic law, or the legislature in a statute, to limit the power of the governor, the fact that the failure of the regular or ordinary agency to appoint to or to fill the new term has not been made a cause of vacancy, and the idea of the wholesomeness of continuing an experienced official in office, are also invoked by these courts as an auxiliary in reaching a conclusion. There is no purpose to question now the result which these several decisions have reached, though, as is apparent, they have not always commanded unanimous conclusions. Still it cannot be maintained that the mere fact that a constitution or a statute provides a person to fill a new term of an office, or to perform its duties until a successor is chosen and qualified, is conclusive upon the question whether or not that successor can be chosen in any other mode than that by which the continuing incumbent was selected. That it has its weight in shaping the conclusion cannot be denied, but it is merely one fact, to be considered with such others as the law may present in forming a correct judgment as to the meaning of that law, whether organic or statutory.

The inquiry confronting us is as to the purpose shown by our own system. There is in the language of the fourteenth section of our sixteenth article a clear implication that the tenure of old incumbents after the expiration of the term prescribed by the constitution or law is not a part of the term for which he was chosen; or, in other words, that as to such time he has not, and it was not intended that he should have, an unexpired legal right to hold onto the office until a successor shall be chosen in the same way he was, as distinguished from any other way, or as implying that any other mode of selection was contrary to the intent of the constitution. The use of the words, "after the expiration of their official terms," is a recognition of a distinction in the nature of the tenure during that time and the subsequent time. The language implies and means that his regular or permanent tenure has expired, and that it is now both temporary and a part of another term. It is different from that used in the *Pennsylvania* and other cases cited *supra*, where he is to hold his office or their offices for a stated time, and until his successor or their successors shall be qualified, or duly qualified, or elected and duly qualified. It is not consistent with the idea that the section was intended as anything else than authority to the former incumbent to hold until a lawful successor, constituted in whatever manner the constitution may permit, shall qualify, and is inconsistent with the idea of giving such incumbent an adverse right to the place against any one except a successor chosen in the same way that he

was. This view is clearly supported by a late decision in Virginia, where it was attempted to impress on the court of appeals of that state the conclusions reached in Pennsylvania and other concurring states. The case is that of *Johnson v. Mann*, 77 Va. 265. Johnson, the petitioner, was elected treasurer of Petersburg on the fourth Thursday in May, 1879, for the term of three years, to commence July 1, 1879, and qualified and continued in office for the full period; and at the election in May, 1882, Couch was elected for the term beginning July 1, 1882, but failed to qualify within the time prescribed by law for so doing. The constitution of Virginia (section 25, art. 6) declared that "judges and all other officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired, until their successors have qualified." The charter of Petersburg conferred upon the corporation court the power to fill vacancies occurring in the office of city treasurer. Johnson claimed that under the above section of the constitution there was no vacancy, and that he was the rightful incumbent, and entitled to hold over for the full term of three years, or until the term of the successor to be elected in 1885 should begin, there being no law for a special election. The decision of the court on a rehearing, modifying its former judgment, was that Johnson was entitled to hold over only until the qualification of a successor to be appointed by the hustings court to fill the vacancy. Speaking of the section of the constitution, the court says: "It simply provides for the holding over by the incumbent after the expiration of his term until his successor shall qualify. The plain, unequivocal import of this section of the constitution is that, when the regular term expires, the office becomes, in the eye of the constitution, vacant, but with authority to the incumbent already qualified to continue by virtue of such previous qualification, made effective for the purpose by the constitution to discharge the functions of the office until he is succeeded in the way preferred by the people as pointed out in the constitution and in the laws made in pursuance of that instrument. The petitioner filled out his regular term, and, under the constitutional provision being considered, is, to prevent evils which would flow from either an accidental or designed failure to qualify on the part of the person elected to succeed him, entitled to go on in the discharge of the duties appertaining to the office,—not his office,—so far into the succeeding regular term as the time when his successor, legally selected, shall be fully equipped as an officer to take charge of the office and perform its functions. \* \* \* The petitioner has filled out his full regular term, and is simply holding on in this, the succeeding regular term, until his successor shall come duly qualified to demand and have the office;

and that successor, *ex necessitate rei*, can hold for the residue of the present regular term. \* \* \* It is idle to argue that it is an abuse of terms to say an office is vacant when a person is rightfully in possession and discharging all the functions thereof. It is enough to reply that it is thus written in the law. The office of treasurer for the city of Petersburg \* \* \* is temporarily occupied by a sort of *locum tenens*, a person designated by the constitution, and thereby enabled to discharge the duties of the station or place until the coming of his successor, appointed and qualified as prescribed by law."

The seventh section of the eighth article of our constitution, when it declares that, "if any person elected or appointed to any county office shall fail to give bond and qualify within sixty days after his election, the said office shall become vacant," means that the term which such person so in default was elected or appointed to fill shall, when the default became consummated, be deemed vacant, to all intents and purposes, and not merely that the newly-elected person should not longer have the right to fill it. "Vacancy" here means that the office is without such an occupant as precludes the filling of it in any mode which the constitution may provide, or may recognize as lawful; that, notwithstanding the incumbent of the former term may, and it is contemplated that he shall, continue in office, or perform the official duties of the said office, after the expiration of his official term, and until his successor is duly qualified, still the office is vacant as to the new term, in the sense that any office is vacant which is not occupied by a person chosen to fill it for such term. The elective county offices being vacant for purposes of appointment, notwithstanding the provision of the fourteenth section mentioned, the filling of the same, in the absence of legislation, would be controlled by the seventh section of article 4, but for the provisions of sections 6 and 7 of the schedule, the former of which sections of the eighteenth article limits the executive appointment to the next regular election. *Advisory Opinion*, 25 Fla. 427, 5 South. Rep. 613. Failures to qualify even for the period of 30 days had long been a cause of vacancy, with a resulting executive duty to appoint. *Acts 1868*, p. 35, (McClell. Dig. p. 974.) The purpose, then, of the mentioned fourteenth section being in the cases of these officers merely to provide a person to perform the duties till the governor may appoint, what is there in the constitution to give it a different or other effect in the case of any other vacancy, or a vacancy in any other office, as to which the governor may, under any contingencies, have the power to fill a vacancy by appointment?

The present constitution is a revision of the old one. In *State v. Gamble*, 13 Fla. 9, the seventh section of the fifth article of the

old instrument was construed, and it was held that the words "next election" confined its application to elective officers, and that under it the governor had the power to fill the vacancy occasioned by the ouster, by judgment of this court, of the former incumbent, who was found not to have been eligible for the place at the time of his election; but that the executive appointment extended only till an election should be held, and that it was the duty of the authorities to call an election within a reasonable time; or, in other words, to see that the election was not postponed at the expense of the rights of the people. Though the statutes provided for a special election in this case, the decision of the court was that this did not supply all the necessities of government, and that an appointment until the choice at an election and the qualification of the person then chosen was necessary to prevent an hiatus in government. The change made by the revision of the constitution is to be found in the use of the words "by granting a commission for the unexpired term" for "by granting a commission which shall expire at the next election." The effect of this change is twofold: First, it makes the section applicable to appointive as well as elective offices; and, second, it vests the appointee with the unexpired part of the term, and not merely till an election or another appointment; and the result is that wherever the constitution and statutes are both silent as to the mode of filling any particular vacancy which may occur in any elective or appointive office, then the governor is to fill it for the unexpired term. It is apparent that the purpose of the convention and the people in this change was, in so far as this section alone shows, to extend the governor's power of appointment both as to the classes of cases to which it should apply and as to the tenure of the appointee. But as appears from the advisory opinion first mentioned above, (25 Fla. 427, 5 South. Rep. 613,) this purpose has a modification, to be found in the sixth section of the eighteenth article, which reads that "the term of office for all appointees to fill vacancies in any of the elective offices under this constitution shall extend only to the election and qualification of a successor at the ensuing general election." The purpose of the latter section is that appointees to any vacancy in an elective office should not hold for the balance of the term, but only till the next general election, if one intervenes; and while it operates as a limitation of the tenure prescribed by section 7 of article 4, it also shows that it was contrary to the judgment and will of the people that there should be special elections to fill vacancies in elective offices, and to this extent it is a limitation on the legislative power as to filling such vacancies by special elections.

The seventh section of article 8, which makes, as did the statute before it, a failure

to qualify a vacancy in office, is not the only vacancy recognized by the revised organic law. The fifth section of the eighteenth article provides that "all vacancies occurring by limitation of terms before the general election in 1888 shall be filled as provided for by law under the constitution of 1868." The third section of the same article ordained that "all persons holding any office or appointment at the ratification of this constitution shall continue in the exercise of the duties thereof according to their respective commissions or appointments, and until their successors are duly qualified, unless by this constitution otherwise provided." The last six words refer to offices not so continued.

Considering these sections together, we see the framers of the constitution regarded the expiration of a term (a recognized termination of an office,—*Johnson v. Mann*, 77 Va. 265, 270) as creating a vacancy, notwithstanding the provisions of the third section, and that the third section did not cut off or preclude the power of the chief executive to fill it, and did not fill such vacancy permanently or in the manner contended for on behalf of the Powell board in this case, but only as a *locum tenens*. If it had understood that the third section would have such an effect as is claimed here for that fourteenth section of the sixteenth article, the fifth section would not have been ordained. Its presence is accounted for only by the fact that the third section was not to have such effect. It is, of course, true that these sections relate to offices which were continued by the revised instrument, and the fifth section was not to have any effect after the first election under such revision; still it is plain that as to the first two years of the operation of the new instrument the purpose was that old incumbents should not hold over, after the expiration of their terms, as a limitation upon the executive power of appointment, but that, notwithstanding the other or third section, the expiration of a term should create a vacancy, and that, if it occurred during a recess of the senate, the governor should have the power to appoint under the statute of 1868.

In the corresponding article of the constitution of Ohio there was a simple provision that the officers continued by it in office should continue in office until their successors should be chosen and qualified, but none as to vacancies to be created by the expiration of terms; and it is invoked by the court in *State v. Howe*, supra, as showing that the constitution did not recognize such expiration as creating a vacancy. Seeing, thus, that the constitution recognized expressly that the expiration of a term of an office created a vacancy for the purpose of filling it by executive appointment during the two years' period referred to, and although another section provided an in-

cumbent in the nature of that provided by section 14 of article 16 for subsequent years, what is there in the instrument that would authorize or justify us in holding that the word "vacancies," used in the sixth section of the eighteenth article, when it says that "the term of office for all appointees to fill vacancies in any of the elective offices under this constitution shall extend only to the election and qualification of a successor at the ensuing general election," does not include a vacancy occasioned by an expiration or limitation of terms, or that section 7 of article 4 does not? If section 3 furnished an incumbent, as it clearly did, why, nevertheless, should the framers of the constitution have provided that the appointing power should still exist, and yet be held not to have intended to retain the same power in the permanent workings of the same instrument, through section 7 of article 4, notwithstanding section 14 of article 16, or when there was no one to fill the term but a former incumbent under the last-stated section? It was the uniform policy of the constitution that the governor's power of appointment should not be limited by either section 3 of article 18, or section 14 of article 16. These several sections clearly indicate that the section last mentioned was not understood or used or intended to have the effect claimed for it, but, on the contrary, was intended merely to prevent an hiatus in government until there should be a choice of some one in some legal mode for the vacancy.

There is, except it be as to the office of governor, (section 19 of article 4,) in the constitution nothing else that indicates what shall constitute a vacancy, unless it be a removal under section 15 of article 4 by the governor and senate, as does any judgment of ouster rendered by a competent tribunal. Nor is there in the instrument anything that militates against the idea that a new term which has not been filled is a vacancy. The legislature being in session as it was, and the new term being vacant in so far as the power and duty of the senate to fill it, why is it not also vacant for the purpose of being filled when the senate adjourns without filling it? It is in no different condition as to an occupant in the person of the old incumbent than it was before the adjournment, nor than a new term of an elective county office of which the party elected has made default in qualifying. The policy of the constitution is that, where elective officers are chosen, and they do not qualify, there shall still be a vacancy, notwithstanding the provision of section 14 of article 16; and there is nothing in the instrument from which it can be inferred that its policy is that no vacancy will exist where there is an expiration of a term, and there has been a failure of the appointing power, or a part of it, to act. The vacancy which arises in the one case from the failure of the officer to qualify is no less

actual than that which continues, in the other case, after the adjournment of the senate, from its failure to act, or even its refusal to assent to a nomination. The failure of the senate to act does not create the vacancy. That existed in the eyes of the law when the senate was called on to act. It was made by the expiration, actual or prospective, of the preceding term. The words "duly qualified" cannot consistently be given any greater force in one case than in the other. If they do not, in the former case, secure the old incumbent the right to hold until the next regular election, or prevent the governor from exercising the appointing power, then they cannot in the latter case. For the reason that no special election can be held, the power to appoint exists until the next general election is held; and for like reason, when the senate ceases to be in session, the governor may appoint in the interim. *State v. Kuhl*, 51 N. J. Law, 191, 17 Atl. Rep. 102. No other "mode" of filling the vacancy exists or is provided by the constitution or laws in the one case until the time for the general election is reached; nor, in the absence of legislation, is any in the other until the senate assembles again. It is not natural or reasonable to give to the fourteenth section of the sixteenth article one effect as to one class of officers, and another as to a different class, unless there is something in the constitution which clearly shows it was intended that it should have such a variant effect. It would be very difficult, moreover, to find any substantial reason why the framers of the constitution, or the people adopting it, should be willing that the governor should fill by appointment for the period of nearly two years a new term of an elective office, vacant by reason of the choice of the people having failed to qualify, and should not be allowed to do so in the case of an appointive office, the creature of the governor with the assent of the senate. If the assent of the senate is such a guaranty of efficiency or other official merit in the latter case, why is not the sole and direct choice of the people equally essential in the other? And if the experience of the old incumbent in the case of the appointive office is so valuable, why is it not so where the officer is elected by the people? These considerations must have addressed themselves to the judgment of the convention in framing, and to that of the people in acting upon, the instrument; and finding that, as relating to elective officers, they were ignored, there is no ground for incorporating them into the policy of the constitution as to appointive officers. Not only is there no express provision which justifies it, but, on the contrary, there is much in the nature of the instrument which repels the idea that such was the intention of the instrument. It is not an instrument which shows any of the conspicuous jealousy of executive power which is the subject of remark in some of the opinions quoted from

above. It is very true that the calling of the convention which framed this instrument was the result of the opposition among the people to the vast executive power which distinguished its predecessor. Yet throughout the state, and in that convention, there was a very deep and serious conviction that a retention of a great deal of executive power was essential to the welfare of a large and very important portion of the state; and the constitution shows that, although a majority of the counties may, in so far as their own separate interests were concerned, have preferred that the very least power should be given to the governor, yet they felt that great concessions were due to the people of other counties and to the common interests of the state, in so far as they could be affected by the concerns of the latter counties. And as a result of this feeling we see that not only were circuit judges, judges of criminal courts of record, state attorneys, county solicitors, and county commissioners made appointive by the governor, with the consent of the senate, but we find also that all officers except the supreme court and circuit court judges and cabinet officers may be suspended by the governor until the next session of the senate, for alleged misfeasance or malfeasance or neglect of duty in office, drunkenness or incompetency, and may be removed by the governor and senate on charges of the character stated, preferred by the governor, and without any inquiry into the same before any of the courts; and during such suspension the governor has power to fill by appointment any office the incumbent of which shall have been suspended. We find, also, that it was provided that any new office which the legislature may create was to be filled by the people or by the governor, and that the election of such officer cannot be given to the legislature alone. Section 27, art. 3. Certainly a frame of government having these provisions cannot be said to present great sensitiveness as to executive power, but must be acknowledged to present a palpable recognition of a grave necessity for the exercise of power which, under different conditions, would have been withheld from an executive, and retained in the people, and in other instances confided solely to the courts.

The legislation in this state on the subject of vacancies is, as is apparent from the language quoted above from the act of 1863, not exclusive, but expressly recognizes that other causes of vacancy than those specified in it may exist; and hence it cannot be invoked as the legislation of California has been in the later decisions there.

The Maryland decision is founded on the several provisions of the constitution, and the remark in one of the opinions that the expressions, "and until his successor shall be appointed and qualified," or "until his successor shall qualify," and a similar remark in *Mechem on Public Officers*, has been the

subject of frequent judicial determination of courts of high authority, and the construction of those terms has been fixed and settled, are not fully borne out by the authorities, but is, as the conflict of authority shows, still a matter open for discussion and decision wherever it has not been settled.

The convention is to be accredited with knowledge of the different constructions which the words, or those of like nature, had received, and with the previous practice of our government as to offices as to which they were used in the former constitution, and conceding that the view to which the constitution gives such support is that the fourteenth section was intended for the purposes of supplying the guaranties against an hiatus in government, which are naturally supplied by a former incumbent, when there is one, continuing to act until the term can be filled, and not as a limitation upon any of the powers granted by the constitution, the purpose of the constitution was that a vacancy not filled in the regular manner was nevertheless a vacancy; and where the law does not provide for filling as is contemplated by section 7 of article 4, this section covers it. The second section of the act of 1868 (section 217, Rev. St.) has been recognized by the executive branch of the government as providing a mode for filling it, until the senate can act; and, if that does not, then the case stands under the section of the constitution last referred to. There has been no conflict between the legislative and the executive branches on this question, as there was in Ohio, as indicated by the opinion in *State v. Howe*, supra.

As to the argument founded upon possible official delinquency in the governor, we can well answer, in the language of the New Jersey court in the case of *State v. Kuhl*, supra: "The possibility of abuse loses its significance the moment we distinguish between power and duty. The question of power alone can be considered by this court. For willful breach of official duty, or abuse of the power committed to him, the governor is, like other civil officers, liable to impeachment, and must answer to the tribunal erected under the constitution for the trial of such cases. Even though the governor should be guilty of a breach of duty in refusing to send any nomination at all to the senate during its session, it would be none the less within his power, and his duty, after the adjournment, to fill the vacancy. In that case the impeachable conduct would be his willful refusal to advise with the senate, and not his act in filling the vacancy in the after recess." Again, if we enter this field of unwholesome possibilities as against the governor, what is to be the limit of that field as applied to official delinquency upon the part of the senate, and what remedy by compulsion, or even impeachment, is there against the senate? This field is not prolific of aid in construing constitutions.

As to the thirty-third section of the judicial article, which provides that "when the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy," it is to be remarked that its purpose was to prescribe a term in such offices, so that, in case a vacancy occurred pending any term, a new appointee by the governor and senate would not hold for six years from his confirmation or commission, but only for the remainder of the term; thus changing the rule of the former constitution as to such officers. And where an appointive officer resigns, or other vacancy occurs, in a recess of the legislature, we do not concede that the vacancy is to be filled by mere executive appointment for the balance of the term, instead of by such appointment until the next session of the senate, under the act of 1868. Section 217, Rev. St.

Acting upon the agreement filed by the several county commissioners, (without which agreement it would have been impossible to pass upon the de jure status of either board, or of any member of either,—Mechem, section 330, and authorities,) we decide that the Marvin board are, and have since they were commissioned been, the lawful county commissioners of Duval county, in so far as anything disclosed by this record enables us to judge.

We are satisfied that the appointments made by Gov. Mitchell are valid, and that the lawful holding of the Powell board ceased on the Marvin board having been commissioned; they having, according to the practice in this state, qualified before being commissioned. Any official action attempted by the former board after that time was unauthorized, and it can have no validity, under any circumstances, except as to the public; and as to the public only on the conditions necessary to give them the status of de facto officers. It is evident that the pleadings in the mandamus proceeding were not framed with reference to such principle. A mere de facto officer is one who is without lawful right to exercise the functions of the office which he is exercising. He must show that he is acting under such circumstances of reputation or acquiescence as were calculated to induce people without inquiring to submit to or invoke his action, supposing him to be the officer he assumes to be. "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer; and, if they employ him as such, should not be subjected to the danger of having his acts

collaterally called in question." *Petersilea v. Stone*, 119 Mass. 465; *Brown v. Lunt*, 37 Me. 423; *State v. Carroll*, 38 Conn. 449; *King v. Bedford Level*, 6 East, 356. Whatever may be the real facts in the case before us, certainly no general acquiescence or reputation is shown by the alternative writ of mandamus and return thereto. The Marvin board is shown to have met in the clerk's office, and organized, two days before the warrant sued on was drawn. Whether or not the Powell board did any other act, or whether or not any one recognized it as the proper board, after the commissioning of the Marvin board, we are not aware. It is certain that the defendant, the county treasurer, is unwilling to recognize it, and the burden is on the relator to present the facts which may show that it was the de facto board up to and inclusive of the time of drawing the warrant. It may be that the Marvin board was as generally recognized as the other one. It is certain that there cannot be two de facto officers in the same office at the same time. *Mechem*, Pub. Off. § 325, and authorities.

Treating the motion of the relator as a demurrer, it must be overruled.

MABRY, J., (dissenting.) Section 5, art. 8, of the constitution of 1885, provides that "there shall be appointed by the governor, by and with the consent of the senate, in and for each county, five county commissioners. Their terms of office shall be two years, and their powers, duties, and compensation shall be prescribed by law. The legislature shall provide for the division of each county into five districts, and one county commissioner shall be selected for each of such districts."

Section 14, art. 16, reads: "All state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified."

Under the agreed submission of the case now before us the interpretation of the foregoing sections becomes necessary. The facts of the case are admitted, and in brief they are as follows: Five persons were duly appointed in June, 1891, by the joint action of the governor and senate, to be county commissioners in and for Duval county, and their commissions recite that they are to hold their offices for two years from the 12th day of June, 1891. During the last session of the senate the governor nominated to that body two of the five persons then in office, and three new men, to be county commissioners for that county. The senate adjourned without confirming said nominations, and without acting upon the same. After the adjournment of the senate the governor appointed the same persons nominated by him for confirmation, and they have been commissioned. When the last appointments were made by the governor, the period of



two years specified in the commissions of the persons appointed in June, 1891, had expired, and the question involved in the case is whether or not, by reason of the expiration of the two-year terms of the incumbents, and the failure of a selection of successors to them by the joint action of the governor and the senate, such a vacancy has happened in the offices as will authorize the governor to fill them. And in the very beginning of this investigation it should be remembered that, as defined by the decisions, a vacancy in office can only be said to exist when the office or place has no legal incumbent to discharge the duties of the office. The constitution of 1885 is a revision of the preceding one of 1868, and the sections above quoted are not found in the old instrument. It is the duty of this court now to ascertain and declare for what purposes the said sections were employed, their meaning and effect. These questions touch a vital part of our constitution, and their importance cannot be overestimated. In arriving at the true and correct meaning of the sections under consideration, we should not shut our eyes, or refuse to give due consideration to the existing conditions that gave rise to the revision of the constitution of 1868. Under that instrument the appointing power of the governor was almost complete in every department of the government; representatives in the legislative branch, lieutenant governor, and constables in the executive department only being exempt from such power. Some were appointed with the consent of the senate, but many were not. County commissioners, county treasurers, county surveyors, superintendents of common schools, and justices of the peace were appointed by the governor alone, without the consent or reference to the senate, and were subject to removal by the governor, "when, in his judgment, the public welfare will be advanced thereby." Very few of the public officers, by the terms of this constitution, held their offices for designated periods, and until their successors were duly qualified. This was true of state attorneys, county judges, and cabinet officers, but probably of no others.

Again, under the constitution of 1868 there were no cycles or beginnings and endings of the terms of public officers definitely fixed in that instrument. Cabinet officers were probably exceptions, as they held office the same time that the governor did, and his tenure was circumscribed. All the other state and county officers held for terms of years, but there was no provision fixing the beginning of these terms. Circuit judges were appointed by the governor and confirmed by the senate, and they were to hold their offices for eight years. The construction put upon this provision by the court was that an appointee of the governor, when confirmed by the senate, held the office for eight full years, and that no part of a previous eight

years during which another had held the office (but had vacated it) entered into the computation of the time for which the successor appointed held. Under this construction there were no unexpired terms in the office, and the appointee, when confirmed by the senate, held a full eight years. Advisory Opinion, 16 Fla. 841. According to this view it could not, of course, be known in advance when the terms of the circuit judges would begin, as unforeseen contingencies might give rise to the beginning of a term in one circuit different from any other in the state. The view promulgated in reference to circuit judges obtained with respect to all the other officers whose terms did not have a fixed beginning. These officers were not elective, but many of them, as before stated, were appointed by the governor alone, and some by the governor with the consent of the senate. Where the governor alone appointed, his appointee, whether at the end of a preceding term in the same office or at some postponed date, commenced a new term. Where the governor appointed with the consent of the senate, and a vacancy occurred in the office during the recess of that body, the governor alone appointed temporarily under the statute. His appointment was during the vacancy, and the person who was thereafter appointed with the consent of the senate commenced the new term of office fixed by the constitution for the office. In reference to none of the officers, with probably two exceptions, state attorneys and county judges, was it provided that they should hold their offices for the terms prescribed, and until their successors were duly qualified. Under this system the expiration of terms even of officers appointed by the governor with the consent of the senate, in consequence of biennial sessions of the legislature, was constantly happening during the recess of the senate, and the executive control over such officers growing out of the authority to make ad interim appointments covering large portions of the terms—from session to session of the legislature without the consent of the senate—was almost without limit. Without definite fixed beginnings of terms it is very easy to see how all the tenures of public officers could work themselves into ad interim appointments, and this was the practical workings of the system under the old constitution. The members of the convention that met to revise that instrument knew, of course, of the construction put upon it, and the practical workings of the government under it. There was widespread dissatisfaction with the appointive system as it existed. Among the demands for a change of this system the one for a reformation in the appointive power was the most vehement and prominent. The right of the people to elect their public officers was the prevailing view, and this is made manifest,

not only by the work of the revision itself, but we know it as a part of the political history of the times.

In reference to the tenure of the circuit judges, the very case in which the opinion of this court under the old constitution has been given, and which determined the policy in reference to all the other officers of the government, the new constitution provides that, "when the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation or retirement, or other cause created such vacancy." Article 5, § 33. Radical changes were made in reference to the selection of public officials, and all of them, with few exceptions, were made elective by the people. Fixed dates were prescribed for the beginning and ending of the elective officers, and provision made for their election by the people. In reference to county commissioners, the officers whose tenures we are now considering, it is provided that they shall be appointed by the governor, by and with the consent of the senate, instead of by the governor alone, as in the old constitution. What was the purpose of this change? It was undoubtedly for the purpose of securing to the public service in these offices men who possessed the confidence of both the governor and the senate. In *Brady v. Howe*, 50 Miss. 607, where the provision was that the judges of the circuit court should be appointed by the governor, with the advice and consent of the senate, the court said: "The initiation—that is, the selection—of the person is with the governor, but the appointment must be with the advice and consent of the senate. If there were no other provision on the subject, [as is the case here,] it would not be doubted that the appointment by the governor alone would not confer a right to the office." The language in *Smoot v. Somerville*, 59 Md. 84, in reference to a similar clause, is: "The governor has no power of appointment except as expressly provided by the constitution or statute, and, if he attempt to make an appointment without such express authority, that appointment would simply be without effect. The plain object of the constitution in this respect is to secure to the public service officers who shall have the confidence and approval of both the governor and the senate; and without this no person can have a right to be inducted into office by virtue of a mere appointment by the governor, except in cases of actual necessity before mentioned." The cases of actual necessity before mentioned were cases of actual vacancy during the recess of the senate. But it is unnecessary for me to cite authorities on this point, as it cannot be doubted that the purpose of the revisers in requiring county commissioners to be appointed by the governor, by and with the

consent of the senate, was to secure men for these offices possessing the confidence of both the governor and the senate. No other construction has ever been placed upon such a provision. In case the office of county commissioner should become vacant during the recess of the senate, the governor, of course, could fill the vacancy; but his right to do so depends entirely upon whether or not there is a vacancy in the office. In the case before us there was no death, resignation, or removal in the offices of county commissioners of Duval county, and if a vacancy existed in any of them when the governor made his appointment in June last it must depend alone upon the expiration of the two-year terms for which the incumbents were appointed. If the effect of the fourteenth section of article 16 is to continue the incumbents in office after the expiration of their two-year terms, then no vacancy existed, and the last appointments are void. In ascertaining the true meaning and effect of this clause it is proper here to ask, what is the real purpose in conferring upon the governor the power to fill vacancies? The courts have answered this question. In construing a statute authorizing the governor to supply vacancies which may happen in offices filled by appointment by the governor, with the consent of the senate, Chancellor Walworth says in *Tappan v. Gray*, 9 Paige, 507: "But the sole object of these temporary appointments, and in a mode different from that prescribed by the constitution, is supposed to be for the purpose of preventing a public injury for the want of some person to discharge the duties of the office until a regular appointment can be made." (The italics are mine.) In the case of *State v. Seay*, 64 Mo. 89, it was announced as a rule that the law abhors vacancies in public offices, and in doubtful cases the construction of a law fixing the tenure of such offices would be greatly influenced by that consideration.

A vacancy in fact occurred in the office of lieutenant governor under the old constitution, and the governor made an appointment to fill it. The question arose under this appointment whether the appointee held the office for the unexpired term or until the next election. In announcing the judgment of the court Judge Westcott says, (*State v. Gamble*, 13 Fla. 9): "The regular incumbent of the office of lieutenant governor, the constitution provides, shall be chosen by the people. They are the power to which is conferred the right of selection by that instrument, and any construction of the constitution which restricts by implication the right to exercise the elective franchise in the selection of this officer, and extends executive power in that direction, is inconsistent with the intent and purpose of the framers of the constitution creating this office. Their view, plainly ex-

pressed, is that its incumbent should be the choice of the people." The view plainly expressed in the present constitution is that the county commissioners shall be the choice of the governor and senate, and not the governor alone. Therefore, in construing section 5 of article 8, no strained or narrow interpretation should be resorted to in behalf of executive patronage, and to produce a vacancy. To do so would be to violate the rules of construction laid down in the cases mentioned, and in fact every rule of constitutional construction on the subject. The law abhors a vacancy, and the language used in reference to a tenure of a public office should have a full, free, and liberal construction as against the vacancy.

Before examining the language of the section referred to in order to get at its real meaning in the light of all the surroundings, and the rules of construction applicable in such cases, it will be of assistance to see what construction the courts have uniformly put upon similar language. We have no decision of this court covering the question now presented. The decision in *State v. Gamble*, supra, announces a wholesome rule for our guidance, but the facts of that case do not meet the present one. The Advisory Opinion, 25 Fla. 427, 5 South. Rep. 613, will be referred to later on, but it does not determine the question before us.

The constitution of Pennsylvania provided that certain clerks should at the time and places of election of representatives be elected by the qualified electors of each county or district over which the courts extend, and shall be commissioned by the governor. They were to "hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified." Const. 1838, art. 3, § 3. It was also provided that vacancies in any of said offices shall be filled by the governor. One Hanley was duly elected, qualified, and entered upon the duties of the office of clerk of the orphans' court for the city and county of Philadelphia, and continued in the office for the term of three years. One Brooks was elected to succeed Hanley, but died before qualifying, and before commission was issued to him. The governor conceived the idea that there was a vacancy in the office after the expiration of the three-year term of Hanley, and appointed one Broom to fill the supposed vacancy. Hanley refused to surrender the office, claiming the right to hold the same until his successor was duly elected by the people, and quo warranto proceedings were sued out to test his right to do so. The court held that Hanley was entitled to the office as against the governor's appointee. *Com. v. Hanley*, 9 Pa. St. 516. The opinion says: "The fundamental error which lies at the root of the whole case of the relator consists in the assumption that, according to the spirit of the constitution, the tenure of county officers is strictly limit-

ed as to time, viz. three years; and that any extension of the time arises only from the exigency of the case, and must be strictly construed. \* \* \* The constitution reads thus: 'They shall hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified.' The obvious meaning of this clause is that they cannot hold office less than three years, if they so long behave themselves well; although, on the happening of certain contingencies, they may hold office for a longer period." Again, the opinion says: "It will be observed that the terms on which alone the governor can appoint are a vacancy in the office; and that there can be a vacancy in an office when there is a person in possession whom all acknowledge to be rightfully in possession, having a perfect right to exercise all the powers and duties of the office, and to receive and enjoy all its emoluments, is a position difficult to comprehend. It is an abuse of terms to say that at the time the governor issued his commission to the relator the office was vacant, for no person can plausibly deny that the respondent was the rightful possessor of the office at that time. The primary object of the framers of the amended constitution (whether wisely or not it would be unbecoming for me to say) was to diminish, as far as practicable, executive patronage, and in accordance with this policy it was thought proper to confine the power of appointment to the single case of a vacancy in office. What, then, is meant by a 'vacancy in office?' Surely an office cannot be vacant when it is filled by a person in the legitimate exercise of all its functions, in the lawful enjoyment of all its emoluments. It would be a waste of time to enter into an elaborate argument to prove a proposition so plain. But, disguise it as you may, this is the case here."

There is no mistaking the meaning of the opinion as to who is meant by the successor in the constitution of that state. The successor is not the appointee of the governor, but the successor duly elected and qualified as the incumbent was. The opinion is conclusive on this point, and its language so plain that it cannot be misunderstood. This case has been referred to in several subsequent decisions, and none condemn it as an improper construction of the clause in the Pennsylvania constitution.

The constitution of Maryland provided that "all civil officers appointed by the governor and senate shall be nominated to the senate within fifty days from the commencement of each regular session of the legislature, and their term of office, except in cases otherwise provided for in this constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years (unless removed from office) and until their successors respectively qualify according to law; but

the term of office of the inspectors of tobacco shall commence on the first Monday of March next ensuing their appointment." Article 2, § 13. There was also a provision that in case of any vacancy during a recess of the senate the governor could fill it, and his appointee could hold until the end of the next session of the legislature, or until some other person was appointed to fill the same; and, in case of any vacancy during the session of the senate in any office which the governor and senate have power to fill, the governor shall nominate to the senate a suitable person, before its final adjournment, unless such vacancy occurs within 10 days before said final adjournment. A question arose under this constitution in reference to the appointment of a tobacco inspector, and the court was called upon to construe it, in the case of *Smoot v. Somerville*, 59 Md. 84, to which reference has been made. Somerville was appointed by the governor and confirmed by the senate, and, after duly qualifying, served out a term of two years. A short time before the expiration of the two years the governor nominated to the senate, then in session, G. W. Jones, to be inspector in Somerville's place. The senate rejected the nomination of Jones, and the governor, on the last day of the session of the senate, nominated to that body Smoot, the relator in the case referred to, but the senate adjourned sine die, without taking any action on this nomination. Subsequent to the adjournment of the legislature the governor appointed and issued a commission to Smoot, and he instituted proceedings to try Somerville's right to hold on to the office. Here the decision is squarely against the authority of the governor to make the appointment, on the ground that no vacancy existed in the office. Two opinions were filed in this case, and in one it is said: "It has been contended that, inasmuch as the term of office of tobacco inspectors commences on the first Monday in March, and is to continue two years, a vacancy occurs immediately upon the expiration of the term of two years; and such would be the case were it not for the further provision of the thirteenth section, by which all officers are to continue in office until their successors respectively qualify according to law. It is true that the governor may appoint, by and with the advice and consent of the senate, at a regular session of the legislature, a successor to an incumbent in office, and the successor so appointed would be entitled to take possession, and enter upon the discharge of the duties of the office, immediately upon the expiration of the term of two years of his predecessor, and in such case there would be no vacancy. But if no appointment be made by the governor and senate, the thirteenth section still guards against a vacancy, by providing that the incumbent shall remain in office until

his successor shall qualify according to law, which cannot be until one shall have been appointed in accordance with the requirements of the thirteenth section; that is, by the appointment of the governor, by and with the advice and consent of the senate. If a successor be not so appointed, the incumbent will continue in office, not as a mere de facto officer, but as an officer de jure, by the express language of the thirteenth section." That the language referred to in the Maryland constitution was designed to limit the appointing power of the governor alone, and to prevent such a vacancy as the governor, without the consent of the senate, could fill, the opinion proceeds to demonstrate beyond a doubt. It says: "In the convention of 1851, while a section, from which section thirteen of the present constitution seems to have been copied, was the subject of discussion, the chairman of the committee on the executive department stated that the provision of that section, by which incumbents were to continue in office until their successors should be qualified according to law, was inserted for the purpose of preventing detriment to the public interests from interregnums, whether arising from the refractory temper of the governor or the senate or both. Volume 1, Debates, 468. The convention which framed the present constitution seems to have been unwilling to confer the power of appointment to office upon the governor alone, excepting cases of absolute necessity, by confining such power to filling vacancies." The language referred to, it is here held, was used for the express purpose of preventing such a vacancy in the office as the governor could fill. The opinion further states that "the effect of the words following the express limitation of the term of an office, as in this case, 'and until his successor shall be appointed and qualified,' or 'and until his successor shall qualify,' has been the subject of frequent judicial determinations by courts of high authority, and the construction of those terms has become fixed and settled. They are held to mean, according to their plain import, an extension of the definite term of office, and that no vacancy exists in the office while an incumbent, lawfully appointed, holds by virtue of such extension of his term; and, of course, no vacancy existing, no appointment can be made merely to fill a vacancy. The very object of employing such language in the limitation of the term of office is to prevent a vacancy occurring before a successor is duly appointed and qualified, as may be provided." There cannot be any mistaking the decision just referred to on the point of who is the successor mentioned in the constitution. In the language of the court: "The successor here meant is not the appointee of the governor alone, who is only authorized to appoint in case of a vacancy actually existing,

but the appointee of the governor, by and with the advice and consent of the senate."

By the Maryland constitution of 1851 it was provided that the adjutant general shall be appointed by the governor, by and with the advice and consent of the senate, and that all civil and military officers then holding commissions should continue to hold and exercise their offices according to the then tenure until they should be superseded according to the provisions of that constitution, and until their successors be duly qualified. The power of filling vacancies was lodged in the governor. The governor nominated a person to be adjutant general, and the senate did not confirm him. The governor then made an appointment to fill what he conceived to be a vacancy in the office, but it was held that the appointment was improperly made, and that the incumbent held over until joint action of governor and senate. *Watkins v. Watkins*, 2 Md. 341.

In the case of *State v. Howe*, 25 Ohio St. 588, a question arose as to the power of the governor to make an appointment, during the recess of the senate, on the expiration of the term of an office required to be filled by appointment by the governor and senate. The statute provided that the offices in question "shall be appointed by the governor, by and with the advice of the senate, one of their number being designated by the appointing power aforesaid, acting commissioner, and all of them to hold their offices for three years from the day of their appointment, and until their successors are appointed and qualified, unless vacancies occur from death, resignation or removal for cause as herein provided." The constitution of that state also provided that appointments of the character in question should be made by the governor and senate, and that the governor could fill vacancies in vacation. At the expiration of a regular three-year term—the legislature not being in session—the governor concluded that a vacancy was thereby created in the office, and assumed to appoint another person than the incumbent to fill the supposed vacancy. This appointment of the governor was held to be void and of no effect by the court. The opinion says: "It is manifestly the design of the constitution, as well as of the statute, to secure to such office an incumbent who possesses the confidence and approval not only of the governor, but also of the senate, of the state. The only exception provided for is one of necessity, to wit, an appointee to fill a vacancy, when the advice and consent of the senate is not attainable. The only question in the case, therefore, is, was there a vacancy in the office of acting commissioner at the time Harper's appointment was made? If not, his appointment was unauthorized, and the defendant is lawfully entitled to hold the office. It is hardly necessary to deny, as no one contends, that a vacancy is created in the office by the mere

appointment of a successor to the defendant. And it is almost as palpable that, if a successor had not been appointed, the defendant would have continued to hold, not merely as a de facto officer, but as an officer de jure. This must be so if effect be given to the provision of the statute authorizing him to hold over his three years, until a successor shall be appointed and qualified. The successor here meant cannot be the appointee of the governor alone, who comes into the office temporarily to fill a vacancy, but the appointee of the governor, by and with the advice of the senate. Were it otherwise, it would be necessary to hold that a vacancy was created by an appointment to fill the vacancy, or that, in contemplation of law, an office is to be regarded as vacant while in the possession of an officer who is rightfully and lawfully entitled to hold it. Much stress is laid by the relator on the significance of the word 'term,' a word not used in the statute, however; and the claim is that the office became vacant on the 16th of April, 1875, by reason of the expiration of the defendant's term of office. Let it be conceded that the defendant's term was limited to three years from April 16, 1872, it is nevertheless true that the same statute which imposed the limitation also provided that the right of the defendant to hold the office should continue thereafter until his successor was appointed and qualified. 'Qui haeret in litera haeret in cortice.' The plain and obvious import of the language of the statute is that a vacancy shall not occur at the end of three years from the incumbent's appointment. It is true, a successor may be appointed by the governor, by and with the advice and consent of the senate, either before or after the expiration of the three years; and, when so appointed and qualified, the right of the incumbent to hold the office ceases whenever the three years from the date of his own appointment have elapsed. In such case there is no interregnum or vacancy in the office. It passes in succession. The end of one tenure and the beginning of the next occur at the same instant. But, if no successor be qualified, the old incumbent continues in office, not as a mere de facto officer, or locum tenens, but as its rightful and lawful possessor until such successor be duly appointed and qualified."

The case of *State v. Lusk*, 18 Mo. 333, involved an executive appointment to the office of public printer. The statute creating this office provides that the public printer should be elected at each session of the general assembly by joint vote of the two houses, and that he should hold his office for two years, and until his successor shall be elected and qualified. Provision was also made that if the public printer should die or resign, or if from any other cause the office should become vacant, the governor could appoint a public printer, who took the place of the one vacating the office. A public printer was duly

elected and qualified, and the general assembly failed to elect his successor. The governor of the state considered that a vacancy existed in the office after the adjournment of the legislature, and made an appointment. It was held he could not do so. It was stated that the only question in the case was whether the office of public printer became vacant by reason of a failure to elect a public printer. Quoting from the opinion: "It is insisted for the state that the term for which the office is to be held is two years, and that the additional time until a successor is elected and qualified is added merely to prevent the office being without some person qualified to discharge its duties, and does not prevent its being considered vacant for the purpose of its being filled by executive appointment. There are many cases, both in the constitution and laws, in which the same words are used in prescribing the tenure of offices." Several cases are then mentioned. "While it may be true that the design of continuing an incumbent in office until his successor is duly elected and qualified is to prevent any interregnum in the office, and to have some person always authorized to discharge its duties, it is also true that the incumbent, until the qualification of his successor, is as fully in the office, and entitled to all of its advantages and emoluments, as he was for the previous period of his service; and it is his right to hold the office until everything has been done which is required by law to give title to the office to another person. \* \* \* It cannot be doubted that Lusk was entitled to discharge the duties of the office, not only until the 1st day of May, 1853, but that he would now be in office, competent to discharge its duties, and entitled to its emoluments, if no appointment had been made by the governor. Such would be the effect of the words prescribing the tenure, 'until his successor shall be elected and qualified.'"

But it is unnecessary for me to consume time and space in quoting from decisions in harmony with the views announced in the cases to which reference has been made. It is unquestionably true, according to the overwhelming weight of authority in this country, that where by a constitution or an act of the legislature public officers are elected or selected for specified terms, and they are by the same authority authorized to hold their offices, or continue in their offices, until their successors are elected and qualified, or until their successors are duly qualified, no vacancies are created in said offices by failure of the electing agency to select successors in the regular mode that the appointing power alone can fill. As stated in the opinion in the case of *State v. Harrison*, 113 Ind. 434, 16 N. E. Rep. 384: "The policy of provisions of that nature is to prevent the happening of vacancies in office, except by death, resignation, removal, and the like. They rest upon the assumption that the

wiser and more prudent course is, in case the electoral body fails to discharge its functions, to authorize the incumbent to hold over until the succeeding election, rather than that a vacancy should occur, to be filled by the appointing power." The cases cited by counsel for relator from the California decisions are clear and positive on this point. It is true that there were some conflicts in the earlier decisions in that state on such cases, but the doctrine was finally put to rest, and the result is as above stated. *People v. Reid*, 6 Cal. 288, has been overruled. These decisions are referred to by Mechem on Public Officers, (section 128,) and he says: "Like rulings have also been made in other states, and such seems to be the settled principle of the law." The case of *State v. Cocke*, 54 Tex. 482, referred to by counsel for respondent, may be conceded to be the other way, but it stands almost alone, so far as I can find. *People v. Whitman*, 10 Cal. 38; *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407; *Stewart v. State*, 4 Ind. 396; *Stocking v. State*, 7 Ind. 326; *State v. Harrison*, 113 Ind. 434, 16 N. E. Rep. 384; *People v. McIver*, 68 N. C. 467; *State v. McLure*, 84 N. C. 153; *Tappan v. Gray*, supra; *McCrory*, Elect. § 314. In this connection reference may be made to the contention that a vacancy is created by section 214, Rev. St. This section is taken from the act passed in 1868, in reference to vacating offices. The only claim that can be made for a vacancy under this statute must rest upon the sixth subdivision, which is as follows: viz.: "When any office created or continued by the constitution or laws shall not have been filled by election or appointment under the constitution or law creating or continuing such office." A careful reading of this provision in the connection in which it is found will impress one with the view that its real purpose was to provide for a case where the constitution or laws created an office or continued one that had ceased to exist, and no selection had been made of an officer to discharge his duties,—a vacancy was declared therein, and the governor was authorized to appoint some person who could perform the duties thereof until a regular selection could be made. Under this view it would be a provision for filling an office originally that had been created or continued in existence. If the legislative purpose was to declare a vacancy in case a successor had not been selected to succeed an incumbent already regularly in office, it seems that direct language to accomplish this purpose would have been used. A legislative provision somewhat similar, in reference to appointing an officer, received such a construction as here indicated in the case of *Stewart v. State*, 4 Ind. 396. The provision in our statute is that when the office created or continued "shall not have been filled by election or appointment under the constitution or law creating or continuing the office." There

can be no claim that the office in question here has not been filled. Incumbents regularly appointed have continued in the office, and were in possession at the time the last appointments were made. But, aside from this, if the constitution has continued a regular incumbent in office until his successor is duly qualified, and this provision was intended to prevent a vacancy until such a contingency happened, it would be beyond the power of the legislature to defeat this provision of the constitution. The decisions cited show that the language construed by them was intended as a limitation upon the appointing power, and for the express purpose of preventing a vacancy. The settled rule is that the policy of such provisions is for this express purpose. If the language of our constitution brings it within the rule of the decisions referred to, then there is an end of this contention; for no one, I presume, will contend that a legislative enactment can contravene the limitations of the constitution. *State v. Howe*, supra; *People v. Wilson*, 72 N. C. 155; *People v. Mott*, 3 Cal. 502.

Let us now examine the language of the provisions of our constitution. The two sections above quoted, taken together, may fairly be stated, in presenting the point to be decided in this case, as follows, viz.: County commissioners shall be appointed by the governor, by and with the consent of the senate. Their terms of office shall be two years. They shall continue in office after the expiration of their official terms until their successors are duly qualified. The official term clearly has reference to the two years prescribed in section 5 of article 8, as this is the only mention made anywhere of the official tenure of such officers. If the official term mentioned in section 14 of article 16 refers to the two-year term already fixed,—and there can be no doubt about this,—then by the very terms of this section the incumbent is continued in office after the expiration of the two years until his successor is duly qualified. It cannot successfully be maintained that the constitution, by the use of the words, “after the expiration of their official terms,” recognizes a vacancy in the office from that date, where no qualified successor appears, because by its unmistakable language the officer is continued in the office after that time. The words “continued in office” imply not the beginning of a new and different holding, but the prolongation of one already existing. To continue in office is to remain in it, for the word “continue” means “to remain in a given place or condition; to remain in connection with; to abide; to stay.” *Webst. Dict.* Remember that the language is not simply to continue in the discharge of the duties of the office after the end of the official term, but to continue in office. If the officer continues in the office itself until his successor is duly qualified, how can a va-

cancy occur by the expiration of the term before the successor is duly qualified? Of course, as soon as a properly qualified successor appears, the incumbent must give way, but until such successor does appear he is still in the office, and rightfully there by the very terms of the constitution itself. The qualified successor cannot be the governor's appointee. The decisions are clear on this point. The governor cannot appoint a successor until the vacancy first happens; and this must precede the appointment. Were it otherwise, in the words of the Ohio court, “it would be necessary to hold that a vacancy was created by an appointment to fill the vacancy, or that, in contemplation of law, an office is vacant while in the possession of an officer who is rightfully and lawfully entitled to hold it.” Instead of trimming down the language of the constitution so as to provide for a vacancy, it must be remembered that we should allow it full scope in order to guard against a vacancy, as the law abhors a vacuum in public offices. If the point is doubtful, the scale should be turned against the appointing power, where there is a party authorized to perform the duties of the office until it can be regularly filled. *People v. Tilton*, 37 Cal. 614.

The distinction between the authority to perform the duties of an office after a vacancy has happened in it until the office has been filled in some legal way and the authority to hold the office itself, or continue therein until a duly-qualified successor appears, is clearly pointed out in the case of *Johnson v. Mann*, 77 Va. 265. Here an incumbent city treasurer was claiming the office against one who had been duly elected in regular succession, but who had failed to qualify before the beginning of the next term. The statute declared a vacancy in the office in such case. The court held that the incumbent was entitled to hold the office, and that the newly-elected officer, by reason of his failure to qualify within the time required by the statute, forfeited his rights to the office. But the incumbent claimed not only the right to get possession of the office, but to continue therein until the next regular election, and that it could not be filled by appointment that was lodged by the statute in the judge of the hustings court of the city in case of vacancy. The incumbent relied upon a clause in the constitution of that state which provided that “the judges and all other officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified.” In construing this clause the court draws the distinction between it and the provisions construed in the cases of *Com. v. Hanley* and *State v. Lusk*, supra. The clause in the Virginia constitution, in the language of its court, “simply provides for the holding over by the incumbent after the expiration of his

term until his successor shall qualify. The plain, unequivocal import of this section of the constitution is that, when the regular term expires, the office becomes, in the eye of the constitution, vacant, but with authority to the incumbent, already qualified, to continue by virtue of such previous qualification, made effective for the purpose by the constitution, to discharge the functions of the office until he is succeeded in the way preferred by the people, as pointed out in the constitution made by them, and in the laws made in pursuance of that instrument." In referring to the following language of the court in *Com. v. Hanley*, viz.: "It will be observed that the terms on which alone the governor can appoint are a vacancy in the office, and that there can be a vacancy in an office when there is a person in possession, whom all acknowledge to be rightfully in possession, having a perfect right to exercise all the powers and duties of the office, and to receive and enjoy all its emoluments, is a position difficult to comprehend. It is an abuse of terms to say that at the time the governor issued his commission to the relator the office was vacant, for no person can plausibly deny that the respondent was the rightful possessor of the office at that time,"—the Virginia court says: "Strong as this language is to show that no vacancy exists where there is a person rightfully in possession, and entitled to hold on until his successor is duly qualified, (for such is or was the language in part of the Pennsylvania constitution,) it in no particular meets the demands of the petitioner's case under the constitution and law of Virginia as will be \* \* \* shown." Again, in reference to the case of *State v. Lusk*, it is said: "In all essential particulars it is the Pennsylvania case of *Com. v. Hanley* over again. It is plain that, like the latter, the peculiar language under construction controlled, and even forced, the decision as made. It was idle to say that the office of public printer was vacant, because the statute creating the office in the most explicit terms expressly invests the incumbent with title and right to hold, not for two years only, but for two years, and until his successor shall be elected and qualified. The appointment of the governor was invalid, because there was no vacancy. That there was no vacancy comes from the fact that the plain language of the statute extended the official term of the incumbent until his successor should be elected and qualified."

Read the Florida constitution in the light of all the surroundings, and guided by the correct rules of construction in such cases, and there can be no reasonable doubt about its landing us within the rule laid down by the Pennsylvania and California decisions which are sustained by the decided weight of authority in this country. By the Florida constitution the incumbent is entitled to hold the office, or hold onto the office, for the lan-

guage is that he shall "continue in office," and not only is he entitled to continue in office, but the time which he can hold is fixed. He is to hold not only during the two years prescribed as the ordinary term, but after his term is ended until a successor is duly qualified. It is difficult to see how language can make it plainer. But there are other considerations in ascertaining the meaning of the constitution that should not be overlooked. The probable results of the workings of the government under any constitution must have been contemplated by the framers thereof. It certainly could not have escaped the attention of the framers of our constitution that the governor and senate might, in some instances, fail to agree on appointments. The courts do not, in construing constitutions and statutes, impute improper conduct to public officials, and we have no right to assume that any governor or senate will refuse to perform a duty. But still judges should not close their eyes to probable results of the operation of a law in seeking after the meaning of the law-makers. If we hold that the governor has the power to make appointments in cases requiring joint action of himself and senate upon the expiration of terms during the recess of that body, notwithstanding the hold-over provision in the constitution, then he has it in his power to force his nominees into office, although the senate may have deliberately rejected them, and in the face of the provision that they shall be jointly made. On the other hand, it may be said that, if the governor cannot appoint upon the expiration of a term during the recess of the senate, then that body has it in its power to continue incumbents in office although they may be objectionable and unworthy. In answer to this objection the courts have said that, as it was the design of the constitution to secure for the public service persons possessing the confidence of both the governor and the senate, where an agreement cannot be had on a successor, the then incumbent, who has received the approval of both the governor and the senate, shall hold over until a successor is selected who does possess such confidence. He has had the experience of a term at least, and is presumed to be familiar with the duties of the office. The large power given the executive to suspend for cause shows that the convention designedly made ample provision to guard against unfaithful officers, and the clause we are now construing should be considered in connection with this fact. But, still further, the few constitutional officers appointed by the governor and the senate, such as state attorneys, circuit and criminal court judges, and county commissioners, have official terms of years prescribed; but the constitution does not fix the beginning of these terms, further than to require the appointments to be made with the consent of the senate, and the regulation in reference to



unexpired terms of judges. In the case before us the record shows that the official terms of the office of county commissioners for Duval county expired during the recess of the senate, and very soon after the adjournment of the last legislature. The governor in this case submitted his nominations of successors to these officers to the senate for their approval, and in this I think he did right. But the constitution is silent as to when the governor shall submit nominations to the senate. Suppose an executive should conclude that it was not his duty to submit to the senate nominations for offices in which vacancies had not occurred, and would not happen until after the adjournment of the legislature, it is certain that there is no power to make him do so; and so far it has not been determined here that it would even be his duty to do so. In consequence of the failure of the constitution to fix a date for the commencement of the appointive offices, we find the terms of circuit judges and county commissioners expiring during the recess of the senate, and this result, as we can readily see, could have been brought about by submitting nominations to the senate during the last days or hours of the session of that body, or by its holding nominations under consideration until the last moment. Without implying blame on the part of either the executive or the senate, the result, as we now see it in this state, could have been brought about in the way indicated. Let the view obtain that the executive is not required to submit nominations for successors in office until vacancies have happened by expiration of terms, and the joint action of the senate in making appointments is virtually destroyed, in face of the plain provision that appointments shall be made with its consent; but, even if this view does not prevail, and it is held that the governor can appoint after the expiration of a term, then he can disregard the action of the senate in rejecting nominations, and put the same persons in office after adjournment. In the case of county commissioners the official term is two years, and the ad interim appointments to this office will consume the entire period prescribed for it in consequence of the biennial sessions of the legislature. These appointive officers are of the highest importance in the administration of the government. County commissioners not only levy the taxes and control county finances, but at the time of the adoption of the constitution appointed the judges and inspectors of elections, granted licenses to retail liquor, laid out public roads, and exercised many powers of vital importance to the people. Is it reasonable to suppose that the framers of our constitution, acting under the avowed purpose of taking away executive patronage and limiting the appointive power, would have deliberately left the constitution in such a condition? And if they have employed language

that naturally and according to its plain meaning tends to a different result, and in harmony with the clearly-expressed purpose that such officers shall be appointed by the governor, with the consent of the senate, should not the court put such a construction upon this language? I think there is but one answer to this question. To construe it otherwise would be to do violence to the language of the instrument itself, and to disregard the rules of construction in ascertaining the meaning of the lawmakers. The construction I contend for will harmonize the entire constitution, and by it senatorial consent will be required in the appointment of all such officers whenever the terms expire, and this is beyond all question in accord with the spirit of the instrument.

It is insisted by counsel who argue for respondent here that the advisory opinion given the executive in 1889 (25 Fla. 427, 5 South. Rep. 613) is in favor of the view that a vacancy existed in the offices of county commissioners of Duval county when the governor made his appointments in June last. The advisory opinion referred to sustains the view that when the term of an elective county office to which a person had been elected for the entire term has commenced, and there is a vacancy in the office on account of the failure of the person elected to give bond and qualify as required by section 7 of article 8 of the constitution, the governor may fill the vacancy by appointment, and such appointee holds only until the qualification of a successor, chosen at the next ensuing general election to be held in accordance with section 9 of article 18. The clause in section 7 of article 8 reads as follows, viz.: "If any person elected or appointed to any county office shall fail to give bond and qualify within sixty days after his election, the said office shall become vacant." Here is plainly a declaration of a vacancy in a county office by the constitution itself, but in what cases does the vacancy exist? When a person who has been regularly elected or appointed to take the place of one already in office, and the person so selected to supersede the incumbent fails to qualify and carry out the mandate of the electoral body, then the office is declared vacant, and the governor can fill it as provided by law. But there is no authority, according to any rule of construction, for holding that the clause in question declares a vacancy in cases where the electoral body has failed to select a successor, and there is no one authorized to give the bond, or otherwise qualify for the duties of the office. The vacancy is declared to exist because the duly-elected person fails to qualify, and in no other case is a vacancy declared. No possible construction can push the language of this section beyond the case actually provided for in it. But if the framers of the constitution were so particular to prescribe a vacancy in the one case mentioned

upon the failure of a properly elected or appointed successor to qualify within 60 days from his election, how can it be contended that they have thereby designed a vacancy to exist in other cases? Does not the provision for the vacancy in one case exclude the idea of a vacancy in any others? It is clear, I think, that the last clause in section 7 of article 8 does not afford any authority for the position that the offices of county commissioners of Duval county became vacant upon the expiration of the official terms of the present incumbents, and a failure of the senate to concur with the governor in the selection of successors, and it is impossible for construction to give it such weight.

It is further contended that the executive department of the government has so construed the constitution as that a vacancy is deemed to exist upon the expiration of a term of office, and that the court should follow this construction in this case. In support of this contention counsel who argue here for respondent furnish us a list of appointments of two state attorneys, or rather one person appointed twice to this office, and eight county judges, under the constitution of 1868, and of four appointments of county commissioners under the present constitution, all made in the year 1891. The provision in reference to the above-mentioned officers in the old constitution was that they should hold office for four years from the date of commissions, and until their successors shall be appointed and qualified, or for four years, or until their successors are appointed and qualified. With the exception of the cabinet officers, who held the same time as the governor, or until their successors shall be qualified, these were the only officers under that constitution that had such a tenure prescribed. The others had a fixed term of years, with no other provision in reference to their tenure. It is not contended that the judiciary department has ever given its sanction to the appointments referred to in the list, but that the construction put upon the old constitution by the governor should control us in our interpretation of the new. There are certain well-recognized rules of construction of constitutions and laws that have always had weight with the judges in their interpretation of the same,—such as that, where a clause has received a definite construction, the subsequent adoption of that clause by the lawmaking department carries with the language adopted also the construction put upon it; and also where the questions do not involve personal rights, but are purely political in their character, and depend upon provisions of doubtful interpretation, the courts will give great weight to the construction adopted by the political department of the government, and, where such construction has been acquiesced in for a long time, it will be followed. But these

rules of construction find no application to the provisions in our constitution. Let us take the case of the state attorneys referred to under the provision of the old constitution,—that they should hold their offices for four years, and until their successors shall be appointed and qualified. With the exception of the Texas decision referred to, there has not been a published case in the American courts, that I can find, that has not held, in construing such language, that the incumbent continues to hold the office after the end of the four years, and until his successor is appointed, as provided by the constitution. This construction has been so uniform that it is said in decisions and text-books to be settled and fixed. Can it be contended that the practice of a governor in making a few appointments can alter the fixed and settled meaning of a constitution as uniformly held by the judiciary? There can be nothing doubtful about such language. But the revised constitution, under which the present case has arisen, makes a radical change in the system of selecting public officials. A new electoral agency has been established, and the appointive power vastly curtailed. All state, county, and municipal officers continue in office after the expiration of their terms prescribed for the office until their successors are duly qualified. This language was not used in the previous constitution; and is made applicable to all officers under a new feature of official tenures provided for in the revised instrument. It should be construed in harmony with this system, and not to defeat it. If the same language that is applied to the tenure of office of state attorneys under the old instrument had been employed in reference to all officers under the new, there is, in my mind, no question as to how the court should construe it. We could not allow the few appointments of the governor to control the settled construction of the constitution. But the language used in the new constitution has never been construed by any department, except by the governor, in the year 1891, in making four appointments of county commissioners, so far as we are informed. It has not been the ordinary lifetime of a lawsuit in this court since these appointments were made, and they cannot, of course, control the court in construing this language according to its real meaning. I have no doubt but that the appointments referred to under both constitutions were made with the purest motives, and in the full belief that the executive power was in each case rightfully exercised; but the court is now called upon to construe the constitution, and this should be done according to the settled rules of construction, and in the light of all the surrounding circumstances. In answer to this idea of executive construction I quote the language of the Ohio decision, *supra*, viz.: "We are aware that the executive department of the state government has on divers

occasions since the adoption of the present constitution assumed to fill vacancies in office by appointment, when, according to the foregoing views, vacancies did not exist; and, on the other hand, the legislative department has adhered to a different construction of its constitutional powers, in providing against the occurrence of vacancies in numerous offices, by authorizing incumbents to hold over the fixed terms until successors should be chosen and qualified. This court is now called upon for the first time to declare the true limit of powers in this regard as between these co-ordinate branches of the government. After a careful examination of the question in the light of both principle and authority, we are led to the conclusion that the general assembly may provide against the occurrence of vacancies by authorizing incumbents to hold over their terms in cases where the duration of their tenures is not fixed and limited by the constitution. By this solution public trusts and offices are preserved to the administration of those agents who may be chosen in conformity to the general policy of the state, as declared by its constitution and laws providing for their election or appointment; and at the same time all the evils contemplated as likely to result from vacancies in office are guarded against by confining the exercise of the power to fill vacancies in office to those cases where no one is authorized by law to discharge the public duties, which, we think, is the constitutional scope of that power."

The case of *State v. Kuhl*, 51 N. J. Law, 191, 17 Atl. Rep. 102, referred to by counsel for respondent, determined that where a vacancy actually happened in an office during the session of the senate, and was not filled by the joint action of that body and the governor during the session, the vacancy still existed after the legislature adjourned. The constitution of that state provided that, "where a vacancy happens during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session of the legislature, unless a successor shall be sooner appointed." An incumbent in office died during the session of the senate, and that body rejected the governor's appointee. The court held that the vacancy that happened during the session of the senate existed, in the meaning of the constitution, after that body adjourned without confirming a person to fill the office. There was no question about the office being vacant in this case, as the incumbent died, and there was no one claiming to hold it; and the only point was whether the governor could fill the vacancy actually existing in consequence of its happening during the recess of the senate. The point we are considering is whether or not any vacancy in fact existed in the office at the time

the governor appointed. It would be rather a procrustean construction to make the New Jersey case an authority for the disposition of the case before us. The articles in the schedule providing for the transition of the government from the old to the new system are not now in force, but the fifth section, providing that vacancies occurring by limitation of terms before the general election in 1888—when the new elective system should begin—should be filled as provided for under the old constitution, shows that a change in such appointment was contemplated under the new. We must, of course, look to the provisions in the new as controlling such matters. Section 14 of this article refers to elective officers.

I think the constitution of Florida continued in office the county commissioners of Duval county holding at the adjournment of the legislature, and that they will continue in office until their successors are appointed in the way provided by that instrument, unless the offices become vacant in some recognized legal way; and that the appointments made by the governor in June last are of no effect. This construction is in accord with the letter and spirit of the constitution, and any other extends executive control over these public officers in a way and manner not authorized by that instrument.

The foregoing views were written without seeing the opinion of the majority of the court in this case, and without reference to that opinion. Since my views were submitted, some additions have been made to the opinion as prepared, seemingly in reply to my position in some respects. I regard the entire opinion of the court as vulnerable, but do not care to review it. There is an expressed design in the constitution to retain in the hands of the governor, in connection with the senate, the appointing power in reference to certain important officers, but it was not the purpose of that instrument to establish executive despotism over these officers. The mere fact that these appointments are required to be made by the governor with the consent of the senate shows this, and a construction of the constitution that tends to destroy the safeguards in this respect is in the wrong direction, and against the letter and spirit of our organic law.

(38 Miss. 384)

### WATKINS v. DUVALL.

(Supreme Court of Mississippi. Oct., 1891.)

LANDLORD AND TENANT — LIEN FOR RENT AND ADVANCES—CONVEYANCE OF PREMISES BY LANDLORD—UNRECORDED RECONVEYANCE—EFFECT.

1. Where a landlord conveys the demised premises to his wife, he has no claim on the crops produced thereon for the rent, though he retains the rent note, since the conveyance carries the note with it, as an incident, and the wife becomes the landlord.

2. Nor has he any claim on such crops for

advances made to the tenant after such conveyance.

3. A reconveyance to him by the wife, by an unrecorded deed, does not constitute him such landlord, as to third persons, since such conveyance is void as to them.

Appeal from circuit court, Monroe county; Lock E. Houston, Judge.

Action of replevin by Scott Duvall, as trustee of M. M. Davis & Co., against W. W. Watkins, to recover certain cotton produced by one Kellum, as tenant, under a lease executed by defendant to him, and taken by defendant on an attachment for rent, and for advances made to the tenant to enable him to produce the crop. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff claimed under a deed of trust from the tenant to M. M. Davis & Co., and in reply to defendant's answer, setting up his attachment, denied that defendant was landlord. On the trial, plaintiff introduced in evidence a deed from defendant to A. L. Watkins, his wife, made January 30, 1889, —the year in which the crop was raised, and for which the rent was due. The deed had been duly recorded, and conveyed the leased premises, and certain goods, chattels, and choses in action, but did not include the notes given by the tenant for rent, and for supplies furnished by defendant. Defendant offered in evidence the rent and supply notes, affidavit and bond for the attachment, the writ and levy, and an unrecorded deed from his wife to him, dated February 14, 1889, reconveying the demised premises and other property. On motion of plaintiff the court excluded all of such evidence.

Gilgleylen & Leftwitch, for appellant. Clifton & Eckford, for appellee.

CAMPBELL, C. J. An affidavit in conformity to section 1774 of the Code of 1880 is a sufficient foundation for the claim of a third person replevying property attached for rent and advances, by virtue of "An act," etc., approved February 11, 1882, (Laws p. 139.)

The conveyance by Watkins to his wife of the land rented carried with it, as an incident, the rent note held by him, and she, not he, became landlord, and remained such, as no valid conveyance of the land by her to him was shown, because the conveyance she made to him was not valid as against any third person, (Code, § 1178,) it not having been "filed for record." As Watkins was not landlord when he made advances, he had no lien for them. Affirmed.

(69 Miss. 406)

#### JONES v. STATE.

(Supreme Court of Mississippi. Oct., 1891.)

LICENSE—COTTON-SEED BUYER.

Under Laws 1888, p. 14, providing for a license tax on a "public buyer of cotton seed," a person buying from the public generally, though he sells to one person only, is liable for the tax.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Defendant, C. L. Jones, was convicted under Laws 1888, p. 14, imposing a privilege tax of \$10 on "each public cotton-seed buyer," and appeals. Affirmed.

Jones was the agent of the Friars Point Oil Mill & Manufacturing Company. He was paid a salary based on the number of tons of cotton seed purchased by him. He put the seed he bought in a warehouse provided by the company, and was buying solely for this concern.

Bucks Yerger, for appellant. T. M. Miller, Atty. Gen., for the State.

WOODS, J. The error of appellant's counsel grows out of a misapprehension of the correct interpretation of the words, "public buyer of cotton seed." Laws 1888, p. 14. The statute designs to impose a privilege license tax on persons whose business is the buying of cotton seed. All persons who are engaged in the business of buying cotton seed from the public generally are liable for the tax, no matter whether they buy to sell to any and all purchasers, or to one only. The test is, was Jones buying for his own private consumption or use, or was he buying from the public generally, in the prosecution of his business? If the latter, it is wholly immaterial whether his business connection was with one cotton-oil mill, or a dozen, or none. He was a public, as contradistinguished from a private, buyer, and should pay the privilege license tax just as any other public buyer. The judgment complained of is correct, and must be affirmed.

(69 Miss. 408)

#### MURPHY v. JACKSON et al.

(Supreme Court of Mississippi. Oct., 1891.)

REPRESENTATIONS AS TO TITLE—ESTOPPEL OF MORTGAGE—SILENCE.

One holding a recorded mortgage is not estopped to assert it against a purchaser by reason of his remaining silent while the owner tells the purchaser that he can give good title.

Appeal from chancery court, Harrison county; Sylvanus Evans, Chancellor.

Suit by W. B. Murphy against Frank Jackson and another. From a decree dismissing the bill, complainant appeals. Reversed.

Appellant filed this bill in the chancery court of Harrison county on January 3, 1891, against R. Seal and Frank Jackson, to foreclose a mortgage. The bill avers that one of the defendants, Jackson, executed and delivered to complainant his promissory note for \$25, and to secure it executed and delivered to complainant a mortgage on certain land described therein; that the said note was never paid, nor the said mortgage satisfied; and that the said property was forfeited,—and avers, on information and belief, that the other defendant, R. Seal, claimed some interest in the land, acquired subse-

quent to the giving of the mortgage by Jackson. The bill prays that an accounting be had, and that defendant Jackson be decreed to pay him amount found due, and the mortgaged property sold to pay same. Both defendants answered, and alleged as a defense that the mortgage was void, and that Jackson owed complainant nothing, because the mortgage was given in consideration that Murphy, as jailer, should discharge Jackson, who had been committed to jail by a justice of the peace on a criminal charge, and that the contract was void, as against the policy of the state, and, further that Jackson was kept in jail after the execution of the mortgage, therefore the mortgage was without consideration. The evidence did not support either of these defenses. It was shown that the consideration of the mortgage was that Murphy should become surety for Jackson's appearance at the next term of the circuit court. It was also shown that Murphy did make this appearance bond, which was \$150, and did not keep him in jail. Jackson testified that he had sold the land, which was worth \$150, to R. Seal, for \$12, and that he told Seal that he could make a good title, and that Murphy was present at the time. At this time the mortgage had been recorded. The court below dismissed the bill, at complainant's costs, and he appealed.

W. G. Evans, for appellant. Mayes & Harris, for appellees.

WOODS, J. The admirable candor of the able counsel for appellees renders any argument by the court unnecessary. The luminous statement of counsel completely covers and disposes of the case, and we make it our own. It is matter of regret to us that, in reversing the decree of the court below, we cannot remand with leave to appellee Seal to amend his answer in the manner "shadowed forth in Jackson's testimony." We would be glad to discharge the grateful obligation counsel has imposed upon us by meeting their wishes in this particular, but, under the settled law of this state, we cannot. If the amendment desired were permitted to be made, the defense would still prove ineffectual. The case of *Markham v. O'Connor*, 52 Ga. 183, is authority for the position stated by counsel, but the rule is otherwise in this state. See *Staton v. Bryant*, 55 Miss. 261; *Sulphine v. Dunbar*, Id. 255. Let the decree of the court below be reversed, and a decree entered here for the appellant.

(69 Miss. 372)

#### PATE v. SHANNON.

(Supreme Court of Mississippi. Oct., 1891.)

#### DISTRESS FOR RENT—WARRANT—AFFIDAVIT—AMENDMENT.

1. In replevin by a tenant for property taken by his landlord on attachment for rent, the distress warrant will not support the land-

lord's avowry of right to possession where the affidavit on which the warrant issued erroneously states the county in which the leased property is located.

2. Such affidavit cannot be amended.

Appeal from circuit court, Calhoun county; C. H. Campbell, Judge.

Replevin by J. A. Shannon against J. B. Pate. Judgment for plaintiff. Defendant appeals. Affirmed.

J. B. Pate of Yalobusha county sued out an attachment for rent against J. A. Shannon of Calhoun county. Certain cotton was seized thereunder, and Shannon replevied the cotton. The case was tried before a justice of the peace of Calhoun county, who gave judgment for Shannon, and Pate appealed to the circuit court of Calhoun county, where a motion was made to quash Pate's affidavit, on the ground that it recited the "locus in quo" to be in Yalobusha county, when in fact the premises were in Calhoun county, as shown by the bond and writ. Pate moved the court, at that juncture, to be allowed to amend his affidavit by writing the word "Calhoun" before county, so as to make the affidavit show that the land rented by Pate to Shannon was in Calhoun county. The writ and all the papers showed that the tenant lived in Calhoun county. The affidavit was made before a justice of the peace in Yalobusha county, and was inadvertently written, following section 1845 of the Code of 1890, "for rent in arrears on the land situated in said county, and occupied by said Shannon during the year 1891." The motion to amend was overruled, and the motion to quash was sustained, by the court. Judgment was given for Shannon, and Pate appealed.

W. S. Chapman, for appellant.

COOPER, J. There is no error in the action of the court below, either in refusing the defendant leave to amend the affidavit upon which the distress warrant was sued out, or in quashing the warrant upon motion of the plaintiff. A distress for rent is not a judicial proceeding, for it is returnable to no court in a pending suit, and serves only as authority to the officer to do what the landlord at common law could do for himself. Its legality rests upon conformity to the statute by the landlord in making the required affidavit and bond. If, upon property being seized, the tenant or a third person institutes a suit for the possession of the thing seized, the warrant, if legal, supports the avowry of the landlord of his right to the possession of the property. It is no more within the power of the court to permit an amendment to the affidavit upon which the validity of the writ depends than it would be to direct an amendment to a defective deed or power of attorney, relied on by a party plaintiff or defendant as a link in his chain of title. The making of the affidavit, as required by the statute, is a condition

precedent to the issuance of the warrant; and, if the condition is not performed, the warrant is illegal. The affidavit in this case was for rent due on lands in Yalobusha county. The warrant was issued by a justice in Calhoun county, directed to an officer in that county, and commanding him to seize the goods of the tenant for rent due and in arrear on lands in that county. The affidavit, confessedly, does not support the warrant issued, and it was properly quashed. *Dudley v. Harvey*, 59 Miss. 34. There is nothing in *Hollingsworth v. Willis*, 64 Miss. 152, 8 South. Rep. 170, or in *Payne v. Stovall*, 67 Miss. 514, 7 South. Rep. 502, at all in conflict with the decision in *Dudley v. Harvey*. In the first of these cases the affidavit was sufficient, but contained an allegation wholly superfluous and unmeaning. This the court permitted to be struck out, and, since it would not have been of any effect if it had remained, it was held immaterial that it was struck out. In *Payne v. Stovall* the objections were properly characterized as frivolous. The judgment is affirmed.

(69 Miss. 811)

**HOWE et al. v. KERR et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**PARTNERSHIP—BUSINESS CONDUCTED IN NAME OF ONE PARTNER—FIRM AND PRIVATE CREDITORS.**

Where one member of a firm transacts the business in his own name, and there is no sign displayed at the place of business, disclosing the fact that another person has an interest therein, a bona fide transfer of the property acquired in such business, by the member transacting it, in payment of his individual debt, is valid, as against the creditors of the firm.

Appeal from chancery court, Clay county; Baxter McFarland, Chancellor.

Action by R. Howe, I. N. Sperry, Lehman & Son, and H. A. Montgomery against Ada P. Kerr, J. J. Kerr, and B. Y. Rhodes, to set aside a sale of certain property by J. J. Kerr to the other defendants, on the ground that such sale was fraudulent as to plaintiffs. From a decree in favor of defendants, all the plaintiffs except Montgomery appeal. Affirmed.

It appeared on the trial that the property in dispute consisted of the supplies and fixtures used in conducting a saloon; that J. J. Kerr and Montgomery were partners, but the business was wholly transacted by and in the name of Kerr, though Montgomery acted as salesman in the saloon; that Kerr, prior to the commencement of this action, and without the knowledge or consent of Montgomery, transferred all the property to defendants Ada P. Kerr and B. Y. Rhodes in payment of his individual debts; and that all the plaintiffs except Montgomery are creditors of the firm.

Clifton & Eckford and J. J. McClellan, for appellants. R. C. Beckett, for appellee Rhodes. Beall & Pope, for appellee Ada P. Kerr.

COOPER, J. The uncontradicted evidence is that Kerr transacted the business in which he was engaged in his own name, and that no sign was displayed at the place, disclosing that Montgomery had any interest therein, and that the property in controversy was "used and acquired" in that business. Under these circumstances, such property is, by express provision of the statute, liable for the debts of the person so transacting the business, and to be "in all respects treated, in favor of his creditors, as his property." There is no doubt that Kerr was indebted to his mother and Rhodes in sums equal to the full value of the property sold to them. The real contention of appellants is that it was not competent for them to accept the partnership assets in payment of their demands against J. J. Kerr individually. But the statute declares that, as to creditors, the property is to be treated as the property of Kerr. They might have subjected it to their demands by proceeding at law to judgment and execution, and what the law would have done it was permissible for the parties to do. Affirmed.

(69 Miss. 309)

**BRENNER et al. v. HIRSCH et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**DEATH OF PARTNER—CONTINUATION OF BUSINESS—SALE OF STOCK—GARNISHMENT OF CREDIT.**

Where, after the death of a member of a firm, the other partner continues the business in the firm name, it is the individual business of such partner; and, though he is liable to account to the representatives of his deceased partner for firm assets which remained in the business, a credit represented by a note taken by him in the firm name, in payment for the stock, is subject to garnishment for his individual debts.

Appeal from circuit court, Coahoma county; R. W. Williamson, Judge.

Actions by Hirsche, Lowenstein & Levy and Stern & Jackson against E. Kahn, as defendant, and Brenner and Galsman, as garnishees. Judgment for plaintiffs, and the garnishees appeal. Affirmed.

Greenbaum & Kahn were merchants doing business in Clarksdale, Miss. Greenbaum died, and Kahn continued the business without changing the firm name. Brenner & Galsman bought from said Kahn the stock of goods and other assets of Greenbaum & Kahn, and gave their note to Kahn, for a balance due on these goods, for \$1,517.33, due October 16, 1890. Kahn, after this, moved to Memphis, and went into business in his own name. There he contracted debts to Hirsche, Lowenstein & Levy and to Stern & Jackson. These creditors of Kahn sued out attachments against him, and garnished Brenner & Galsman, who answered, denying that they owed Kahn anything. Their answer was controverted. The plaintiffs in attachment got judgment against Kahn, and on the trial of the garnishment issue they recovered a judgment

against the garnishees. The note given by appellants had been transferred to B. Lowenstein & Bro., who are not parties to this suit, and they transferred it to the Bank of Commerce, who collected it from Brenner & Gaisman. It was shown that the transfer to B. Lowenstein & Bro. was made by Kahn after Brenner & Gaisman had been served with the garnishment writ, and that Lowenstein & Bro. had agreed, at the time the note was paid, to indemnify them against loss. The two cases were tried together, on the same evidence, before the judge without a jury. From a judgment in favor of plaintiffs in attachment the garnishees appealed.

Sam C. Cook, for appellants. Calhoun & Green, for appellees.

CAMPBELL, C. J. Although E. Kahn was liable to account to the representatives of Greenbaum, the deceased partner, for continuing business in the firm name, and with firm assets, if such was the case, the business done by Kahn after Greenbaum's death was his individual business; and debts accrued to him in such business, although nominally due to Greenbaum & Kahn, were legally due to Kahn, and appropriable to his creditors. A party cannot make use of a firm name, and take notes payable to that name, and, when such assets are sought to be reached by his creditors, elude their pursuit by setting up the real or imaginary claim of a partner, who was not such, to defeat creditors. Affirmed.

(88 Miss. 279)

**BENNETT v. CHAFFE et al.**

(Supreme Court of Mississippi. Oct., 1891.)

**QUIRING TITLE—EVIDENCE—TAX TITLES—DEED FROM STATE.**

1. In a suit to confirm title to land, where the title is specifically set forth in the bill, and not specifically denied, evidence thereof need not be produced.

2. A conveyance from the state is no evidence of a tax title, without a showing that there had been a sale of the land to the state for taxes.

Appeal from chancery court, Lincoln county; H. C. Conn, Chancellor.

Suit by Charles Chaffe and others against J. W. Bennett and others. Decree for complainants, and Bennett appeals. Affirmed.

The bill in this cause was filed March 7, 1890, by Messrs. Chaffe & Powell, to confirm, under local laws, (Laws 1886, p. 827,) their title to a considerable quantity of land. Appellant and his wife were made defendants, by name, and all other persons interested, being unknown, were made defendants, as such. The appellant claimed 160 acres, and his wife disclaimed all interest. There was a decree confirming complainants' title to all the land except that claimed by Bennett, and there is no appeal from that decree. The title of complainants is traced in the bill, and

deraigned, unbrokenly, from the United States government. This derangement is not denied. Appellant, in his answer and cross-bill, claimed the ownership of 160 acres of this land, and asserted that it was sold for taxes May 10, 1860, and purchased by the state, and exhibited an auditor's deed therefor executed to him in 1868, and further pleaded that he had been in the actual adverse possession since 1868. The cross bill sought the cancellation of complainants' deed, and the confirmation of defendant's tax title. The answer to the cross bill denied that the land was taxable, denied that it was sold for taxes, and put in issue the adverse possession of Bennett. Appellant's proof consists of the auditor's deed, a certified copy of the assessment roll of 1857, the deposition of appellant, the certificate of the chancery clerk that he could not find a record of a sale to the state by the tax collector, and a certificate from the auditor. From a decree confirming complainants' title, defendant appealed.

A. C. McNair, for appellant. R. H. Thompson, for appellees.

CAMPBELL, C. J. The complainants were relieved of the necessity of producing evidence of their title, as specifically set forth in their bill, by the failure of the respondent to deny it specifically. Code 1880, § 1892.

The tax title relied on by the respondent, in itself, is nothing, because it is not shown that a sale for taxes was made, at which the state became the buyer, without which the conveyance by the state carried nothing; and, for the same reason, neither the act of February 10, 1860, (Laws, p. 213,) nor section 1709 of the Code of 1871, nor section 539 of the Code of 1880, is of any avail, since each must rest on a sale for taxes by the collector, primarily. Those were the sales contemplated. *Clay v. Moore*, 65 Miss. 81, 3 South. Rep. 142. Affirmed.

(89 Miss. 277)

**STEIN et al. v. BRUNSWICK-BALKE-COLLENDER CO.**

(Supreme Court of Mississippi. Oct., 1891.)

**ACTION ON NOTES—ALTERATION—EVIDENCE.**

Where, in an action on notes, defendants claim that they had been altered by the insertion of the words, "and attorneys' fees," it is error to exclude as evidence a written contract for the sale of the property for which the notes were given, where such contract contains the terms of the sale, and does not state that the notes are to be made payable with attorneys' fees.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Action by the Brunswick-Balke-Collender Company against Samuel J. Stein and J. T. Flanagan on promissory notes. From a judgment in favor of plaintiff, defendants appeal. Reversed.

The notes on which the action was brought were given for a pool table bought of plaintiff by defendant Stein. As a defense, defendants claimed that the notes had been altered by the insertion therein of the words, "and attorneys' fees." It appeared that at the time of the purchase a written contract, which particularly described the terms of the sale, was signed by the parties, and that such contract contained no stipulation that the notes to be given by defendants should contain a clause providing for the payment of attorneys' fees. On the trial, defendants offered this contract in evidence, but it was excluded by the court, on plaintiff's objection, and its exclusion is assigned as error by defendants.

Rush & Gardner, for appellants. Longino & Weathersby, for appellee.

COOPER, J. In determining whether the notes sued on were altered after their execution, the contract for the purchase of the goods for which they were given was competent and relevant evidence. It was in writing, signed by the parties, and contained the terms of the sale, and was therefore competent, as tending to prove that the notes signed by the defendant were given in conformity to the terms of the sale. "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject-matter, are deemed to be relevant to the fact with which they are connected." Steph. Dig. Ev. c. 2, art. 3. Reversed and remanded.

(45 La. Ann. 1137.)

STATE v. NASH et al. (No. 1,264.)

(Supreme Court of Louisiana. June 14, 1893.)

MURDER—CONTINUANCE—EVIDENCE—CHARACTER OF DECEASED—CHALLENGING JURORS—WAIVER.

1. It is not a legal ground for a continuance or the fixing of the case for trial at a later day than that ordered by the judge when alleged important witnesses are absent in another state. In such a case the fixing of the case for trial or its continuance is a matter within the exclusive discretion of the district judge. It is not a good ground for a continuance where the witness who resides in the jurisdiction of the court, but who has not been summoned, is absent, and what he would testify to can be proved by other witnesses present.

2. It is not error to exclude testimony as to the character of deceased in a distant community, unless it is first shown that the accused were aware of his character as a dangerous and quarrelsome man, and the foundation has also been laid by proof of some overt act on part of deceased.

3. After a verdict a juror cannot give evidence to contradict what he said on his voir dire as to his competency as a juror.

4. If a juror is interrogated on his voir dire as to his competency as a juror, and swear falsely, it is good ground, on his incompetency being established, for a new trial. But if the defendant fails to interrogate, and the incompetency is afterwards discovered, it cannot be urged after verdict, as the failure to inquire into the juror's competency is a waiver of it.

5. On a motion for a new trial, where the fact of interrogating the juror as to his compe-

tency by defendant is at issue, and the evidence is conflicting, the appellate court will not disturb the finding of the trial judge on this disputed fact.

6. The accused have no cause to complain of the overruling of challenges for cause to jurors when they are afterwards peremptorily challenged by him, and do not serve on the jury. (Syllabus by the Court.)

Appeal from district court, parish of Caddo.

Kid Nash and Kid Barnett were convicted of murder, and appeal. Affirmed.

M. E. Elstner, Arthur L. Kahn, and Hicks & Hicks, for appellants. John R. Land and E. B. Dubuisson, for the State.

McENERY, J. The defendants were indicted jointly for murder, tried and convicted, and separate verdicts as to each returned by the jury,—Nash guilty as charged, and Barnett guilty as charged, without capital punishment. They were sentenced in accordance with the verdicts, and appealed from the judgment. Their defenses are as follows: (1) To the ruling of the court in setting the case for trial. (2) To the ruling of the court in refusing motion for continuance. (3) To the ruling of the court in refusing to let the witness T. W. Tusten testify before the jury as to the general reputation of the deceased, McCort, at Monroe, La. (4) To the ruling of the court in refusing to let P. W. Perry, one of the jury, testify on the motion for new trial; the said Perry having been offered as a witness by defendants to prove that when offered as a juror he was asked as to his age, and that he answered that he was 22 years of age. (5) To the ruling of the court in overruling motion for new trial. (6) To the ruling of the court in overruling the motion in arrest of judgment.

Exceptions 1 and 2 are controlled by the same principle, and will be discussed together, as is done in defendants' brief. The rule of the district court before which the defendants were tried is that the district attorney has the exclusive right to fix cases, except when sufficient time is not allowed the defendant to secure his witnesses. On the 22d of April, 1893,—the first day in which cases on the calendar of the court were called under the rules for the purpose of being set down for trial,—the district attorney proposed and offered to fix the case of defendants for trial on the 25th of April following. The defendants objected, on the ground that two important witnesses, residing in another state, would be present if the case was fixed at a later date; but there was not sufficient time to obtain their voluntary attendance, which was assured at a later period, and defendants had not the time to communicate with them and secure their promised voluntary attendance. The fixing of cases for trial by the court is a matter relating to its discipline, and, as we have often said, we will not interfere with this discipline, unless a manifest wrong has been inflicted upon the defendant. From the statement of the trial judge we are



satisfied that no such wrong has been inflicted upon the defendants. He says: "The absent witnesses were nonresidents, and could not be forced to appear by any process of this court." It would be a most unusual proceeding to continue a case for the purpose of allowing the defendant to communicate with absent witnesses, to ascertain if their voluntary attendance could be obtained. Defendants in criminal cases could multiply absent witnesses at each succeeding term, and impose upon the indulgence of the court, and thus indefinitely postpone the trial. But this is a matter, when the witnesses are beyond the jurisdiction of the court, for the exercise of discretion by the trial judge. There is no legal right for a case to be postponed on such a showing, and a refusal to grant the delay, even in a meritorious case, would not authorize us to review the discretion exercised by the trial judge. He says the witnesses lived at points in Texas, from which they could reach the court in 24 hours, and that they could be reached by telegraph. The defendants, as a matter of right, were not entitled to the delay, and we think the trial judge was fully justified in refusing to allow the delay in the exercise of a discretion which in such a case was exclusively his, on the showing made by defendants. For the reasons alleged in their protest, defendants filed a motion for a continuance on the ground of the absence of these two alleged important witnesses. The reasons above stated will apply to the refusal to grant the continuance in court because of the absence of these witnesses.

In the same motion it is alleged as a ground also for a continuance that two witnesses, who reside in Shreveport, material and important, were absent from said city, and that defendants had placed their names with the clerk of court for the purpose of having them summoned. The facts which they expected to prove by said witnesses are detailed at length. Crisp, one of the witnesses, was in court during the trial, and he was not placed on the stand. The trial judge states this from his personal knowledge. In respect to the facts expected to be proved by Bernstein, the other absent witness, the trial judge states that his testimony would be only cumulative. But several witnesses testified to the conduct of deceased; that he did make threats against the life of the accused Nash, and that he and his codefendant were informed of these threats. But the evidence showed to the satisfaction of the jury that the deceased made no effort to carry these threats into execution. On this part the evidence was conflicting, but the trial judge says the jury rejected the testimony of an overt act by the deceased, and accepted that of the witnesses who testified to the fact that the "deceased was facing the bar counter, with his left side towards the front door of

the saloon, when the accused entered by that door, and that immediately upon their entrance two pistol shots were fired by them, or one of them, at deceased, and that they saw no pistol in deceased's hands, and no attempt by him to draw one." These observations on the testimony, the trial judge says, are made for the purpose of showing that, if he erred in refusing a continuance, no injury was done the defendants, as they had through other witnesses and their own testimony the advantage which Bernstein's testimony would have given them. But we are of the opinion that the accused did not show due diligence in endeavoring to procure the attendance of Bernstein. On January 24, 1893, on motion of defendants, the case was continued. They had from this time on to the trial to secure by legal process the attendance of Bernstein.

3. T. W. Tusten, a witness for the defense, was offered to prove the reputation of the deceased in Monroe, La., for being a dangerous and quarrelsome man; one who would likely carry his threats into execution. His testimony was rejected, on the ground that it was not an effort to prove his character where the deceased and accused resided, which would be a presumption that the accused knew his character. To give the reputation of the deceased in evidence which he bore in a distant community it is necessary to show at least that the accused were aware of his character in said community. No attempt was made to show that the defendants knew the character deceased bore in the city of Monroe. Besides, the proof of some attempt on the part of deceased to commit an overt act against accused must be first shown as a foundation for such evidence.

4. P. W. Perry, a member of the jury, was placed on the witness stand by defendants, to prove that when offered as a juror he was asked as to his age, and answered that he was 22 years of age, when he was in fact only 20, and therefore an incompetent juror. The judge refused to admit his statement as a witness. It is true that the evidence sought to be elicited from the witness was not to impeach the verdict, but we are of the opinion that the same rule will apply in rejecting such testimony as prevents the testimony of a juror to impeach the verdict rendered by him. In the case of *State v. Price*, 37 La. Ann. 217, we said: "The rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict, and thus declare their own perjury, for one oath would but offset the other. Both public decency and public policy alike demand the rejection of such testimony." In the instant case the juror's oath on the trial of the motion for a new trial would be offset by his oath on his voir dire.

5. Evidence was introduced to show that the juror Perry was an incompetent juror, not having attained his majority. If the de-

defendants had interrogated the juror Perry on his voir dire as to his age, and he had deceived them by stating he was a major, this would be evidence of due diligence on part of defendants. If they had not so interrogated him, this would be a lack of diligence, and a waiver of the cause of challenge. *Thomp. & M. Jur. § 302 et seq.*; *State v. Garig*, 43 La. Ann. 365, 8 South. Rep. 934. If the fact had been shown conclusively on the trial of the motion that the witness had been questioned as to his age, then testimony could be heard as to his age, and, if the fact of minority was proven, the defendants would be entitled to a new trial. The testimony is conflicting as to whether the juror had been interrogated as to his age. The presumption is in favor of the juror's competency after he has been sworn and impaneled. To rebut this presumption the evidence must be strong and convincing. The trial judge believed that the question as to age had not been asked the juror, and he therefore overruled the motion for a new trial. The trial judge says in his written opinion: "It cannot be denied that defendants have, in the language of Bishop, failed to make it very distinct that the juror Perry was questioned as to his age before he was accepted. It is not necessary to go into any examination of the evidence. It is admitted to be contradictory, and the admission might have gone to the extent of conceding that it is flatly contradictory in some vital points; so contradictory in fact that no one can read it and be free of a reasonable doubt on the subject. It was the duty of defendants to remove these doubts, and, as they have failed to do so, their application for a new trial must be denied." We can add nothing to the force of this statement. A disputed fact was submitted to him, and he has found the fact. We will not, on a motion for a new trial in a criminal case, disturb his ruling in such a case. The other matters in the motion have already been disposed of.

6. The motion in arrest of judgment assigns as a ground therefor the nonage of the juror Perry. This fact does not appear on the face of the record. It also assigns as a reason for arresting the judgment the fact that one of the defendants was found guilty as charged, and the other guilty as charged, without capital punishment. They were jointly tried. The jury could have acquitted one and convicted the other. There is no reason why a qualified verdict could not be released as to one, and an unqualified verdict as to the other. The law authorizes such a verdict.

7. Two persons were challenged for cause by defendants, which was amended. They were then presumptively challenged. They did not serve on the jury, and the defendants have no cause to complain. *State v. Farrer*, 35 La. Ann. 817; *State v. Dugay*, Id. 827;

*State v. Melton*, 37 La. Ann. 77; *State v. McGee*, 36 La. Ann. 206; *State v. Jackson*, 37 La. Ann. 768.

Judgment affirmed.

(45 La. Ann. 1137)

STATE v. NASH et al. (No. 1,454.)

(Supreme Court of Louisiana. July Term, 1893.)

CRIMINAL LAW—REVIEW ON APPEAL—NEW TRIAL  
—NONAGE OF JUROR.

1. It is settled law in this state that rulings of the trial judge on questions not submitted to the jury, but to the judge alone, and involving blended issues of law and fact, are reviewable in this court on the facts as well as on the law, provided the testimony has been reduced to writing, and embodied in or attached to the bill of exceptions taken to the ruling.

2. To entitle an accused as matter of right to new trial on the ground of nonage of a juror, he must prove affirmatively three facts, viz.: (1) The fact of nonage; (2) that this fact was unknown to accused or his counsel until after verdict; (3) that the juror was questioned as to his age on his voir dire, and falsely answered that he was of the age required by law.

3. The accused have the constitutional right to a trial by jury,—by a jury of 12 men possessing the qualifications required by law; and when they show by proof of the above facts that they have been deprived of this right, notwithstanding the exercise of all due diligence to secure it, and by deception, they are entitled to relief, even after verdict.

4. The evidence in this case was reduced to writing, and is regularly brought up as part of the bill of exceptions taken to the judge's ruling refusing the new trial. There is no dispute as to actual nonage of the juror, and as to its discovery only after verdict; and the evidence of 10 unimpeached witnesses, who swear that they heard the juror questioned as to his age, and his answer that he was 22 years old, cannot be overcome, or even shaken, by the negative testimony of 5 witnesses, who say they did not hear the question or answer, though admitting the possibility that it might have been asked and answered, and not heard, or, if heard, forgotten by them.

(Syllabus by the Court.)

On rehearing. Reversed.

For former report, see 13 South. Rep. 732.

FENNER, J. This case has been transferred from the Monroe term to this term for decision under an application for rehearing. The only point in our original opinion which demands reconsideration is the one based on the nonage of the juror Perry, who served on the jury, and participated in the verdict. This point is presented on a motion for new trial on the following terms: "That one of the jurors that composed the panel that tried the case against the defendants, P. W. Perry, was not a competent and qualified juror under the laws of Louisiana, for the reason that he was under 21 years of age, and not a qualified elector, at the time of said trial, and at the time he was taken on said jury; that they, through their counsel, used all due diligence in their efforts to secure jurors competent and qualified; that one of their counsel asked the said juror, Perry, his age, and the said juror answered he was twenty-two

years old; that said answer was untrue, misleading, and a fraud upon defendants, and that by said answer he caused himself to be taken on said jury; that they had no knowledge of said juror's disqualification and incompetency at the time he was tendered and accepted by them, and until after the trial of said case had been concluded, and the verdict rendered, and jury discharged." The facts thus alleged were verified by the affidavit of both the accused and of their counsel. The motion was set down for trial, and evidence was taken contradictorily between the parties, which evidence was reduced to writing. When the judge overruled the motion for new trial, a bill of exceptions was duly taken to his ruling, and the evidence was attached to and made a part of the bill.

In this state it has been held in a long series of decisions that rulings of the judge, made in the course of the trial or on motions for new trial, on questions submitted to the judge alone, and involving blended issues of law and fact, are reviewable in this court on the facts as well as the law, provided the testimony be reduced to writing, and embodied in or attached to the bill of exceptions taken to the ruling. The leading cases on this point are *State v. Nelson*, 32 La. Ann. 842, and *State v. Selley*, 41 La. Ann. 143, 6 South. Rep. 571, in the last of which the whole subject was reviewed, and the doctrine not only reaffirmed, but extended (over a dissenting opinion) so as to authorize the parties to demand the reduction to writing of the testimony taken in such cases, and to make a refusal of the judge to do so reversible error. But the general doctrine has been announced in a multitude of cases. *State v. Red*, 32 La. Ann. 819; *State v. Ross*, Id. 854; *State v. Hudson*, Id. 1052; *State v. Trivas*, Id. 1086; *State v. Briggs*, 34 La. Ann. 69; *State v. Bartley*, Id. 149; *State v. Chatman*, Id. 881; *State v. Riculf*, 35 La. Ann. 770; *State v. Belden*, Id. 823; *State v. Hyland*, 36 La. Ann. 87; *State v. Miller*, Id. 158; *State v. Molisee*, Id. 920; *State v. Redwine*, 37 La. Ann. 780; *State v. White*, Id. 172; *State v. Ford*, Id. 443; *State v. Tucker*, 38 La. Ann. 539; *State v. Deas*, Id. 581; *State v. Wire*, Id. 684; *State v. Keenan*, Id. 660; *State v. Hebert*, 39 La. Ann. 319, 1 South. Rep. 872; *State v. Newhouse*, 39 La. Ann. 862, 2 South. Rep. 799; *State v. Waggoner*, 39 La. Ann. 919, 3 South. Rep. 119; *Succession of Townsend*, 40 La. Ann. 75, 3 South. Rep. 488; *State v. Dorsey*, 40 La. Ann. 740, 5 South. Rep. 26; *State v. Selley*, 41 La. Ann. 143, 6 South. Rep. 571; *State v. Richard*, 42 La. Ann. 83, 6 South. Rep. 897. It is no longer open to discussion, and it imposes on this court the power and duty to review the findings of the judge in this case not only on the law, but on the facts as exhibited by the testimony, with which the questions of law are inseparably blended. We consider that, for the maintenance of their motion for new trial on this point, it was essential that defendants should

prove all of three facts, viz.: (1) That the juror Perry was under the age of 21; (2) that this fact was unknown to the defendants and their counsel until after verdict; (3) that the juror was questioned as to his age on his voir dire, and answered that he was of the age required by law. The sufficiency of the proof on the first two points was conceded by the judge a quo, and we find no ground for questioning it. The learned judge, with his usual directness and perspicuity, says: "The pivotal point is, did the defendants examine the juror as to his age, and were they misled by his answers? This is purely a question of fact, to be decided on the evidence adduced. If the juror was in fact interrogated as to his age, and answered falsely, and defendants were induced by such false answers to accept him on the panel, they are entitled to a new trial, although the juror may have been honest and conscientious in his belief, and free from any intent to deceive. On the other hand, if the question was not asked, and the false information not voluntarily given by the juror, it is too late, after verdict, to object on the ground of nonage." We think this statement absolutely correct, and fully sustained by authority. We affirmed it in our original opinion herein, saying: "If the defendants had interrogated the juror Perry on his voir dire as to his age, and he had deceived them by stating he was a major, this would be evidence of due diligence on their part. If they had not so interrogated, this would be a lack of diligence, and a waiver of the cause of challenge. *Thomp. & M. Juries*, § 302 et seq.; *State v. Garig*, 48 La. Ann. 365, 8 South. Rep. 934. This court has decided the precise points, saying: "An opportunity is offered the prisoner of inquiring into the qualifications of the juror on the voir dire examination. If, upon that inquiry, he be found to want the legal qualifications, he may be set aside for that cause. It would have been different if the juror, when interrogated, had stated that he had acquired the requisite residence, was free from bias, or that he possessed any other legal qualification, and it has been subsequently discovered that the statement was false. This would have been a fraud upon the prisoner, from which he could have been relieved." *State v. Renely*, 8 Rob. (La.) 596.

We have been at pains to make quite an extensive examination of the authorities bearing on this subject, and, while we discover some conflict of opinion on the question whether the incompetency of a juror, though discovered only after verdict, will be ground for new trial in absence of due diligence in testing his qualifications by proper inquiries during the examination on the voir dire, we find no authority holding or suggesting that the new trial can be denied when the party has exercised full diligence in questioning the juror on his voir dire, and has been misled and deceived into accepting an incompetent juror by his own

answers avowing his competency, which are subsequently discovered to be false. We do not believe such a precedent exists, or will ever be made. The learned trial judge, however, while affirming the above principle, bases his refusal of the new trial on the ground that the evidence does not establish with sufficient certainty the pivotal fact that defendants did question the juror on his voir dire as to his age, and did receive a false answer. He quotes the following observation of Mr. Bishop in his work on Criminal Procedure, (volume 1, § 949b:) "But if, through undiscoverable and unknown wrong, the defendant has been tried and convicted by a panel containing an unfit juror, the evidence of which must be very distinct where the verdict is right, a new trial will be granted." He then proceeds to state his opinion that the verdict in this case is right, and that the defendants suffered no practical injury from the fact of the juror's nonage, and then continues: "These observations of Bishop do not affect the right of defendant to a new trial, where the evidence distinctly shows that they were misled by incorrect answers touching a juror's age, given before he is accepted and sworn; but they distinctly recognize the rule that the burden of proving that the preliminary examination was held is on the defendants, and the proof must be very distinct and clear where the verdict is right. A mere numerical preponderance of witnesses, or a reasonable doubt whether the preliminary examination was or was not had, is insufficient. The fact must be established with such a degree of distinct certainty as leaves no reasonable doubt of its existence. If there remains a reasonable doubt of its existence, such doubt cannot inure to the benefit of the accused. On the contrary, it inures to the benefit of the verdict where the latter is fully justified by the law and the evidence." It must be admitted that the above is a very strong statement of the weight of the burden of proof carried by defendants; but, while the language employed is perhaps a little too strenuous, we are disposed to approve the statement of the rule, with some moderation of its terms, as substantially correct. The judge proceeds: "Testing the application of this rule, it cannot be denied that defendants have failed, in the language of Bishop, to make it very distinct that the juror Perry was questioned as to his age before he was accepted. It is not necessary to go into an examination of the evidence. It is admitted to be contradictory in some vital points,—so contradictory, in fact, that no one can read it and be free of a reasonable doubt on the subject. It was the duty of defendants to remove such doubt, and, as they have failed to do so, their application for a new trial must be denied."

Influenced by these statements of the district judge, by our great respect for his

rulings and indisposition to disturb them, we affirmed them in our original opinion without criticising the testimony very closely. The application for rehearing emphasizes the solemnity of our duty, in a case involving the life of one and the liberty of the other defendant, to review the testimony on the point involved, and to determine whether or not it has been correctly weighed by the district judge, and sustains his conclusion that it leaves the fact in controversy subject to reasonable doubt. This duty we could not evade without ignoring the tenor of the constant jurisprudence of this court as settled by the numerous decisions above quoted. We have now read again and reread the evidence, and, if any fact can be established by human testimony, we cannot avoid the conclusion that the testimony in this case clearly establishes that the juror Perry was questioned on his voir dire as to his age, and that he did answer that he was 22 years of age. Ten witnesses positively swear that they heard the question asked and the answer made. We name them, because several of them are known to members of this court as honorable and creditable persons, and none of them are in any way impeached. They are M. C. Elstner, A. L. Rohn, (the two counsel of defendants,) W. M. D. Canthon, T. T. Land, Dr. H. C. Rogers, C. W. Crane, S. Rohn, D. March, A. Holh, and Frank Looney. Our late respected clerk, W. G. Boney, also testified that he heard some juror questioned as to his age, who answered that he was 22 years old, but could not say whether or not it was the juror Perry. Against this positive testimony the state brings five witnesses, all of whom state that they were paying attention to the examination and to the questions and answers, and that they heard no such question to Perry or answer by him. One of these (M. L. Scovell) says, "I am positive the question as to his age was not asked, but there is a possibility that it was asked, and I might not have heard it." Another (N. W. Buckalew) says, "I will not swear that I heard all the questions asked him." Another (J. H. Jordan) says, "I do not think the question was asked, but it possibly was." Another (J. H. Prescott) says, "I will not say it was impossible," etc., and again, "If the question was asked I would have heard it, as I heard everything, but positively it passed from my memory." The last (John L. Hodges) simply swears that he did not hear the question asked; that he was paying pretty close attention; and that to the best of his knowledge and belief it was not asked. This is a fair statement of the whole testimony found in the record, with the exception of some conflicting evidence about certain statements made by one of the counsel, which has no substantial bearing on the question. On this evidence we are bound to determine whether the defendants have discharged the burden of proof devolv-

ing on them. If they have not, how could it be done? If ten unimpeached witnesses, positively testifying to a fact evidenced by their own senses are not sufficient, what number would suffice? If the testimony of five persons who did not hear, or do not remember to have heard, a question asked and answered, can overthrow or even shake the testimony of ten persons who positively swear that they heard the question and answer, how could such a fact be established in any case? A case of the kind could hardly arise in which witnesses could not be found who did not hear or remember the question and answer. The question as to a juror's age is not one ordinarily calculated to attract any one's attention, or to fix itself on the memory. The question and answer may have been made, and yet the witnesses of the state may be absolutely truthful in their statements. But if the question and answer did not occur, the 10 witnesses who swear positively that they heard them are undoubtedly perjurers. As we said in another case: "The assertion of a fact which has never had existence cannot be consistent with truth, whereas the denial of a fact which has existence may, without violating truth, be the result of inattention or defective memory; hence the rule that positive testimony on a given point must always predominate over negative testimony on the same point." *Story v. Insurance Co.*, 37 La. Ann. 258; *Guesnard v. Bird*, 33 La. Ann. 799. In this case we do not think it to be a mere question of predominance of evidence. We consider that there is no conflict whatever in the evidence. It leaves no doubt on our mind, reasonable or unreasonable. Unless the 10 witnesses of defendants are willful and conscious perjurers, the defendant's case is so clearly established that "the probation bears no hinge or loop to having a doubt on." The defendants unquestionably had the constitutional right to a trial by jury,—by the historical jury of 12 men possessing the qualifications required by law,—"*legales et libere homines*,"—which unquestionably exclude aliens and minors. They have exercised all due diligence to secure the enjoyment of this right, and have done nothing and omitted nothing which disables them from asserting it in the manner and at the time when they have done so. Whether guilty or innocent, they are entitled to the protection of the constitution. Unless found guilty by due process of law, conducted according to legal and constitutional requirements, the judicial power has no more right to condemn to death the blackest criminal than it has to visit like penalty on the whitest innocent.

However much we may regret the necessity of setting aside a verdict approved as right by the trial judge, our duty under the law and on our official oaths leaves us no other alternative. It is therefore ordered

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that our former decree herein be annulled, and it is now adjudged and decreed that the sentences appealed from be avoided and reversed, that the verdict be set aside, and that the case be remanded to the lower court for a new trial according to law.

(45 La. Ann. 1135)

BERNARD et al. v. NOEL. (No. 1,455.)

(Supreme Court of Louisiana. July Term, 1893.)

GIFT INTER VIVOS—QUESTIONING VALIDITY AFTER DEATH OF DONOR—HUSBAND AND WIFE.

Where a wife, who has made a donation inter vivos of all her property to her husband without reserving anything in the act for her subsistence, dies without having either revoked or attacked the donation as being motive of article 1497 of the Civil Code, the right of attack does not pass to her collateral heirs, but dies with her.

(Syllabus by the Court.)

Appeal from district court, parish of Vermillion; A. C. Allen, Judge.

Action by Antenor Bernard and others against Edward Noel to annul a donation of certain property. Defendant had judgment, and plaintiffs appeal. Affirmed.

L. L. Bourges, for appellants. Lastie Broussard and C. Debaillon, for appellee.

NICHOLLS, C. J. Plaintiffs seek to annul a donation of certain property made by Francoise Marie Nezat to her husband, upon the ground that the donation was in violation of article 1497 of the Civil Code, which declares that "the donation shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence—if he does not the donation is null for the whole." The wife died some time in the year 1892, without having attempted to invoke the nullity of that act. She left no descendants nor ascendants, and no question of an interference with the rights of forced heirs is involved in this case. The plaintiffs base their rights upon being the collateral heirs of the donor. Defendant excepted that plaintiffs' petition disclosed no cause of action. This exception was sustained, the suit dismissed, and plaintiffs have appealed.

Plaintiffs' allegation as to the donation is that on the 20th day of September, 1880, the said Francoise Marie Nezat passed an act of donation inter vivos to Edward Noel, without reserving anything for her subsistence. For the purposes of this exception we must assume as true that the property donated was the whole of donor's property, and that the act of donation was passed without reserving anything for her subsistence. The donor and donee were husband and wife. The donation was not made to a stranger, but to one who, under the law, was bound to support her, (Civil Code, arts. 119, 120,) and who, as no complaint was ever made to the contrary, we must presume complied with his obligations. The use, fruits, and

revenues of the property donated inured to the benefit of the community, in which the wife was a partner, and contributed to her subsistence. *Id.* art. 2402. Again, donations between married persons during marriage, though *inter vivos*, are always revocable; thus differing essentially from donations *inter vivos* in a strict sense, as the latter are by law, when once accepted, irrevocable. A revocation of the donation by the wife to her husband may be made at any time by her without her being authorized to that effect by her husband or by a court of justice. *Id.* art. 1749. In the case at bar the act of donation received its full effect up to the dissolution of the marriage by death. The wife had the legal right to have revoked the donation, and to have left the whole of the property to her husband by will, had she so desired, without the possibility of complaint from the plaintiffs, who had no vested right, absolute or contingent, in it. The nullity declared by article 1497 of the Civil Code is absolute only relatively to the particular persons in whose special interest it was passed, and among them cannot be classed her collateral heirs invoking it when she had not done so herself. See *Scott v. Briscoe*, 37 La. Ann. 178. In the case at bar the right to invoke the nullity was a personal one, in the sense that when she died the right to revoke the act died also. To discover the true meaning of a law we must often consider the reason and spirit of it, the cause which induced the legislature to enact it, and the mischief which it sought to prevent or to remedy. However general may be the terms in which it is couched, it only extends to those things or persons it appears the legislature intended it to reach and apply to. The law in question, in its enactment, did not have in view collateral heirs, and it certainly was not passed for their benefit. The possible interest which such heirs might set up in donation between two spouses was too remote and contingent, in our opinion, to have been attempted to have been safeguarded by the lawmaker through this article of the Code. For the reasons herein assigned the judgment of the district court is hereby affirmed.

(45 La. Ann. 1036)

**STATE v. ASHLEY. (No. 1,440.)**

(Supreme Court of Louisiana. July Term, 1898.)

**MURDER—APPEAL—RECORD—INSTRUCTIONS—MALICE—INTOXICATION OF DEFENDANT—SUDDEN PASSION.**

1. The decisions in the cases of *State v. Onnmacht*, 10 La. Ann. 198, and *State v. Mason*, 82 La. Ann. 1018, affirmed and applied.

2. A special charge to the effect "that, to find the accused guilty of murder, it is necessary that a malicious intent to kill existed at least five minutes before the killing," was correctly refused. There is no human gauge by which the duration of intent can be measured. If the killing was with the malicious intent to kill, the case was one of murder, although that

malicious intention was formed at the moment of striking the fatal blow.

3. A charge which assumes that drunkenness is so inconsistent with malice that, when shown to exist at the time of the killing, it becomes the duty of the state to seek for the latter at a period anterior to the drunkenness, and to show affirmatively that the drinking was for the purpose of committing the deed, is palpably false.

4. It does not necessarily follow that a homicide was not murder because done in sudden passion. There are many cases where that fact would entitle an accused neither to an acquittal, nor to a verdict of manslaughter.

(Syllabus by the Court.)

Appeal from district court, parish of St. Charles; Emile Rost, Judge.

Leonard Ashley was convicted of murder, and appeals. Affirmed.

H. Kenner and R. McCulloh, for appellant. J. L. Gaudet, E. B. Dubuisson, and Gervais Leche, for the State.

NICHOLLS, C. J. The defendant was indicted for murder, tried, convicted, and sentenced to be hung. He has appealed. He asks a setting aside of the verdict and judgment on the ground that the court erroneously refused to charge the jury as requested by him in three special charges submitted to it, and on the ground that the record does not show that the indictment was found by the grand jury, and returned and presented by it in open court. The last objection urged is presented under an assignment of error; the former, in a bill of exception reserved. The particular error assigned is not tenable. The record, though made up in a very unsatisfactory and careless manner, is not so much so as to call for a reversal. See the cases of *State v. Onnmacht*, 10 La. Ann. 198; *State v. Mason*, 82 La. Ann. 1018.

The special charges refused were as follows: "(1) That, to find the accused guilty of murder, it is necessary that a malicious intent to kill existed at least five minutes before the killing. (2) That if the jury find that the accused was drunk, and under the influence of liquor, at the time of the killing, there can be no malice aforethought, as charged, and consequently no murder, unless the accused drank for the purpose of committing the deed. (3) That the killing in the heat of blood or passion is not murder, and the jury must take into consideration whether the accused was in liquor or not, so as to become easily violently angry." In respect to his action and ruling, the judge says: "The jury was charged fully upon the law of murder, and specially as to malice, express or implied, and refused to charge the first special charge because the question of how long the malicious intent had existed was a matter of fact for the determination of the jury. The court refused to charge the special charges second and third, in the form presented, because they were not considered good law, as to matters of drunkenness. The court had explained fully to the

jury the difference between murder and manslaughter, and the law applicable to both, and with this reservation the bill is signed." The contention of the accused, that, in order to find him guilty of murder, it was necessary that a malicious intent to kill should have existed at least five minutes before the killing, is utterly without merit. If the malicious intent to kill exists at the time of the killing, it is enough. On this subject, Wharton, in his *Law of Homicide*, (section 32,) says: "No human gauge existing by which duration of intent can be measured, we are obliged to resort for this purpose to the same probable reasoning by which the existence of intent is proved. A. shoots B. in the public streets without authority, and without provocation. As reasonable beings usually premeditate any important step they take, we infer that A. premeditated this shot, and this inference is sufficient proof, in the lack of all other evidence, of premeditation. This is what is meant by the expression we frequently meet with in the books, that instantaneous intent is enough. It is not meant by this that it is enough if the defendant formed the intent coincidentally with the blow, for this we have no way of determining. What is meant is that, even where we have no other proof of intent prior to the blow, from the blow we may infer the intent. Hence, it is constantly laid down that intent at the time of killing is enough. It is not intended to assert by this that a person who, under a sudden impulse, kills another, is guilty of murder. To say this would be unwarranted, for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this: that, when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant. In the leading case of *People v. Clark*, 7 N. Y. 385, the charge was, "If the jury believed the killing was with the intention to kill, though that intention was formed at the moment of striking the fatal blow, it was murder;" and the chief justice, in delivering the opinion of the court, said: "If there be sufficient deliberation to form a design to kill, and to put that design into execution, by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months." See, also, *Whart. Hom.* § 180. It will be observed that in the charge submitted the existence of the malicious intent to kill at the moment of the killing was admitted, and that it was claimed that this intent

should have existed for a definite period prior to the same.

The second charge assumes that the fact that a person is drunk at the time of his killing another is so inconsistent with the idea of malice that it becomes the duty of the state to trace the existence of the latter to a period anterior to the drunkenness, and to show affirmatively that the drinking was for the purpose of committing the deed; otherwise, there can be no murder. This position is so palpably false as to need no particular discussion. In *Pirith v. State*, 9 Humph. 663, Judge Turley, in delivering the opinion of the court, said: "It will frequently happen, necessarily, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison or by lying in wait, that it will be a vexed question whether the killing has been the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation, and in all such cases whatever fact is able to cast light upon the mental status of the offender is legitimate proof, and, among others, that he was, at the time, drunk. Not that this will excuse or mitigate the offense, if it were done willfully, deliberately, malignantly, maliciously, and premeditatedly, (which it might well be, though the perpetrator was drunk at the time,) but to show that the killing did not spring from a premeditated purpose, but sudden passion and heat, to the point of taking life without premeditation and deliberation." Wharton, referring to this decision, says: "Here the court explicitly lays down the rule to be that, in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprang from a premeditated purpose, or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light upon the mental state of the offender is not alone that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design, deliberately and premeditatedly, to do an act, for the court says that, in the state of drunkenness referred to, a party may well be guilty of killing willfully, deliberately, maliciously, and premeditatedly, and, if he so kill, he is guilty as though he were sober. The principle laid down by the court is that when the question is, can drunkenness be taken into consideration in determining whether the party be guilty of murder in the second degree? the answer must be that it cannot; but when the question is, what was the actual mental state of the perpetrator at the time the act was done,—was it one of

deliberation and premeditation? then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done. The complaint which the defendant urges before us is not that the court excluded evidence on the subject of intoxication for the purpose of showing the actual mental state of the accused at the time the act was done, in order that the jury might determine whether, in view of intoxication, in connection with all the other facts and circumstances, the act was such as to call for a verdict of murder, or whether one of manslaughter, or whether, if calling for a verdict of murder, it should be an unqualified verdict, carrying with it the death penalty, or a qualified verdict, entailing imprisonment for life. If defendant had testimony bearing on that subject, it was permitted to be introduced, and went before the jury; and, being before the jury, the court would have acted unjustifiably, had it given the charge requested.

The third charge was faulty in assuming that the killing was in the heat of blood and sudden passion, and it would most certainly have misled the jury. The proposition advanced—that, because a homicide is committed in sudden passion, therefore, necessarily, it is not murder—is not law. There are many cases where that fact would entitle an accused neither to an acquittal, nor a verdict of manslaughter. Judgment affirmed.

(45 La. Ann. 1119)

**WILKINS v. DURIO et al.** (No. 1,446.)

(Supreme Court of Louisiana. July Term, 1893.)

**CONVEYANCE BY DEED—SALE OR MORTGAGE.**

Plaintiff placed the title to her property in the name of her creditor as owner, as security in his favor. Many years afterwards it was conveyed by the party in whose name the title was to a third person, with plaintiff's consent. Plaintiff subsequently became the lessee of the property. It not being proven that the parties intended to create an act of mortgage, in adopting the form of the sale, the consideration not being greatly inadequate, the act of sale and the lease concurring in sustaining the sale, it must be held that it was a sale, and effect given to the authentic deed between the parties.

(Syllabus by the Court.)

Appeal from district court, parish of St. Martin; Felix Voorhies, Judge.

Action by Annie W. Wilkins (Mrs. Neblett) against Adelin Durio and others to have title to certain property conveyed to plaintiff. Judgment for defendants. Plaintiff appeals. Affirmed.

W. H. Peterman and Edward Simon, for appellant. Robert Martin, James E. Mouton, and Thos. H. Lewis, for appellees.

**BREAUX, J.** The most valuable portion of the land claimed by the plaintiff was sold to her by Zerron Broussard in 1878, for the price of \$8,930.66. A short time prior, that year, her vendor, Broussard, under sheriff's adjudication, had acquired it for \$5,700. The other portion she claims as forming part of the plantation was sold to her also by the said Broussard. It consisted of a small adjacent tract. At time of Broussard's death, in 1881, the plaintiff was indebted to him in the sum of \$8,720.70, and several years' interest, being the unpaid purchase price on the plantation. His widow at the sale of the property of his succession became the owner of the notes made by plaintiff, and representing the purchase price of the plantation. The owner of these notes, Mrs. Broussard, recovered judgment upon them in 1883, and granted a stay of execution until February, 1884. In 1885, Mrs. Neblett, plaintiff in this suit, sold the plantation to the holder of these notes, the amount and interest of which amounted at the time to \$13,484.47. The deed recites that the plantation is conveyed and given in payment or satisfaction of vendor's indebtedness to the vendee. The act contains the recital "that the vendor [Mrs. Neblett] will continue to live and reside on said plantation until the 1st of February, 1886, on which day she will move away from and vacate the premises, and deliver actual possession of all of said property; and that, in case she should refuse to vacate and deliver the said plantation," she obligated herself to pay the sum of \$500, and all other damages. Mrs. Broussard, the vendee, bound herself to reconvey the plantation to the vendor upon the latter's payment to her of \$9,000 at any time prior to the 1st of February, 1886. Mrs. Neblett remained in possession. She was called upon by her creditor, Mrs. Broussard, for the amount due. A short time subsequent, i. e. in 1886, plaintiff's brother called upon Mrs. Broussard, and obtained from her the promise to take \$6,000 in cash and \$3,000 on time in satisfaction of her claim. He offered his note for the credit portion of the payment, and this Mrs. Broussard consented to accept. Subsequently to this, instead of the \$3,000 in notes, she agreed to take \$1,500 in cash. Mrs. Broussard, after this agreement, authorized her agent to sell the plantation for an amount not less than \$6,000. At this point of the case the defendant Durio became a party to the transactions. The agent of Mrs. Broussard, Judge C. H. Mouton, called on Durio, and offered to sell a portion of the place for that price. This was declined. Plaintiff's brother informed the witness that he would pay to the agent the \$1,500 before mentioned if he sold to Durio. There was no agreement whatever entered into between him and the said defendant Durio about this amount. He sold to him for the price of \$6,000, without reference to any other amount. The



act of sale by Mrs. Broussard to the defendant Durio bears date 4th May, 1886. It is unconditional and absolute. The purchase price was paid in cash, as recited in the deed. No reference is made in this deed to any loan made to Mrs. Neblett, or to any right of hers in the property. The same day the purchaser, Durio, leased the plantation to Mrs. Neblett for the sum of \$488.20, and all the taxes on the place each year of the lease, (annual rental.) This lease was entered into for the term of three years. Immediately after these acts were executed, the defendant Durio, by authentic act, promised to sell the plantation to the lessee, Mrs. Neblett, for \$6,102, provided she paid him that sum on or before the 31st of December, 1888. In default of payment, the promise to sell was to become null and void ipso facto. It was agreed that the same stipulation should also apply if the rent notes were not promptly paid at their maturity. At the expiration of this lease it was renewed for three years; also the promise to sell. About 20 days prior to the expiration of the lease and the term of the promise to sell, Durio notified the plaintiff that he would not renew the lease, and that he would take possession at the end of the year. The plaintiff, Mrs. Neblett, wrote to the defendant: "We expect to have the amount ready for you in time, as we know it is due; and, should we not, we know of course we must give possession according to agreement." The value of the place is one of the issues presented. The estimates of witnesses who testified upon the subject greatly differ, and are quite contradictory. "The amounts for which lands were sold in the vicinity offer a safer criterion of value, also the price this plantation sold for at different times, together with the testimony of witnesses who somewhat accord in their estimates with the market value of the plantation as established by sales and transactions." In *re Hollingsworth*, 45 La. Ann. 134, 12 South. Rep. 12. The amount of the annual lease of the place, the price at which the plantation was sold at sheriff's sale, the abandonment of amounts by the owner, Mrs. Broussard, and the amount she was willing to take for her claim, and which she finally accepted, do not prove the correctness of the high estimate of a few of the witnesses. Plaintiff obtained possession at the expiration of the lease.

#### On the Merits.

Plaintiff's petition sets forth clearly the grounds upon which she relies to have a contract evidenced by authentic act declared to be a mortgage or security for debt. She avers that the *dation en paiement* by Mrs. Broussard to her was never intended to divert her title to the property, for she never claimed title or possession as owner, but left her in full control; that the office of the

*dation en paiement* was to secure the indebtedness by placing the title in the name of Mrs. Broussard. She alleges that Durio loaned her the amount, and, desiring to indemnify him against all loss, and to secure him, she consented that possessor's title to the same should pass directly from Mrs. Broussard to Adelin Durio; "It being further agreed that the annual interest of said loan should be secured to the said Durio by obligations in the shape of rent notes, and that the return of the title to said property to her name should be warranted by a promise of sale on the part of said Durio." The defendant interposed an exception that plaintiff, as a condition precedent to the institution of her action, should have tendered reimbursement to the defendant. The defendant pleads the general issue, and sets forth the different transactions and grounds upon which he relies. The judgment of the court *a qua* was pronounced in his favor, from which the plaintiff appeals.

The counsel for plaintiff disclaims that the action is revocatory, or to rescind any of the acts connected with the title to the plantation in this suit. They argue that the deed from the client to Widow Broussard did not operate a divestiture of title, and they contend that the defendant knew that the plaintiff was the owner of the land, and in possession, and urge that the defendant took paper title from Widow Broussard as security for his loan. The relief prayed is that the defendant shall convey, under the judgment for which he sues, title to the property, and that his claim be recognized as a lien upon the property, and that she have reasonable time within which to pay it, and that possession of the property be delivered to her. The evident purpose is to apply the principle laid down in *Howe v. Powell*, 40 La. Ann. 308, 4 South. Rep. 450, and in other authorities referred to in that decision, to the case at bar. The doctrine is stated as being settled that redeemable sales, unaccompanied by delivery of the thing sold, of which the consideration is inadequate, will be treated by courts, without sufficient evidence to the contrary, as contracts, for which the thing nominally sold stands as security, and nothing else. It devolves upon the plaintiff to bring her cause within the application of these principles, that she may sustain her contention. The Broussard act remained in the record unquestioned as a sale during nearly an entire decade, during which plaintiff was the vendor, without any written evidence whatever that she was the owner. The vendees during the time have passed away. The secret equities existing at the time, the verbal promises and conversations, are now invoked by plaintiff as affecting the authentic act. That which was a sale on the face of the papers would now be changed by plaintiff to a mortgage, conferring hypothecary rights.

The verbal agreements, as testified to on the trial, are doubtless true; but how uncertain and unstable would be titles to immovable property if after so many years parol evidence were admissible to alter or change them! The owner who appears of record as defendant's immediate author desired to realize, it is said, the amount of her claim on the property. It was known to plaintiff prior to the sale that she was offering the property for sale for an amount not less than \$8,000. The plaintiff did not protest against the inadequacy of the price. She did not in the least object. On the contrary, she gave the offer her unqualified approval, and sought and earnestly requested the defendant to become the owner. He finally consented, and purchased. In all the preliminaries preceding the sale the plaintiff did not make any attempt to secure the recognition, by an act or the least writing, of the right she now sets up to the property. Immediately after the sale she became the lessee of the property. During three years she held it as plaintiff's lessee by authentic act. She during the whole time, unqualifiedly, admitted that plaintiff was the owner. At the end of the three years the contract of lease was renewed, and during three more years she continued holding for plaintiff, as his lessee of the property. On the face of the papers the defendant is a third person as to all transactions and acts preceding the one under which he became the owner. His relation to these transactions cannot be changed, and he made a party to them, or affected by them, by verbal contradictory statements. "When parties really intend to create a mortgage for the security of an existing or contemplated debt, and adopt the form of a sale, with a counter letter, which, taken together, exhibit such intention, the contract will be construed as a mortgage, and effect will be given to it accordingly. But when the act of sale and the counter letter both concur in asserting that it is a sale, the letter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption; and, if the right is not exercised within the time agreed on, it is lost forever." 34 La. Ann. 371. The act of sale and the lease in the case at bar both concur in asserting that it is a sale, and not a mortgage. She, the plaintiff, was, it is true, in possession, but her possession was not that of an owner. She paid the taxes on the property. In the contract of lease she bound herself to pay the taxes. The price has not the appearance of "vile" or gross inadequacy, as was the consideration in *Howe v. Powell*, 40 La. Ann. 307, 4 South. Rep. 450; so that the case at bar differs from those in which this court has interpreted certain contracts as securities for the payment of debts, and not as sales, as they purported. Parties have no one to blame

but themselves, who remain quiescent, or who hastily lend their approval, without securing themselves against the force and effect of authentic deeds.

Having reached this conclusion as to the legal effect of defendant's authentic deed of sale, the objection to the process of ejectment and the legal proceedings by which defendants obtained possession loses importance. They were objected to, and presented certain grounds of defense, possibly, that would have been substantial and of some avail if plaintiff's petition for conveyance by proper muniment of title had been granted. Moreover, there was a settlement made after the proceedings of ejectment and other suits, a compromise entered into, and payment, which preclude setting them aside.

It is therefore adjudged and decreed that the judgment appealed from be affirmed at plaintiff and appellant's costs.

(45 La. Ann. 1012)

A. BALDWIN & CO., Limited, v. BOND et al., (GILKERSON-SLOSS COMMISSION CO., Intervener. No. 1,290.)

(Supreme Court of Louisiana. June 16, 1893.)

EXECUTION—CLAIMS OF THIRD PERSONS—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

Same as in case cited in opinion. *Yale v. Bond*, (La.) 13 South. Rep. 587.

(Syllabus by the Court.)

Appeal from district court, parish of Morehouse.

Action by A. Baldwin & Co., Limited, against Bond & Williams. Opposition of Gilkerson-Sloss Commission Company. Judgment for opponent. Plaintiff appeals. Affirmed.

Ellis & Hall and Newton & Cason, for appellants. Boatner & Lamkin and S. T. Baird, for appellees.

WATKINS, J. This cause being founded upon the same state of facts as that presented in the case of *Yale v. Bond*, 13 South. Rep. 587, No. 1,279, on the docket of this court, and just decided in favor of the plaintiffs in injunction, for the same reasons as are therein assigned, like judgment should be pronounced in this case. Judgment affirmed.

(45 La. Ann. 1090)

PARISH OF ST. LANDRY v. BLOCH. (No. 1,449.)

(Supreme Court of Louisiana. July Term, 1893.)

JUSTICES OF THE PEACE—JURISDICTION—ORDINANCES.

1. The constitution defines the jurisdiction of justices of the peace, and confines it to action as committing magistrates, having power to bail and discharge in certain cases.

2. Justices of the peace have no jurisdiction to enforce penalties of fine and imprisonment imposed for violation of parochial ordi-

nances by criminal proceedings inaugurated by ordinary civil process and citation.

3. An ordinance conferring such jurisdiction on justices of the peace is illegal and unconstitutional, and proceedings in exercise thereof are null and void.

(Syllabus by the Court.)

Appeal from first justice's court, parish of St. Landry.

Proceeding by the parish of St. Landry against Joseph Bloch for violation of an ordinance. From a judgment condemning defendant to pay a fine, or, in lieu thereof, to be imprisoned, he appeals. Reversed.

Kenneth Baillio, for appellant. E. B. Dubuisson, for appellee.

FENNER, J. This is an appeal from a judgment rendered by a justice of the peace condemning the defendant "to be fined in the sum of twenty-five dollars and the costs of these proceedings, and, in default of payment of same, he be imprisoned ten days in jail." The proceeding was for a violation of an ordinance of the police jury prohibiting the propulsion by steam of traction engines over the public roads of the parish, and providing that "whoever shall violate this ordinance . . . shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any justice of the peace, shall be fined in the sum of twenty-five dollars and the cost of the court, and, in default of the payment of said fine and cost, shall be imprisoned in the parish jail not less than five nor more than ten days." The obvious import of this language shows that the ordinance creates and defines a criminal offense, prescribes penalties therefor, and authorizes the prosecution and conviction of offenders before a justice of the peace. The proceeding in this case was begun by affidavit, charging defendant with violating the ordinance, contrary to the statutes of the state in such cases made and provided, and against the peace and dignity of the same, and concludes: "Wherefore affiant prays that the said Bloch be arrested, and dealt with according to law."

The case has no feature of a civil suit. It is unquestionably a criminal prosecution, and this is evidently the proceeding contemplated and provided in the ordinance. The plea of the illegality and unconstitutionality of the ordinance was duly made and overruled, as also a plea to the jurisdiction. These pleas should have been sustained. The ordinance could not constitutionally confer such jurisdiction on justices of the peace. Articles 125 and 126 of the constitution of 1879 define the jurisdiction of justices of the peace, and they have no criminal jurisdiction, except as committing magistrates, with "power to bail or discharge in cases not capital or necessarily punishable at hard labor." Whether, under section 3364 of the Revised Statutes, the fine imposed by

the ordinance might have been recovered in an ordinary civil suit before the justice of the peace is a question not here presented. The ordinance does not contemplate such a proceeding, and the case before us does not present such a one. In two very recent cases, we held that justices of the peace had no jurisdiction to enforce penalties imposed for violation of parochial ordinances by criminal proceeding inaugurated by affidavit and arrest, but were confined to ordinary civil proceedings by citation: *State v. Justice*, 44 La. Ann. 949, 11 South. Rep. 588; *Board of Health v. Justice*, 45 La. Ann. —, 12 South. Rep. 125. In *Police Jury v. Arleane*, 34 La. Ann. 646, we very distinctly held that "a person cannot be arrested under a warrant issued by a justice of the peace charging him with violating an ordinance of the police jury, and sentenced to fine, and, in default of payment, to imprisonment, by said justice," and that an ordinance authorizing such a proceeding was illegal, and null and void. Our conclusion on this point is so clear and so fully sustained by authority that we deem it unnecessary to consider any other. It is therefore adjudged and decreed that the judgment appealed from be annulled and reversed, at plaintiff's cost in both courts.

(45 La. Ann. 1134)

DUPRE v. ANDERSON. (No. 1,448.)

ANDERSON v. DUPRE.

(Supreme Court of Louisiana. July Term, 1893.)

MORTGAGES — SEIZURE AND SALE — INJUNCTION — REPRESENTATIVE OF DECEASED DEBTOR.

1. Injunction to restrain the execution of an order of seizure and sale by the debtor only lies in cases prescribed by article 739, Code Pr.

2. The legal representative of the deceased debtor stands in the latter's shoes, and has no other or greater rights than his.

3. Insufficiency of the authentic evidence on which the order issued is no ground for injunction. The remedy is by appeal.

4. Inability to furnish a suspensive appeal bond furnishes no title to relief by injunction.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; W. C. Perrault, Judge.

Godefroy Dupre, administrator, instituted executory proceedings against Mrs. M. M. Anderson on mortgage notes, and obtained an order of seizure and sale of the mortgaged property. Mrs. Anderson then instituted suit to enjoin the sale. Injunction denied, and she appeals. Affirmed.

E. N. Cullom, for appellant. Estlette & Dupre, for appellee.

FENNER, J. The plaintiff in the first case, as holder of mortgage notes of W. H. Anderson, deceased, took out executory proceeding thereon against defendant, his wid-

ow and sole universal legatee, and obtained an order of seizure and sale of the mortgaged property. Thereupon the defendant instituted the second suit to restrain by injunction the sale of the property.

Article 739, Code Pr., provides: "The debtor can only arrest [by injunction] the sale of the thing thus seized by alleging some of the following reasons to wit." And it proceeds to enumerate specially eight grounds. It is admitted that the petition for injunction in this case alleges not one of these grounds, and, indeed, the party admits that her injunction is not based on article 739, but on article 296, of the Code of Practice, which is the general article declaring that "injunction, or prohibition, is a mandate obtained from a court by a plaintiff prohibiting one from doing an act which he contends may be injurious to him, or impair a right which he claims." This is a mere definition of "injunction," and it is impossible that it should derogate from the prohibition contained in article 739, which confines the power of arresting the execution of orders of seizure and sale, by injunction, to the specific cases therein enumerated, and, by their clear implication, prohibits that remedy in any other case.

The contention that article 739 only applies to "the debtor," and that the defendant here is not "the debtor," is without force. Mrs. Anderson is the legal representative of the debtor, stands in his shoes, and can have no rights except his rights. Equally meritless is the contention that the article only applies to injunctions without bond. The language applies to all injunctions, and denies that remedy except in the specified cases; and the fact that, in subsequent articles, bond is dispensed with in those cases, does not authorize injunctions in other cases even with bond.

The particular ground upon which the injunction is rested is that the order of seizure and sale issued without production of the complete, authentic evidence required by law. It has been repeatedly and distinctly held that this affords no ground for injunction in any case, but that the remedy is by appeal. *Durac v. Ferrari*, 25 La. Ann. 80; *City of Shreveport v. Flournoy*, 26 La. Ann. 709.

The plea that defendant should be granted relief by injunction because she was unable to furnish a suspensive appeal bond is surely untenable. If recognized, the remedy of suspensive appeal would be substituted in many cases by injunctions. It would seem that the fact that the law only allows an appeal to suspend execution of a judgment when the ample bond required in such cases is furnished would be the strongest argument against allowing the same purpose to be accomplished by an injunction issued on a comparatively insignificant bond. Judgment affirmed.

(98 Ala. 426)

WOLFFE et al. v. LOEB et al.

(Supreme Court of Alabama. July 27, 1893.)

WILLS — CONSTRUCTION — SALE OF REAL ESTATE FOR DISTRIBUTION — VALIDITY — PETITION — SUFFICIENCY — FAILURE TO STATE INTEREST OF JOINT OWNERS.

1. A holographic will, made a year before death, provided "that, in the event of my death, my wife, —, shall be the sole controller of all my real estate, my personal property, any stock or bonds which are assigned to me, or will be by reason of paying up this unpaid installment. All and everything now under the name" of four specified firms, "and everything which I now possess without distinction, I make my wife sole controller just the same as if I was alive. \* \* \* Out of this all just debts shall be paid out of the undivided part of all property now in the different above-mentioned firms." At testator's death he had four minor children, and one was born after his decease. Held, that the wife was simply constituted executrix and trustee, and that the property passed to testator's heirs in the manner directed by law in cases of intestacy.

2. Where a petition in the probate court by one of several joint owners of real estate, for the sale thereof for distribution, on the ground that it cannot be equitably divided, under Civil Code, § 3253, fails to set forth the interest in the property of each of the joint owners, as required in petitions for partition by Civil Code, § 3239, a sale in pursuance of the prayer of such petition is void, since such averments are necessary to jurisdiction.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Action by Carrie J. Loeb and others against Sophie Wolfe and others to have the claims of defendants to certain real estate removed as a cloud on plaintiffs' title. From a decree for plaintiffs, defendants appeal. Reversed and remanded.

In 1888 Samuel Wolfe, who, in common with B. Wolfe, was seised of the lands described in the bill, died, leaving his wife, Lena Wolfe, and four children. Shortly after his death a posthumous child was born to Lena Wolfe. What purported to be the last will and testament of Samuel Wolfe was admitted to probate on May 1, 1888; but no letters testamentary or of administration have been issued, and no administration has been had on his estate. This will is copied in the opinion. On January 15, 1890, B. Wolfe filed his petition in the probate court for the sale of the lands for division. This petition alleged the cotenancy of the petitioner and the testator, the death of the testator, the names and ages of his children and his widow, the birth of the posthumous child, after the date of the will, and the execution and probate of the will. The petitioner also alleged in said petition that by the terms of the will, and on account of the birth of the posthumous child, the interest of the testator belonged to the widow of the said Samuel Wolfe and the posthumous child; and that the interest of said widow, Lena Wolfe, in said lands, was five-twelfths, and that of the posthumous child one-twelfth, thereof. This petition resulted

in a decree for the sale of the property, a sale under said decree, which was confirmed, and a commissioner's deed executed to the purchasers. The complainants claimed title to the lands involved in this suit by conveyance from the purchasers at this sale. Defendants set up in support of their claim of interest in the property their rights under the will. On the final submission of the cause, the chancellor decreed that the property described in the bill belonged to the complainants, and that they had a good title thereto, and thereupon decreed that the defendants be forever enjoined and restrained from interfering with the possession or title of the complainants, their heirs or assigns.

Lester C. Smith, for appellants. Tompkins & Troy, for appellees.

**HARALSON, J.** In this appeal we are called to construe the following will: "State of Alabama, Montgomery county: Know ye by these presents, that I have declared made this my last will; that, in the event of my death, my wife, Lena Wolffe, shall be the sole controller of all my real estate, my personal property, any stock or bonds which are assigned to me, or will be by reason of paying up this unpaid installment. All and everything now under the name and firm of B. Wolffe & Brother, also everything in real and personal property under the style of Wolffe, Abraham & Co., also all the real estate yet under the style of Berg & Wolffe, such and everything now under the name and style of N. Wolffe & Bro., real estate, personal property, chattel mortgages, and everything which I now possess without distinction, I make my wife sole controller just the same as if I was alive; and, in order that this will shall not have to come about of any dispute or misconstruction, I declare this will incontestible. This, my last will, shall be probated after my death, and the property turned over to my wife. Out of this all just debts shall be paid out of the undivided part of all property now in the different above-mentioned firms. Signed this, the 11th day of June, eighteen hundred and eighty-seven. Sam. Wolffe. Witness: E. C. Seligman. Alex Sternfeldt." The contention of the appellants, for the construction of this will, is that it created Mrs. Lena Wolffe, the wife of the testator, the trustee or executrix, with ample powers, as therein contained, to administer the estate and distribute the same under the statute of descent and distribution; and the other, that of appellees, is that under it an absolute estate in fee is devised to said Lena Wolffe. As was aptly said by her counsel in argument: "There is no half-way ground upon which she can stand. There is not a word in the will, if any estate in the realty is vested in her, which would limit it to an estate for years, to an estate for life, to an estate *pur autre vie*, or to any lesser estate. If any estate is vested in her,

it must be an estate in fee simple, for it does not clearly appear from the will that a less estate was intended. Code, § 1824." It is a legal truism that the cardinal rule—the one above all other rules—for the construction of wills is to ascertain the intention of the testator and give it effect. Wills are often drawn by persons very unskilled in the use of language, and are loose and inaccurate in expression; and this will is of that class. But, however inartificially or inaccurately expressed a will may be, when the judicial mind is brought to its construction, the effort is to ascertain from the language employed, the surroundings of the testator, and the objects of his bounty, what his intentions were in the disposition he has made of his property, and, when ascertained, to give effect to that intention, if it is not inconsistent with the law. *Whorton v. Moragne*, 62 Ala. 209; *Alford v. Alford*, 56 Ala. 353. Samuel Wolffe, we may reasonably infer from the evidence, was in the prime of life when he executed his will and when he died. His wife, Lena, was not yet old. At his death they had four children, all minors, the eldest 17 years old, and one, Samuel, was born after his decease. According to the ordinary and natural instincts of the human mind and heart, without something to indicate a good reason for a contrary course, a testator thus circumstanced, if he make a will at all, will make some just and equal provision for his children, and take care that the means of their maintenance and education be not left dependent upon the will or disposition of their mother, of the age this one was. It would probably have occurred to the testator that, at her age, his wife might contract after his death another marriage, and, if so, and all he had were vested by his will absolutely in her, his children, born in his lifetime, might in the vicissitudes of fortune, or by some influence to which she might be subjected, be deprived of inheritance in his estate. He could not have been ignorant of the fact, also, at the time he made his will, that his wife was of the age to bear other children, and he probably knew before he died that she was then bearing him an unborn child. As to such as might be born after the execution of his will, he knew also that, in the absence of a provision in the will for such contingency, the birth of such, whether in his life or afterwards, would work a revocation of his will, so far as to allow such child or children to take the same share of his estate as if he had died intestate. Code, § 1955. Without some good grounds to induce it, one would be slow to believe he intended to make discriminations in the bestowment of his generosity in favor of unborn children over those already born, who were of his household, and whose lives had already been interwoven by the ties of parental and filial love with his own. In this construction it is pertinent to refer to two of Jarman's rules of construction, hav-

ing their foundation in natural justice and goodness: (5) That the heir is not to be disinherited without an express devise, or necessary implication, such implication importing, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed; and (6) that merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other object. 2 Jarm. Wills, (2d Amer. Ed.) § 525; 3 Jarm. Wills, (5th Ed.) p. 704. In *Denson v. Autrey*, 21 Ala. 209, this court, speaking upon this subject, said: "Indeed, to defeat the heir at law or the distributee under the statute, the property must be disposed of by will, and mere words of exclusion, without a disposition of the property, cannot have that effect, for, the property not being devised or bequeathed, the statute then designates who shall take." In *Banks v. Sherrod*, 52 Ala. 270, the following language, in support of the same principle, is employed: "The law, and courts of justice, pursuing its spirit and maxims, have always favored heirs. They are appointed by the law to succeed to the estate of which a valid disposition is not made by will. Plain words are required to disinherit them. Though it may appear the testator did not intend that his heir or next of kin should take his estate, real or personal, and intended to exclude them from succession to it, yet, if he fails to make a valid devise or gift to another, they will take under the statute of descents and distributions." It is a maxim at common law that the heir at law cannot be disinherited except by express devise or by necessary implication. *Whorton v. Moragne*, 62 Ala. 209; *Hartun v. Corse*, 2 Barb. Ch. 506, 522; *Chamberlain v. Taylor*, 105 N. Y. 185, 11 N. E. Rep. 625; *Schouler, Wills*, § 545.

A careful reading of this will discloses the facts that there is not a word of gift or devise in it, and nothing from which a gift can be fairly implied, and no charge is made on the wife to pay the legacies, as in *Whorton v. Moragne*, supra, or to pay debts. The whole estate is left to be disposed of under the statute of descent and distribution, after the payment of the debts. The language is, after bestowing on his wife the "control" of his entire estate, and having mentioned in what it consisted: "Out of this all just debts shall be paid out of the undivided part of all property now in the different above-mentioned firms." The will discloses he had stocks and bonds and personal property, outside of his interest in the several firms mentioned in the will, of which he was a member; but it was out of his undivided part of the property in said firms he desired his debts paid, and not out of his stocks, bonds, and other personal assets. The only words in the will which, according to the contention of appellees, are words of devise and bequest, are: "My

wife, Lena Wolfe, shall be the sole controller of all my real estate," etc., and "I make my wife sole controller just the same as if I was alive." These latter words do not imply that the wife had control over the property of the testator during his life, but that, after his death, she should have the management of it, as he had, in his lifetime. Nor do the words "control" and "controller" imply the power in her to make absolute disposition of the property, and use and enjoy it as her own, but to have management and authority over it. "Control" means "to check, restrain, govern, have under command, and authority over," (Webster); "to hold in restraint or check, subject to authority, direct, regulate, govern, dominate," (Cent. Dict.) The testator, we must presume, understood the meaning of the words "give," "grant," "devise," or "bestow," as well as he did that of "control;" and, if he had desired to devise or bequeath his wife anything, he would have employed some apt word to effect that intent.

But can a devise and bequest to Mrs. Wolfe of the absolute beneficial interest in the property mentioned in the will be raised by necessary implication from the language of the will? All estates by implication are founded on the intent of the testator, as ascertained from the words of the will, and, where implications are allowed, they must be necessary in order to effectuate this intention. *McCoury v. Leek*, 14 N. J. Eq. 70. A construction in favor of a devise, or a bequest by implication, should be so strong as that a contrary intention to that imported cannot be supposed to have existed in the mind of the testator; and such a construction, it is held, should never be adopted except in cases where, after careful and full consideration of the whole will, the mind of the court is convinced that the testator intended to make the devise or bequest. *Denise v. Denise*, 37 N. J. Eq. 163; *Bishop v. McClelland's Ex'rs*, 44 N. J. Eq. 450, 16 Atl. Rep. 1; *Jones v. Morgan*, 1 Brown, Ch. 206, 3 Brown, Parl. Cas. 323, (cited in 1 Fearn, Rem. Append. No. 3, pp. 589, 590, opinion of Lord Mansfield); *Post v. Hover*, 33 N. Y. 593; *Rathbone v. Dyckman*, 3 Paige, 9. The implication, as was said in *Sherrod v. Sherrod*, 38 Ala. 543, must not rest on conjecture; it must be necessary, and so plain as to be irresistible to the mind. If the words of the will as written, construed in their ordinary sense, will make a valid will, then there can be no room for implication. *Whorton v. Moragne*, supra; *Hollingsworth v. Hollingsworth*, 65 Ala. 327; 2 Jarm. Wills, pp. 102, 103; *Beach, Wills*, § 334. Finding, then, no words of gift or devise in the will, and no language from which a gift may be implied, we conclude that the intention of the testator was that his estate should pass to those entitled and in the manner directed by law in cases of intestacy. The evident object in making a will at all was to enable his

wife to take charge of his interests, as connected with the several firms of which he was a member, and wind them up, endowed with full authority to that end by his will. The words he employed were as effective to constitute her "executrix" as if he had used that word itself in conferring on her the trusts with which he clothed her in administering his affairs. The appointment of an executor may be by express words or by construction,—“by the tenor,” as it is termed. The appointment of one to be executor need not be by express nomination to that office; but if, by any word or circumlocution in his will, the testator commit the charge of his affairs, and the rights and duties which ordinarily apply to the office of executor, to a party or parties named in the will,—as by the word “controller,” as used in this will,—it amounts to as much as ordaining and constituting him or them to be his executors. 1 Williams, Ex'rs, 280, (239,) and note 6; Schouler, Ex'rs, § 36; 1 Swinb. Wills, p. 4. § 2; Bayeaux v. Bayeaux, 3 Paige, 333; Humbert v. Wurster, 22 Hun, 405.

After the death of Samuel Wolfe, his will was duly probated, but letters testamentary or of administration were never issued to any one. On the 14th January, 1890, B. Wolfe filed in the probate court of Montgomery county his petition for a sale for division of the real estate therein described which belonged to him and said Samuel Wolfe in his life, on the ground, as averred, that the property could not be equitably divided without a sale. In this petition he gave the names, ages, and residences of the children of said Samuel, and alleged that by the terms of the will of said Samuel, made a part of the petition, he and Lena Wolfe, the widow of said Samuel, and Samuel, the posthumous child, were the joint owners of the property sought to be sold; that petitioner owned one-half, said Lena five-twelfths, and said infant, Samuel, one-twelfth, undivided parts thereof. The petition fails to set forth the interest of any other of the heirs of said Samuel in the property to be sold. It has been held by us that all the averments of a petition for partition, under section 3237 of the Code, as required by section 3239,<sup>1</sup> were applicable to petitions for sale for distribution, under section 3253, and must be complied with in the one as well as in the other instance; that these averments are jurisdictional, and without them the proceedings are void. McCorkle v. Rhea, 75 Ala. 214; Ballard v. Johns, 80 Ala. 32; Whitlow v. Echols, 78 Ala. 210; Whitman v. Reese,

59 Ala. 532; Johnson v. Ray, 67 Ala. 603; Freem. Judgm. p. 33. Tested by these requirements, the proceedings in the probate court for the sale of the land for division are fatally defective, and the decree of sale thereunder is void and of no effect. Reversed and remanded.

(101 Ala. 395)

O'ROURKE et al. v. LEVA et al.

(Supreme Court of Alabama. June 20, 1893.)

APPEAL—TIME OF TAKING—ASSIGNMENTS OF ERROR—MISAPPLICATION OF FUNDS BY ADMINISTRATRIX—RIGHTS OF HEIRS AND PERSONAL CREDITORS.

1. In an action by the heirs of an estate to declare a lien in their favor on a certain lot, alleged to have been purchased and improved by defendant administratrix with funds of the estate, and mortgaged by her to her codefendants, a decree holding the mortgage to be a superior lien on the lot to the amount of a certain debt owed by the administratrix and assumed by her codefendants, and directing an accounting to ascertain how much of the estate funds were used in the purchase and improvement of the lot, in as far as it settles the equities between the parties, is a final decree, from which no appeal will lie if not taken within a year from the time of rendition.

2. No assignments of error can be made upon a decree from which an appeal is barred.

3. In an action by the heirs of an estate to declare a lien in their favor on a certain lot, alleged to have been purchased and improved by defendant administratrix with funds of the estate, and mortgaged by her to her codefendants to secure her individual debt to them, there is no error in a decree applying the rents of the lot to the satisfaction of the mortgage, as the heirs, by electing to have a lien declared on the lot instead of claiming the lot itself, confirm the title of the administratrix to it.

4. In an action by the heirs of an estate to declare a lien in their favor on a certain lot, alleged to have been purchased by defendant administratrix with funds of the estate, and mortgaged by her to her codefendants to secure a debt of hers assumed by them and her individual debt to them, the heirs' contention that a certain sum borrowed by the administratrix individually, and paid by her to her codefendants on her personal debt to them, should be applied to the satisfaction of the assumed debt decreed to be the superior lien, is untenable, even though the administratrix repaid the borrowed money out of funds of the estate.

Appeal from chancery court, Dallas county; William H. Tayloe, Chancellor.

Action by the heirs of Patrick Foley, deceased, against Ann Foley, administratrix, Marx Leva, and another, to declare a lien on a certain lot. From a decree declaring defendant Leva's lien superior to that of plaintiffs', they appeal. Affirmed.

The bill in this case was filed by the children of Patrick Foley, deceased, against Ann Foley, Marx Leva, and Aaron Maas, alleging that said Ann Foley was the widow of said Patrick Foley, and the administratrix of his estate; that while acting as such administratrix she purchased in her own name, and improved, a certain lot of land in Selma, Ala.; that in paying for said lot and improvements she used \$986 of

<sup>1</sup>Civil Code, § 3239, provides as follows: “The application for division or partition must set forth the names of all of the persons interested in the property, their residence if known, whether they are over or under twenty-one years of age, a full and accurate description of the property sought to be divided or partitioned, the interest of each person in the same, and the number of shares into which it is to be divided.”

money belonging to the estate of her intestate; that after she purchased and improved said lot she gave a mortgage on it to Adler, Leva & Co., to secure a debt she owed them, amounting to about \$1,800; that at the time Adler, Leva & Co. took said mortgage they had notice that said \$986 of money belonging to the estate of said Patrick Foley had been used in purchasing and improving said lot; that Marx Leva, one of the firm of Adler, Leva & Co., afterwards became the owner of said mortgage, and on the 6th of December, 1887, sold said lot, under the power contained in said mortgage, in foreclosure thereof; that at said sale Aaron Maas became the purchaser of said lot, and purchased it for said Marx Leva; that at said foreclosure sale, and before said Maas bid the same off, he was notified that \$986 used in purchasing and improving said lot by said Ann Foley belonged to the estate of said Patrick Foley, and that complainants, as his children and heirs, would subject said lot to the payment thereof. The prayer of the bill was that said lot be sold, and that complainants "obtain and realize the said sum of \$986 and the interest thereon." Ann Foley declined to answer the bill, and a decree pro confesso was taken against her. Aaron Maas answered, and admitted the purchase of said lot as charged in the bill, and that complainants gave notice that \$986 of the money of the estate belonging to them had been used by Ann Foley in the purchase and improvement of said lot, and that he bought it for said Leva with such notice. Leva answered denying that any money of the estate of said Patrick Foley, as averred, had been used by said Ann Foley in purchasing and improving said lot; and he set up in his answer (a fact to which no reference was made in the bill) that \$928.15 of the debt secured by said mortgage from said Ann Foley to Adler, Leva & Co. was secured by a prior mortgage given on said lot by her to the firm of Spence & Steele, to whom she was indebted in that sum, which debt and mortgage, at the instance and request of said Ann Foley, said firm of Adler, Leva & Co. paid to said Spence & Steele, and to secure which, and the other sum of \$986 owing by her to them, she executed and delivered her said mortgage to them. The cause was submitted for final decree on the pleadings and proofs, and on the 3d day of April, 1890, the chancellor rendered a written opinion and decree in the cause, which was received, filed, and enrolled on the 7th of April, 1890. In his opinion the chancellor said: "The conclusion reached from the authorities and testimony is that for the amount paid to Spence & Steele, and interest thereon, the mortgage must stand as a valid security, and must prevail over the equities of complainants; and that as against the remainder of the debt secured by the mortgage complainants are entitled

to relief." The decree directed: (4) "That the mortgage executed by Ann Foley to Adler, Leva & Co., mentioned in the pleadings, is a valid security for the amount, and interest thereon, paid by Adler, Leva & Co. to Spence & Steele, and to this extent is prior and must prevail over complainants' right to relief." (5) "That complainants are entitled to relief; and a lien and trust, as a security to satisfy complainants' demand, is hereby declared in the lot and improvements thereof described, and conveyed by mortgage executed by Ann Foley to Adler, Leva & Co., mentioned in the pleadings, subject to the prior lien established and declared in the fourth section of this decree." Particular instructions and directions were given in the decree to the register in and about taking and stating an account, which was ordered, to ascertain the respective interests of the said Ann Foley individually and of the complainants, as the representatives of the estate of Patrick Foley, in the purchase and improvement of said lot; to ascertain what part of the payments which had been made as credits on said mortgage belonged to said Ann Foley, or had been derived by her from said estate as rents or otherwise, to which complainants were entitled; and he was directed, in stating the account, to apply the money and assets, if any, which of right belonged to complainants,—and which had been received as partial payments upon the mortgage,—to the Spence & Steele debt, entitled thereto as a prior debt, and to report what balance of said mortgage debt remained thereafter. This appeal is prosecuted by original complainants, the suit being revived in name of O'Rourke, administrator of one who died pending the suit, and was taken April 19, 1892. The errors assigned are based on the fourth section of the chancellor's decree filed April 7, 1890, upon the overruling of several exceptions to register's report, and on the final decree filed March 18, 1892, confirming the report of the register, and ordering a sale of the lot in controversy, the proceeds of such sale to be applied first to the payment of the amount decreed to be due on the Spence & Steele mortgage, and then to the payment of amount decreed to be due complainants.

John C. Reid, for appellants. Satterfield & Young and Pettus & Pettus, for appellees.

HARALSON, J. The decree rendered in this cause on the 7th April, 1890, was a final decree, which settled all the equities of the bill as between the complainants and the defendants. The account ordered was in accordance with the opinion and decree of the court, and looked merely to the perfecting of the decree. To the extent of settling the equities between the parties it was final, and as to the matter of the taking of the account it was interlocutory. *Smith v. Cole*



man, 59 Ala. 262; Jones v. Wilson, 54 Ala. 30; Waldrop v. Carnes, 62 Ala. 374; Malone v. Marriott, 64 Ala. 486; Broughton v. Wimberly, 65 Ala. 550; Walker v. Crawford, 70 Ala. 567; May v. Green, 75 Ala. 162; Adams v. Sayre, 76 Ala. 509; Marshall v. McPhillips, 79 Ala. 145; Manufacturing Co. v. Brown, 13 South. Rep. 15, (at present term.) The decree, being final, was subject to review on appeal to this court, if taken within a year from the rendition thereof; and no appeal having been taken from it until the 19th day of April, 1892, it was barred at the time taken, and cannot now be reviewed. No assignments of error can be made upon a decree which does not support an appeal, or upon one which is barred. A motion to strike out the errors here assigned, based on this decree, must be granted. Stoudenmire v. De Bardelaben, 85 Ala. 85, 4 South. Rep. 723, and authorities supra; Kimbrell v. Rogers, 90 Ala. 346, 7 South. Rep. 241.

The account, as finally stated and confirmed by the court, contained several items which were excepted to by the complainants, which require notice. Mrs. Foley bought the lot out of which this litigation springs, having used the money of her intestate in its purchase and subsequent improvement. She rented it out afterwards, and turned the rent contract over to defendants, on which they realized \$700. She borrowed \$300 from Daniel O'Rourke on her own account, with which the estate of her intestate had nothing to do, and paid it to defendant Leva on her individual debt to him, secured by said mortgage; and this money she afterwards refunded to O'Rourke, out of the money of the estate, but it is not shown that defendants had any knowledge of or connivance in that transaction. She also paid them, as she claims, the proceeds of five bales of cotton, amounting to \$162.29. These several sums, the complainants claim, ought to have gone as credits on the Spence & Steel debt, of prior claim to defendants' individual debt against Mrs. Foley, and not to the latter; and these constitute the basis of many exceptions in various forms, but to the same effect. It is a familiar principle that, when an administrator uses the funds of the estate in the purchase of land, taking title to himself, the distributees may, at their election, either claim the land, with rents, or hold him responsible for the money, with interest, and have a lien declared on the land for the payment of the same. Lehman v. Lewis, 62 Ala. 131; Patton v. Beecher, Id. 579; Parks v. Parks, 66 Ala. 327; Bass v. Bass, 88 Ala. 413, 7 South. Rep. 243; 3 Brick. Dig. 785, §§ 50, 51. The complainants made their election, and by their bill seek to charge the defendants with the money of the state of Patrick Foley which went into the lot, with the interest thereon, and not to recover the lot itself. Having elected to claim the money and interest, they

must stand by their election, and cannot also claim the lot in which the money of the estate was invested, or the rents thereof. By this election they confirm the title of Mrs. Foley to the lot and to its rents. There was no error, therefore, in treating the rents of the lot as hers, and in applying them to her individual debt to Leva & Co. 2 Story, Eq. Jur. §§ 1262, 1263; 2 Perry, Trusts, § 842; Whaley v. Whaley, 71 Ala. 161; Parks v. Parks, supra; Preston v. McMillan, 58 Ala. 84.

The exceptions based on the supposed erroneous application of the \$300 borrowed by Mrs. Foley from O'Rourke, with which she made a payment to the defendants on her debt to them, is equally untenable. When she borrowed and paid the money it was her individual property. The estate had no right or equity in it, and the fact that she subsequently took a like amount from the estate of her intestate, and paid this debt to O'Rourke, did not change or have any effect on the transaction of the payment of the sum originally borrowed from him to defendants. No equity in her favor or that of her children, the complainants, as against the defendants, arises out of such a conversion of the funds of her intestate.

As to the application of the proceeds of the five bales of cotton, it is sufficient to say there is no evidence to show that they belonged to the estate. Mrs. Foley testified she was doing a mercantile and advancing business to farm hands on her own account; and as to one of the bales she testifies positively it was hers, and as to the others she did not say they belonged to the estate, but she did say she was receiving at the time cotton of her own on account of advances. There was no error in the ruling as to this cotton. We find no error in the record, and the decree of the chancery court is affirmed.

(88 Ala. 417)

THORN et al. v. KEMP et al.

(Supreme Court of Alabama. June 22, 1893.)

EVIDENCE—BEST AND SECONDARY—WRONGFUL LEVY.

1. The bill of exceptions stated: "There was evidence of the loss or destruction of the originals of said instruments [the summons and complaint] preliminary to admission in evidence; and that they were correct copies of originals was also in evidence." *Held*, a sufficient record, in the absence of evidence, to sustain the admission of the copies.

2. Where the record recites, "Plaintiffs then offered in evidence the affidavit and bond in detinue in justice's court," an objection on appeal that copies, not originals, were produced is ill taken.

3. Plaintiffs' attorney testified that copies of a complaint and summons against plaintiffs in justice's court, offered in evidence in the absence of the originals, were pencil copies, made by him from the papers received in the suit before the justice; that, as he recollected, the copies were correct; that, after he had made the copies, the originals were used in the suit before the justice; and that after the suit he never saw them. *Held* competent, so far as it

went, as foundation for introduction of the copies.

4. When a witness has been placed under the rule, but afterwards comes into court, and listens to the evidence, the court has discretion to allow him to testify or not, and its ruling is not reviewable.

5. In a suit on a constable's bond for failure to redeliver property levied on under a writ of detinue, he contending that he took it as agent for the mortgagee, the justice's record of the detinue case showed that plaintiff had amended his complaint by striking out the property in question, and thereafter "motion to amend by striking off the entry as to levy on [said property] granted." There being evidence that this motion had been made in the constable's behalf, *held*, that the adverse party could impeach his return by parol evidence that he did levy on the property.

6. In an action on a constable's bond for failure to redeliver property levied on as alleged, under a writ, the burden is on him to sustain his defense that he took it as agent under a chattel mortgage.

7. In such case it was error to refuse to charge that, unless the jury were reasonably satisfied that the writ came into the hands of the constable before he took the property, he would not be liable; this being plaintiffs' burden of proof.

Appeal from circuit court, Butler county; John P. Hubbard, Judge.

This was an action brought by A. A. Kemp and Samuel Parker against Samuel A. Brunson, constable, and Eli Thorn and others, who were sureties on Brunson's official bond. There was judgment for plaintiffs, and defendants appeal. Reversed and remanded.

The breach alleged in the complaint is that on the 29th of January, 1889, W. P. Larkin, as assignee of a mortgage executed to Joseph Touart by A. A. Kemp and Samuel Parker, brought an action of detinue in a justice of the peace court, and, after having given bond and made affidavit before the justice of the peace, a writ of detinue was issued by said justice, and placed in the hands of the defendant Brunson, as constable, to be levied upon certain personal property, claimed to be the property of said Larkin; that the constable, on January 29, 1889, levied the writ on a log cart, chains, and fixtures; that the defendants in said detinue suit (plaintiffs in the present action) neglected to give bond for the replevy of the property, and that plaintiff Larkin also failed, within the time prescribed by statute, to give a replevy bond for said property; and that after said failures the defendants in said detinue suit demanded of said Brunson the return of said property, who refused to restore the said property.

The evidence of the plaintiffs and that of the defendants are in direct conflict on most of the material facts. On the part of the plaintiffs the testimony tended to show that the constable levied the writ of detinue on the cart, chains, and fixtures, and refused to surrender the same to the defendants in the detinue suit, who are the plaintiffs in this action, on the failure of the plaintiff Larkin to give a replevy bond within the

time required by statute. The testimony for the defendants tended to show that the property taken by said Brunson was not levied upon under the writ of detinue, but was taken by said Brunson as the agent of W. P. Larkin, who was the assignee of Joseph Touart, of a mortgage executed to said Touart by A. A. Kemp and Samuel Parker, and that said property was taken by said Brunson as agent of Larkin, and was delivered to said Larkin before the writ of detinue came into his hands as constable, and that said Larkin sold the property at public outcry, under the provisions of said mortgage. There were many rulings of the court upon the evidence sought to be introduced, but those noticed by this court are sufficiently stated in the opinion.

The court, at the request of the plaintiffs, gave the following written charges to the jury: "(1) The court charges the jury that, though the docket in evidence may show that Brunson was allowed to amend the return on the writ, still this would not prevent the plaintiffs from introducing evidence to show whether, in point of fact, the defendant Brunson did levy on the log cart, chain, and fixtures, the subject-matter of this suit. (2) The court charges the jury that if they believe from the evidence in the case that Brunson levied under a writ of detinue on the log cart, chain, and fixtures, the subject-matter of this suit, and that Kemp and Parker neglected for five days to replevy said property, and that, after Kemp and Parker failed for five days to replevy said property, Larkin failed for five days to replevy the same, then, after the expiration of said time, it was the duty of Brunson to return the property to Kemp and Parker, and, if he failed to do so, then the defendants would be liable, and it was not necessary for Kemp and Parker to demand the property. (3) The court charges the jury that if they are reasonably satisfied from the evidence in the case that Brunson levied on the log cart, chain, and fixtures, the subject-matter of this suit, and that Kemp and Parker failed for five days thereafter to replevy the same, and that Larkin, for the succeeding five days, failed to replevy same, and that the property was not afterwards returned to Kemp and Parker by Brunson, then the plaintiffs are entitled to recover. (4) The court charges the jury that if they are reasonably satisfied from the evidence in the case that Brunson levied on the log cart, chain, and fixtures as constable under the writ of detinue, and that the said property was not replevied by Kemp and Parker or Larkin within the time required by law, and that Brunson failed to return said property to Kemp and Parker, then the plaintiffs are entitled to recover. (5) The court charges the jury that if they are reasonably satisfied from the evidence that S. A. Brunson, the constable, levied and seized the log cart and fixtures under the

writ of detinue sued out by W. P. Larkin, and against plaintiffs, on the 29th day of January, 1889, and if they are satisfied that no replevy bond for the cart and fixtures was made by Larkin, the plaintiff, or Parker and Kemp, the defendants, and S. A. Brunson did not deliver the cart and fixtures to Parker and Kemp, and they thereby lost the cart and fixtures, then the plaintiffs are entitled to recover in this case the value of the cart as shown by the evidence. (6) The court charges the jury, if they are reasonably satisfied from the evidence in this case that the defendant Brunson took the cart, and when he took the log cart he had the writ, and stated he levied on the property—the log cart and fixtures—under the writ, and took possession of the log cart and fixtures under the writ, then he would be liable if the plaintiffs never after got the property back, and no forthcoming bonds were given either by the plaintiffs or Larkin."

The defendants separately excepted to the giving of each of these charges, and also separately excepted to the refusal of the court to give each of the following charges requested by them: "(1) The court charges the jury that if they believe from the evidence that Brunson made an application to the court which issued the detinue writ to amend his return, and if they further find that upon said application, and after hearing the evidence on said application, such justice allowed such application, and allowed the constable to amend said return by striking out the entry as to levy on cart and fixtures, then they must find that such return as amended speaks the facts and the truth as to such transaction. (2) The court further instructs the jury that the privilege which is given to an officer to amend his return is upon the principle that the truth of the facts ought to appear of record, and the officer, having been mistaken in regard to them, ought to be permitted to amend his return. (3) The court further charges the jury that the statements of the written record of the justice, Stoll, are in this case conclusive, and cannot be here contradicted, but should be considered by you as it appears in the writing of Justice Stoll. (4) The court further instructs the jury that if the evidence fails to reasonably satisfy you that the writ of detinue came into the hands of Brunson before he took the cart, your verdict should be for defendants. (5) The court further charges the jury that the defendants are not liable in this case, unless you are reasonably satisfied from the evidence that the writ of detinue was placed in the hands of Brunson before he took the cart, and that he did take the cart under the writ. (6) The court further charges the jury that the statements of the written record of Justice Stoll are conclusive as to what was done in the case before him, and when in said court the complaint was amended, and the log cart and chain

were stricken out, the log cart and chain were no longer in said suit, and the case stood as if the suit had at first been brought without putting the log cart and chain therein. (7) The court further charges the jury that if the evidence fails to reasonably satisfy you that the writ of detinue came into the hands of Brunson before he took the cart, your verdict should be for defendants. (8) The court further charges the jury that if the plaintiffs have failed to satisfy you with reasonable certainty that defendant Brunson did not take the cart under the mortgage, your verdict should be for defendants. (9) The court further instructs the jury that if the plaintiffs have failed to show that within five days from the taking of the property Parker and Kemp failed to give bond for same, and further show that within ten days the plaintiffs failed to give bond for same, then the plaintiffs cannot recover. (10) The court further charges the jury that the presumption of the law is that the officer did his duty, and this presumption is overcome only by clear, convincing proof that he did not do his duty."

J. C. Richardson, for appellants. Gamble & Powell, for appellees.

HARALSON, J. 1. The objection to the introduction of the official bond of the constable, Samuel A. Brunson, was withdrawn by the defendants, as the record shows, and it was read without objection. After this an assignment of error cannot be predicated on its introduction.

2. The affidavit, the detinue bond, and the summons and complaint in the justice's court were competent evidence for the plaintiffs, as their proof tended to establish the allegations of the complaint, and, if not objectionable on other grounds, were properly allowed to be read. The objection to the affidavit and bond, on the ground that copies, and not the originals, were produced, is not well taken, since the record shows the originals were read; the recital being, "Plaintiffs then offered in evidence the affidavit and bond in detinue in justice's court."

3. The objection to the summons and complaint cannot be sustained. The bill of exceptions states, "There was evidence of the loss or destruction of the originals of said instruments preliminary to [their] admission in evidence; and that they were correct copies of originals was also in evidence." What this evidence was, we are not informed; but, if what is stated is true, the ruling admitting the copies in evidence was free from error. We are bound to presume there was sufficient evidence to sustain the ruling of the court.

4. D. M. Powell, one of plaintiffs' attorneys, testified as a witness that the copies of the detinue summons and complaint in the justice's court, which were offered in evidence by the plaintiffs, were pencil copies

made by him of the papers which he received while he was attorney for Parker and Kemp, in the case before the justice, and that his recollection was that said copies were correct copies of the papers he had; that after he made copies, the papers were used in the suit before J. S. Van Pelt, a justice of the peace at Georgiana, and that after the suit he never saw them any more. The objection to the admission of this evidence was that it was illegal, not to its sufficiency. It was certainly legal, as far as it went, in connection with other evidence, as tending to show the loss of the originals, and that the copies he was deposing to were correct copies. Besides, the bill of exceptions states that this witness gave other testimony as to the original detinue summons and complaint, without stating what it was.

5. The exception on which the fifth assignment is based is groundless, because the question to the witness Parker, objected to by defendants, does not appear to have been answered; but, if answered, the bill of exceptions states, immediately following the reservation of the exception, said evidence was afterwards excluded from the jury.

6. There was no error in refusing to allow the witness Larkin to be examined. He was placed under the rule, and afterwards came into the court room, and listened to the evidence. It was a matter of discretion with the court to allow him, after this, to testify or not, and its ruling on the subject is not a subject of review.

7. We held in *Gay v. Burgess*, 59 Ala. 578, that "a sheriff who has seized property under an order in a detinue suit, by express words of the statute, is bound, on the expiration of ten days from the seizure, if the plaintiff in the detinue suit fails to take it into possession, by the execution of a forthcoming bond, to restore it to the possession of the defendant, (Code 1886, §§ 2717, [2942,] 2718, [2943,] *Hall v. Perryman*, 42 Ala. 122;) and that the duty of obedience to the order of seizure and of restoration, in the event of the failure to execute the forthcoming bond, are equally imperative, and are each official. A failure to perform either duty is a misfeasance, involving the sheriff and his sureties on his official bond in liability for the damages the party aggrieved may sustain."

8. The docket of the magistrate, introduced in evidence, showed that the cause was continued from the 11th day of February, the day on which the summons and complaint in detinue were returnable, until the 25th of February, 1889, on which date the following entry appears on said docket: "The plaintiff amends his complaint by striking out one log cart and chain and one sorrel mare, and case continued until the next term of court." The complaint contained other personal property besides that stricken out. The cause, as shown from the entries on the docket, was then continued until the 6th April, when the following entry appears:

"Motion to amend by striking off the entry as to levy on cart and fixtures granted." This motion does not appear to have been made by the constable, and, since no one has the right, generally, to make a motion in a cause except one of the parties, in the absence of anything else, we would presume the plaintiffs made it. Yet it may have been done in the interest of the constable, and the proof tends to show that fact. The complaint had been amended by the plaintiffs, as we have seen, by striking out the log cart and chain from it, and there remained nothing then for the levy as to them to rest on, and the cause stood in court without a complaint for, and a levy on, the property about which this suit is brought. The constable appears, so far as this present action is concerned, therefore, with no levy, as a matter of record, in the detinue cause. If the proof shows that he levied on the property, and made no return on the writ, it cannot be allowed, as contended by defendants, that the plaintiffs cannot prove by parol evidence that the levy was in fact made. In *Hensley v. Rose*, 76 Ala. 378, we said: "A defendant in attachment has no control over the return which the officer may make, and cannot be prejudiced by his omission or neglect. The return is not conclusive as to any matters in respect to which it is silent. If a sheriff levies upon and seizes property, which he fails to mention in his return, the fact may be shown by extrinsic evidence in a proceeding against the sheriff in which the question of what property was actually levied on is involved." *Bank v. Eborn*, 84 Ala. 535, 4 South. Rep. 386.

9. To recover under the complaint in this case it is necessary to sustain the averments as laid. The plaintiffs must show the seizure of the property under the detinue writ, and the failure of the plaintiffs in the detinue suit to give the bond required by the statute to entitle them to the possession, and the failure of the constable to restore the property to plaintiffs. In this form of action the burden is on the plaintiffs to show the breach of the condition of the constable's bond, as averred in the complaint. Failing to meet the burden, the plaintiffs cannot recover. It would be different if plaintiffs had sued in detinue or trover, or for a bare trespass. In this action, proof of actual possession or ownership and the right of immediate possession, and the seizure of the property by the constable, would have authorized a recovery, and the burden would have rested upon the constable to justify the seizure and retention of the property. The defendants contend that they took peaceable possession of the property, before the writ in detinue came to their hands, for and as the agent of W. P. Larkin, assignee of the mortgage, who held a valid mortgage upon it, and that they delivered it to the assignee. If the jury are satisfied of the

truth of this contention, plaintiffs have not only failed to make the necessary proof, but defendants have affirmatively shown a defense and justification. The jury must determine the disputed facts. If the constable seized the property under a writ of detinue, having thus obtained possession, he would not be permitted to turn it over to the mortgagee. No man can obtain possession of property in the actual possession of another, against his will, by a breach of the peace, and then justify under a superior right or title. Public interest will not tolerate such conduct. *Street v. Sinclair*, 71 Ala. 110; *Thornton v. Cochran*, 51 Ala. 415. Neither can a private person or legal officer, by the forms of law, to which every citizen must submit, obtain possession of property in the possession of another under a claim of ownership, and, having used the process of the law to acquire possession, abandon the legal process, and set up an independent superior title. The law will not allow its process to be abused for such purposes; and the same rule applies where possession is obtained by artifice and fraud. Any person who thus deprives another of the possession of property is guilty of a wrong, and must either restore the property to him from whom taken, or answer in damages for its full value. *Gay v. Burgess*, 59 Ala. 579; *Ex parte Hurn*, 92 Ala. 102, 9 South. Rep. 515. A different rule as to the measure of damages applies where one obtains the peaceable possession of the property of another, under some color or claim of right, and detains it, or converts it to his own use, against one who has a prior right. In the latter case, the measure of damages is the actual damage sustained. *Wilson v. Strobach*, 59 Ala. 488; *Williams v. Brassell*, 51 Ala. 397; *Pollak v. Harmon*; *Draper v. Walker*, (Ala.) 13 South. Rep. 595. "A defendant, when sued for a tort under these latter conditions, may set up an outstanding title superior to the plaintiff, if he can properly connect himself with it." *Marks v. Robinson*, 82 Ala. 78, 2 South. Rep. 292; *Gardner v. Morrison*, 12 Ala. 547; *Draper v. Walker*, *supra*; 3 Brick. Dig. p. 776, § 5. There are some decisions apparently conflicting, but which we think may be reconciled upon these principles, and which are believed to be sound. Except where exemplary damages or smart money is recoverable, the actual damage, as a general rule, should measure the extent of recovery. But the law will not tolerate a violation of the public peace, or a fraudulent resort to legal process, or fraud or artifice, to get an undue advantage over one who submits to its mandates. He who thus defies and disregards the law, or obtains an advantage by fraud, cannot defend, but must make full restitution.

10. Applying the foregoing principles to the charges given and refused, to which

exceptions were reserved, many of them disappear. The six given for the plaintiffs state the law correctly, and, for the same reason, they were properly given, No. 9, asked by defendants, was properly refused, and, besides, it misplaces the burden of proof. All those asked by defendants except the fifth and seventh were properly refused. No. 1 is abstract. The return, as amended, is silent, and does not speak anything, as to the property in question, and it was competent for plaintiffs to show the levy under the writ. Nos. 2 and 3 are abstract and misleading. Nos. 4 and 8 each misplace the burden of proof. No. 6 states no reason why the plaintiffs should not recover, and denies the right of plaintiffs to show that the log cart and chain were in fact levied on and seized by the constable. No. 10 is misleading.

11. There was evidence tending to show that the writ of detinue was not placed in the hands of the constable, Brunson, before he took the cart and fixtures, and that he did not take them under said writ, but under a mortgage, and that said writ came into his hands after he took possession of said property. Under the averments of the complaint, it was incumbent on the plaintiffs to show, as we have before stated, that the property was taken by Brunson as constable, under said writ, and, detinue bonds not having been given, as required by statute, it was not returned by him. Whether he did or not was a question of disputed fact, proper for the determination of the jury; and, if the facts hypothesized in charges 5 and 7 were true, the plaintiffs were not entitled to recover. The refusal to give them was error, and the cause must be reversed on that account.

Reversed and remanded.

(39 Ala. 173)

#### THOMPSON v. STATE.

(Supreme Court of Alabama. June 22, 1893.)

##### GAMING—BETTING ON GAME.

1. On indictment, under Crim. Code, § 4057, for betting at a game of cards or dice played in a public place, evidence that other persons played or bet in the game is not irrelevant, as not going to show that defendant bet or played, since it goes to prove that there was somebody present to bet with, and some game being played on which to bet.

2. In a prosecution for gambling in a public house, a witness testified that he did not remember how often he had been at the house in the 12 months preceding the time in question, and seen a game played there. *Held* no error to allow the prosecuting attorney to question witness from a memorandum of his testimony before the grand jury, in order to refresh his memory in that regard.

3. On indictment under Crim. Code, § 4057, for betting at a game played in a public house, there being evidence that several games had been played in said house within 12 months, and more than one within 6 months of the game in question, a charge that said house might have formerly been a public house, "but if it is shown by the evidence" that people stopped going there to play, "and the evidence

<sup>1</sup> Opinion not yet filed.

fails to show that any game had been played there for several months" before that in question, defendant was not guilty, is properly refused, as argumentative and abstract, if not otherwise vicious.

4. On indictment under Crim. Code, § 4057, which prohibits the betting of "money, bank notes, or other thing of value," at certain games played in public places, a witness testified that defendant played and bet, but did not state what he bet. Another witness stated that at the time and place in question there were a good many shooting "craps," that when they did this they would all get in a ring, on their knees, and put the money up, and throw the dice; that he saw defendant on his knees, but did not recollect, positively, that he saw him put up money or shoot the dice, but his best recollection was that defendant did play. *Held* sufficient proof to go to the jury that defendant bet "money, bank notes, or other thing of value."

Appeal from criminal court, Pike county; William H. Parks, Judge.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Frank Thompson bet at a game played with cards or dice, or some device or substitute for cards or dice, in public house or highway, or some other public place, or at an out-house where people resort, against the peace and dignity of the state of Alabama." Affirmed.

The defendant demurred to the indictment on the ground that it did not allege that the game was played on which the bet was made; that it did not allege that the game was played at one of the places prohibited by statute; and that it did not allege that the defendant bet any money, bank notes, or other thing of value at a game played at one of the places prohibited by statute. This demurrer was overruled, and the defendant duly excepted. The facts of the case are sufficiently stated in the opinion. The defendant requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them: (1) "If the jury believe the evidence in this case, they must find the defendant not guilty." (2) "The court charges the jury that Edmond Stegars' house may have been a public house before the 'love shooting.' But if it is shown by the evidence that, for some cause, people stopped going there to play, and the evidence fails to show that any game had been played there for several months prior to this one, at which the defendant is said to have played, the jury must find the defendant not guilty."

R. L. Harmon, for appellant. Wm. L. Martin, Atty. Gen., for the State.

HARALSON, J. 1. Before the Code of 1886 went into effect, we held that it was necessary to aver in the indictment that the game at which the betting was alleged to have been done was played. *Smith v. State*, 63 Ala. 55; *Johnson v. State*, 75 Ala. 7;

*Dreyfus v. State*, 83 Ala. 54, 3 South. Rep. 430; *Tolbert v. State*, 87 Ala. 27, 6 South. Rep. 284. The present Code, under which this indictment appears, prescribed a form which had not before existed. The indictment in this case follows this form strictly, and is in all respects sufficient. *Rosson v. State*, 92 Ala. 77, 9 South. Rep. 357; *Darby v. State*.<sup>1</sup>

2. The witness Carter, for the state, testified that he saw the defendant bet at a game called "craps," at the dwelling house of Edmond Stegars, on the last Monday before Christmas in 1891, and that there were several other persons there who played the same game, and bet on it. The solicitor then asked the witness whether the other persons there that day played at the same game, and bet on it. This question asked the witness to state again the same thing which he had just stated without objection on the part of defendant. The defendant objected to the question on the ground that it was illegal and irrelevant, in that whether other persons played or bet in the game then played was no evidence that the defendant bet or played. The question and answer were allowed, and the court committed no error therein. There could be no conviction as charged without betting, and there could be no betting without playing, and some one or more persons with whom to play and bet. The defendant could not play or bet with himself. It was necessary, therefore, to show these facts with others, in order to show defendant's guilt.

3. The solicitor, on the examination of the witness, was proceeding to read from a memorandum of the witness' testimony before the grand jury, when an objection to his doing so was made by defendant, and sustained by the court. The bill of exceptions states that "the solicitor was then permitted to ask questions from the memorandum to refresh the memory of the witness as to his testimony before the grand jury, and the defendant duly excepted." In what manner the solicitor asked questions from the memorandum for the purpose stated, and in what the objection to his doing so consisted, does not appear. A witness may refresh his memory by a memorandum made at or about the time to which it relates, when he knows it to be correct, and, after refreshing his memory, can testify from independent recollection. *Stoudenmire v. Harper*, 81 Ala. 242, 1 South. Rep. 857; *Acklen's Ex'r v. Hickman*, 63 Ala. 494. And a party may, for the purpose of refreshing the memory of his own witness, when put to a disadvantage by an unexpected answer, or when the witness fails to answer as was expected of him, ask him if he had not, at a certain time and place, made certain statements, even if they are inconsistent with his testimony just given. *White v. State*, 87 Ala.

<sup>1</sup>Opinion not yet filed.

24, 5 South. Rep. 829; Griffith v. State, 90 Ala. 583, 8 South. Rep. 812. The witness had just stated that he did not remember how many times he had been to Edmond Stegars' house within twelve months before he saw defendant play and bet, and had seen "craps" played there; but, after the questions propounded by the solicitor from the memorandum referred to, he stated that his memory was refreshed, and he had seen craps played at said Stegars' house as many as four or five times within the time specified. There was no error in allowing the witness to be refreshed in his memory in the manner objected to. Billingslea v. State, 85 Ala. 325, 5 South. Rep. 137.

4. There was no error in refusing to give charge No. 2 asked by defendant. It was argumentative and abstract, and, if not otherwise vicious, was properly refused on these grounds. The witness Carter testified that he had seen craps played at Stegar's house as many as four or five times during the twelve months prior to the game in which the defendant was charged to have played; and witness Wiley, for the state, testified that he had seen dice or craps played there as many as three or four times during the twelve months preceding the game above mentioned, but that he did not have any recollection of seeing more than one or two games played there during a period of about six months next before the game above mentioned, for betting at which defendant was being tried. The charge is predicated, not upon the belief of the tendencies of this evidence, but it is based on what the evidence shows, or fails to show, without reference to the jury's belief of the evidence.

5. The defendant asked the court to give the general charge, which was properly refused. The ground on which this charge was requested is based on the supposed absence of proof showing that the defendant bet any money, bank notes, or other thing of value. This was necessary to have been shown, to the satisfaction of the jury. Chambers v. State, 77 Ala. 80; Dreyfus v. State, 83 Ala. 54, 8 South. Rep. 430. The first of the witnesses examined proves the playing and betting by defendant, but he does not state what he bet. The other witness stated that, on the day he saw defendant at Stegars' house,—the occasion selected by the state,—there were a good many there, engaged in crap shooting; that, "when they would shoot craps, they would all get in a circle or ring, and get down on their knees, and put the money up, and throw the dice." He saw defendant down on his knees, but did not recollect, positively, that he saw him put any money up, or shoot the dice, but his best recollection was that he did play. This evidence afforded ground for inference, and tended to show, that the defendant did bet money at the game played.

6. The evidence in the cause tended to

show that the dwelling house of Stegars, where the game was played, was a public house, in the meaning of the statute, and was proper for the consideration of the jury. Downey v. State, 90 Ala. 644, 8 South. Rep. 869; Jacobson v. State, 55 Ala. 151; Coleman v. State, 20 Ala. 51.

Affirmed.

(101 Ala. 264)

### WADSWORTH v. WILLIAMS.

(Supreme Court of Alabama. June 22, 1893.)

#### INSTRUCTIONS—SINGLING OUT FACTS—ABSTRACT PRINCIPLES.

1. Refusal of an instruction that, in determining a certain question, a certain fact may be considered, cannot be held error where the bill of exceptions does not purport to set forth all the facts, and there may therefore have been other facts controlling or qualifying the fact singled out.

2. It is not error to refuse an instruction which emphasizes and gives undue prominence to a single fact.

3. Error cannot be predicated of the refusal of an instruction which, from all that appears in the record, was abstract.

Appeal from circuit court, Autauga county; J. R. Dowdell, Judge.

Trespass by James R. Williams against W. W. Wadsworth to recover damages for cutting and carrying away timber and wood from plaintiff's land. Judgment for plaintiff, and defendant appeals. Affirmed.

The only evidence introduced for the plaintiff, as shown in the bill of exceptions, were several deeds conveying the land on which the trespass was committed to the plaintiff, and the bill of exceptions recites that "said deeds, on their faces, and the evidence, tended to show that said deeds were executed, filed for record, and recorded." The defendant requested the court to give the following written charge, and excepted to the court's refusal to give it as asked: "(1) The juror, in investigating the question of possession of the lands, the subject of pretention in this suit, may look to the fact, if it be a fact, that some of the deeds introduced by the plaintiff were not recorded in the probate court of Autauga county until the commencement of this suit in this case."

J. M. Falkner, for appellant.

COLEMAN, J. This was an action to recover damages for trespass upon lands. The assignments of error are upon the refusal of the court to give two several charges requested in writing by the defendant. No briefs have been filed by either party. The bill of exceptions is very meager, and does not purport to set out all the evidence. When this is the case, this court will presume there was evidence introduced on the trial which justified the action of the court. Packet Co. v. Slater,<sup>1</sup> and authorities collected.

<sup>1</sup> Held pending rehearing.

The first charge requested directed the attention of the jury to a single fact. There may have been other facts in evidence controlling or qualifying the fact thus singled out. Moreover, it is not error to refuse a charge which emphasizes and gives undue prominence to any single fact. Such charges are calculated to mislead the jury, and generally are regarded as argumentative, and for this reason may be properly refused. *Bell v. Kendall*, 93 Ala. 489, 8 South. Rep. 492; *Railroad Co. v. Sellers*, 93 Ala. 9, 9 South. Rep. 375; *Jackson v. Robinson*, 93 Ala. 157, 9 South. Rep. 391; *Eastis v. Montgomery*, 93 Ala. 293, 9 South. Rep. 311.

From all that appears in the record the second charge refused was abstract. *Bostic v. State*, 94 Ala. 45, 10 South. Rep. 602; *Smith v. Collins*, 94 Ala. 394, 10 South. Rep. 334. There is no error in the record. Affirmed.

(100 Ala. 634)

**PARKS v. STATE** ex rel. OWENS. **HILLIARD v. STATE** ex rel. BROWN. **WORTHY v. STATE** ex rel. REEVES. **GIBSON v. STATE** ex rel. ALLEN.

(Supreme Court of Alabama. July 27, 1893.)

**ELECTIONS—MODE OF CONTEST—STATUTORY REMEDY—QUO WARRANTO—WHEN WILL LIE.**

Code 1886, pt. 3, tit. 2, c. 14, (which defines the procedure in quo warranto "for usurpation of office or franchise,") § 3177, provides that the validity of no election which may be contested under this Code can be tried under that chapter. Held that, where the Code provides for the contest of certain elections, the remedy by quo warranto cannot be resorted to by the aggrieved parties, whether the statute provides for a contest on account of the particular wrongs complained of, or not.

Appeals from circuit court, Pike county; John R. Tyson, Judge.

Four proceedings, tried together, on informations in the nature of quo warranto, brought by the state on the relation of A. H. Owens, T. H. Brown, L. Reeves, and T. J. Allen, against William H. Parks, W. J. Hilliard, Oglethorpe Worthy, and M. V. Gibson, respectively, to contest the declared result of the election of respondents to the offices, respectively, of judge of the criminal court, judge of the probate court, clerk of the circuit court, and tax collector of Pike county, Ala., to which offices relators claimed to be elected. From a judgment in favor of each of the relators, respondents appeal. Reversed.

John Gamble, M. N. Carlisle, and R. L. Harmon, for appellants. Gardner & Wiley and A. A. Wiley, for appellees.

STONE, C. J. These four cases were by consent tried together in the circuit court, and by like consent were argued and submitted in this court as one case. The facts in each of the cases are substantially the same, and each and all of them are dependent on the same legal principles. They were in-

formations in the nature of quo warranto, intended to test the correctness and legality of the declared result of the election of certain county officers of Pike county, who were voted for at the August election in 1892. They are proceedings under chapter 14, tit. 2, pt. 3, of the Code of 1886, commencing with section 3170 of that compilation of statutes. The chief defense relied on is that under our system the remedy invoked in these cases is not open to the relators, and that for that reason the judgments should have been in favor of the defendants. This defense was raised by demurrer and by plea or answer to the petition. The circuit court ruled against its sufficiency, and granted relief to the relators. From that judgment the present appeal is prosecuted.

At the time this election was held,—August, 1892,—we had a statutory system<sup>1</sup> in force which provided expressly for a contest of the election of each of the officers which furnish the subject of the controversy shown in this record. It was very comprehensive in its terms, embracing "the election of persons declared elected to any office, whether state, county, representatives in congress, or to any office which may be filled by a vote of the people," and it provided that the contest might be inaugurated "by any qualified elector." It enumerated the causes of such contest, under four specifications, as follows: "(1) Malconduct, fraud or corruption, on the part of any inspector, clerk, returning officer, or board of supervisors. (2) When the person, whose election to such office is contested, was not eligible thereto at the time of such election. (3) On account of illegal votes. (4) Offers to bribe, or bribery, or any other misconduct calculated to prevent a fair, free and full exercise of the elective franchise; but no person shall contest the election of any person on account of race, color, or previous condition of servitude." A contest under this statutory provision was required to be instituted within a prescribed time, which had elapsed when these proceedings were instituted. The statute remained as stated supra until it was re-enacted—somewhat modified in form and substance—by act approved February 10, 1893, (Sess. Acts 1892-93, p. 468.) The later statute expressly repealed the former one, as to all the provisions which affect the question presented by the record before us; but it expressed an additional ground of contest,—“on account of the rejection of legal votes.” We have, since 1852, had another statutory system in force, by which the right of persons exercising official functions can, in certain conditions, be tested. It is an information in the nature of a quo warranto, and commences with section 3170 of the Code of 1886. Its provisions, as applicable to the case before us, are that “when any person usurps, intrudes into, or unlawfully

<sup>1</sup>Code 1886, pt. 1, tit. 6, c. 4.



holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state," an action may be maintained to redress the wrong. This mode of redress, and of ousting persons illegally in office, had long been in force, and received additional vitality and energy from the English statute of Anne. Many of the states have enacted statutes regulating its use, so that it has gotten into very general use, as a means of getting rid of persons who intrude into, or unlawfully hold, public offices. In many of the states, as in our own, they recognize the continued existence of this remedy, while at the same time they, like ourselves, have special statutes providing for a contest of elections. And the question has often been raised, whether such statutory contests, when provided for, take the place of, and supplant, the common-law writ of quo warranto, or, rather, information in the nature of quo warranto. The general ruling on this question is that the statutory contest does not displace the older remedy by quo warranto, unless the statute so declares, or it is implied in its terms; that in the absence of such expression or implication the statutory remedy is cumulative. In *McCrary on Elections*, (section 345,) the principle is thus expressed: "The true doctrine seems to be that a special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless the manifest intention of the statute be to make such special remedy exclusive, and such intention must be manifested by affirmative words to that effect." *Mechem, Public Officers*, (section 24,) says: "In several of the states, special tribunals have been created for the trial of election contests, but where this is not the case the ordinary courts of law are to be resorted to. Where such a special tribunal has been created, individuals desiring to institute proceedings must, where such appears to have been the intention, have recourse to that tribunal alone, and cannot, in general, resort to the courts of law." In *Paine on Elections*, (section 860,) is this language: "When the statute creates a special tribunal, and prescribes special proceedings, for the trial of contested election cases, and the tribunal to which jurisdiction is given is vested with full powers to adjudicate all questions involved in such cases, the courts will not take jurisdiction by quo warranto, at common law, even in cases of fraud on the part of the officers of election, or candidates." In *High on Extraordinary Legal Remedies*, (section 617,) the doctrine is thus stated: "Where a specific mode is provided by statute for contesting elections, and a specific tribunal is created for that purpose, and the method of proceeding therein is fixed by law, resort must be had to the remedy thus provided, and proceedings by information in the nature of a quo warranto

will not be entertained." The quotations from the last two authors are supported by *Com. v. Leech*, 44 Pa. St. 332; *Com. v. Garriques*, 28 Pa. St. 9; *Com. v. Baxter*, 35 Pa. St. 263; *State v. Marlow*, 15 Ohio St. 114; *People v. Every*, 38 Mich. 405. The following authorities hold that the enactment of special provisions, or the creation of a special tribunal,—one or both,—does not, without more, supplant or take away the right to controvert and try the validity of an election under quo warranto proceedings: *Attorney General v. Barstow*, 4 Wis. 567; *State v. Messmore*, 14 Wis. 115; *People v. Hall*, 80 N. Y. 117; *Kane v. People*, 4 Neb. 509; *State v. McKinnon*, 8 Or. 493; *People v. Holden*, 28 Cal. 124; *State v. Frazier*, (Neb.) 44 N. W. Rep. 471; *People v. Londoner*, (Colo. Sup.) 22 Pac. Rep. 764; *State v. Boyd*, (Neb.) 48 N. W. Rep. 739; *Dudley v. Mayhew*, 3 N. Y. 9; 1 Dill. Mun. Corp. § 202; 2 Dill. Mun. Corp. § 891.

We do not consider it necessary to discuss or criticise the somewhat varying phraseology employed in the foregoing citations. The case we are considering must be determined by the language of our statute, and its proper interpretation. As part and parcel of our statutory quo warranto system, it is provided (section 3177 of the Code of 1886) that "the validity of no election which may be contested under this Code can be tried under the provisions of this chapter." This whole chapter, with all its provisions, was adopted and made part of the Code of 1852, commencing with section 2651 of that Code. Section 2654 of that compilation corresponds to section 3082 of the Code of 1867, section 3422 of the Code of 1876, and to section 3170 of the Code of 1886. Section 2664 of the Code of 1852 was in the following language: "The validity of any election which may be contested under this Code, can not be tried under the provisions of this chapter." That language was carried, without change, into the Code of 1867, § 3092, and into the Code of 1876, § 3432. The slight change in the words of the section, as shown in the copy first above given, is for the first time found in the Code of 1886, § 3177. That change in the words cannot lead to a change of interpretation, for the phrase, "the validity of any election cannot be tried," is certainly the synonym and equivalent of that other phrase, "the validity of no election can be tried."

Several cases of controverted elections have been before this court, while our statutory provisions governing the remedy of quo warranto, as applicable to such cases, have remained substantially unchanged. Some of those provisions we have copied above. The cases of *Ex parte Lambert*, 52 Ala. 79; *Ex parte Harris*, Id. 87; *Moulton v. Reid*, 54 Ala. 320; and *Hudmon v. Slaughter*, 70 Ala. 546,—do not appear to shed any light on this question. In *State v. Tucker*, 54 Ala.

205, possibly the question might have been raised and considered. It was not done, but relief was denied on other grounds. In *Echols v. State*, 56 Ala. 131; *Clarke v. Jack*, 60 Ala. 271; *Leigh v. State*, 69 Ala. 261; and *Savage v. Wolfe*, Id. 569,—we held that the statutes had made no provision for a contest in those cases, and hence no ruling was or could be made, affecting the question with which we are now dealing. In *State v. Hamill*, (Ala.) 11 South. Rep. 892, is found a remark not necessary to a decision of the case, which, if not an error, would at least tend to mislead. Under the facts of that case the common-law writ of *quo warranto* would not lie. There was, however, a clear right to contest under the statute, and that supplied all that was necessary to make the argument complete. Having an adequate remedy by statutory contest, there was no authority to resort to *mandamus*.

One of the cases embraced in this proceeding—that of *Hilliard v. Brown*, being a contention over the probate judgeship of Pike county—has been heretofore before us. 13 South. Rep. 125. That was a contest before the circuit judge under section 428 of the Code. The judge of the circuit court sustained the contest, and decided that *Brown*, the contestant, was entitled to the office. The case was then brought by appeal to this court, and we held that the statement of the grounds of contest made to the circuit judge, and on which he tried the case, failed to make a case within section 396 of the Code, and hence failed to make a case for which statutory contest would lie. We said: "It is a principle of law too long and well settled to be now the subject of contention, that the record, or quasi record, of a court or tribunal of special, limited jurisdiction, created by statute, whose proceedings are required to be written, must affirmatively disclose every fact upon which, by the statute, the jurisdiction of the court or tribunal is made to depend, in order to sustain the jurisdiction, and uphold the validity of the judgment rendered. \* \* \* The present proceeding was before the circuit judge, created by statute into a new and special tribunal, with the limited power conferred upon it to enforce a new right conferred by the same statute. The grounds upon which this tribunal may exercise the power and jurisdiction for which it was created are expressly prescribed, and expressly required—one or more of them—to be set forth in writing in the statement required to be filed as the institution of the suit or proceeding. They are therefore jurisdictional. Without them the tribunal does not legally exist. They must affirmatively appear by the record, or else the proceeding is *coram non iudice* and void. Does the statement of contestant, *Brown*, contain an averment of either of these necessary jurisdictional facts? A mere inspection of the paper would constrain us to hold

that it does not. It is conceded by counsel that the second, third, and fourth grounds prescribed by section 396 are not set forth, or relied on. The first ground, as we have seen, is thus stated in the statute: 'Malconduct, fraud or corruption on the part of any inspector, clerk, returning officer, or board of supervisors.' It would seem unnecessary to discuss the meaning of the words, 'malconduct, fraud or corruption,' as they are here used. They are of such obvious signification as to preclude discussion.

\* \* \* The statement in the present case, given the most latitudinous construction, does not approximate a charge of malconduct, fraud, or corruption on the part of either of the officers mentioned in the statute.

\* \* \* The conduct complained of, though negligent, is entirely consistent with perfect honesty and good faith." In the foregoing case we declared that the proceedings before the circuit judge were void, for the want of jurisdiction, and we ordered them to be quashed. It is very clear that the case of *Hilliard v. Brown* was rested on the first subdivision of the grounds of contest specified in section 396 of the Code, and that it was decided on that ground alone. The argument made, showing that the facts did not make a case for relief under that subdivision, is unanswerable.

The issue which has given rise to the main controversy before us is the inquiry, what are the proper meaning and scope of section 3177 of the Code of 1886? We have copied that section, but for convenient reference we will repeat it: "The validity of no election which may be contested under this Code can be tried under the provisions of this chapter." That chapter, (No. 14, tit. 2, pt. 3,) commencing with section 3167, is the chapter which defines the conditions, and prescribes the rules to be observed, when proceedings in *quo warranto* are resorted to "for usurpation of office or franchise." It expressly declares that its provisions cannot be invoked or resorted to to try or test the validity of any election, if the Code has made provision for contesting such election. Now, the Code, § 396, had made express provision for contesting each of the elections which are involved in this controversy, and in four subdivisions had embodied the grounds of such contest. For either one of the wrongs or improprieties therein enumerated the election might be contested, and if the charge was sustained the result would or might be that the person declared elected would be ousted from office. The grounds stated in the statute are very comprehensive in their terms. The first embraces all "malconduct, fraud, or corruption" of every person employed in an official or quasi official capacity in the conduct of the election, extending up to the time when the result is declared; the second is confined to the eligibility of the person declared elected; and the third, to the

receipt of illegal votes. This was perhaps imperfect, in that it made no provision for cases in which legal voters were denied the privilege of casting their ballots. That omission has been supplied, and the imperfection healed, by the statute of February 10, 1893. The fourth subdivision relates alike to inside and outside interference. Its first clause makes bribery, or offer to bribe, a ground of contest, but the second clause is generic, and is quite comprehensive. It makes "any other misconduct calculated to prevent a fair, free and full exercise of the elective franchise" a cause of contest. What is "the elective franchise?" It is the right or privilege of a qualified elector or voter to cast his ballot freely in favor of the man of his choice, in an election authorized by law to be held.

We return to the question of the interpretation of section 3177 of the Code. Its language is very plain and very simple. If the Code makes provision for the contest of the election, then its validity cannot be tried by a proceeding in quo warranto. Relators (appellees in this case) contend for a narrower interpretation. Their contention is that the section must be interpreted as if written, "the validity of no election which may be contested under this Code can be tried under the provisions of this chapter," for wrong or irregularity committed, which this Code specifies as a ground of contest. In other words, if the contest provided for in the Code furnishes a remedy for the particular grievance complained of, then quo warranto cannot be resorted to, but, if the wrong be not included in the specified grounds of contest, then quo warranto will lie. This, they contend, is the extent of the inhibition. They contend further that the wrong and irregularity complained of in this case are not made a ground of contest in either of the subdivisions of section 396, and therefore they were and are entitled to the present remedy. Waiving the inquiry whether the wrongs set forth in this record are or are not embraced in one of the subdivisions of section 396 as a ground of contest, is the language of section 3177 susceptible of the interpretation contended for? "To contest" means to strive to win or hold; to controvert, litigate, oppose, call in question, challenge, dispute; to defend, as a suit or other proceeding. Dictionaries. What right have we to say there is no contest unless it has within it the elements of success? And how can we assume that the legislature did not employ the word "contest" or "contested" in its natural and ordinary sense? What is the subject of this sentence, and what is it the statute declares shall not have its validity tried under proceedings in quo warranto? Every one must and will promptly answer, the election. Nothing else was being spoken of. Not every election, but only those which could be contested under the provisions of the Code. These having had secured to

them what was conceived to be an ample and speedy remedy by statutory contest, it was intended they should not be clothed with the additional, optional remedy, which might leave the question of the rightful incumbency of the office in protracted doubt and uncertainty. Cannot the right to every one of the offices that are in controversy in the suit before us be contested under the Code? Every one will answer, it may be. Then on what principle can this case be taken without the influence of the inhibitory clause of the statute? Again, the statute, in defining the grounds of contest, employs very comprehensive terms. They embrace almost every conceivable wrong that may be perpetrated in the holding of an election, even up to the declaration of the result. The legislature doubtless thought they had covered the entire field they intended to make grounds of contest. They had the clear right to define the grounds on which elections could be contested, and to make them broad or restricted; and they had the equal power and right to declare that the validity of no election should be contested or questioned save on the grounds and for causes prescribed by them. Shall we arrogate to ourselves the right to say they did not mean what they said? We must, if we can, ascertain the sense and intention of the legislature in and through the words they employed, and we must not be led off by a seemingly hard case to give to the section an interpretation either larger or smaller than its words import. "Words of common use are to be understood in their natural, plain, ordinary, and genuine signification, as applied to the subject-matter of the enactment." *End. Interp. St. § 2.* "When the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise, [and those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.] \* \* \* It is not allowable, says Vattel, to interpret what has no need of interpretation. \* \* \* The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. \* \* \* But whilst it may be conceded that where its provisions are ambiguous, and the legislative intent is doubtful, the effect of several possible constructions may be looked at in order to determine the choice, it is very certain that when once the intention is plain it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words." *Id. § 4.*

The first codification of the statutes of Alabama, known as the "Code of 1852," went into operation January 17, 1853. We have heretofore given a copy of section 2664 of the Code, and have shown that it was continued in force, without any change what-

ever, until the adoption of the Code of 1886. We have also shown that the change wrought by the Code of 1886 effected no change whatever in the meaning of that section. In 1858 the first Code of the statutes of the state of Tennessee was adopted, and went into effect, Meigs and Cooper being the codifiers. Section 3423 of that Code, found in a chapter devoted to proceedings in quo warranto, is an exact copy of section 2664 of the Alabama Code of 1852, without change or transposition of any word, letter, or even punctuation point. To suppose this was accidental would be to suppose almost a miracle. Theirs was manifestly copied from ours. The case of *State v. Wright*, 10 Heisk. 237, was a proceeding on information in the nature of quo warranto. The commissioner of registration, the officer charged by their statute with such duty, had certified in his return that W. had received the largest number of votes and was elected. The information was filed by one C., as relator, who claimed to be, and was, really elected sheriff; and the purpose was to have W. ousted, and C. proclaimed sheriff. The case was one of great wrong and abuse on the part of the commissioner of registration. Their statute, like ours, had provided for a contest of the election for sheriff, and the question was made that the proceeding by information in the nature of a quo warranto could not be entertained. The court, quoting section 3423 of their Code,—the same as our section 3177,—said: "A cursory reading of the particular section relied on would seem to give force and plausibility to this position." The court then, by a process of reasoning not susceptible of easy comprehension, attempts to answer this interpretation of the statute. The writer of the opinion concludes what he has to say on this feature of the case in the following language: "I apprehend that the statute should be construed as if it read, 'the validity of any election which may be contested under this Code, by the party who seeks this remedy, cannot be tried under the provisions of this chapter.' If the relator in this case had resorted to the remedy by contest, his petition would have necessarily shown the fact that a majority of the votes actually given were cast for him. This was an election, and he would have been very properly repelled by the answer that, being the elected candidate, and having a clear right to the office, by the actual popular vote, he had not adopted the appropriate remedy to recover the office." We may well inquire, what authority had the writer of that opinion to amend a solemn act of the legislature by inserting words which give it a totally different meaning? And, in reference to the second subject mentioned in the language quoted, most contests of elections are based on the averment that the contestant received a majority, or plurality, as the case may be, of the legal votes cast, and that by fraud

or some other wrong he has been counted out, and the contestee improperly proclaimed elected. When fraud or mistake in the count is the ground of contest, the statement of the contestant would be insufficient, if it did not show that upon a fair count of the lawful votes cast he had received a plurality, and is therefore entitled to the office. His complaint is that by accident, or by a graver wrong, the plurality of the votes cast for him has failed to be computed, and by that means he has failed to receive the certificate of election to which he was entitled. This is the groundwork on which he bases his contest, and the most prominent point of his contention—the *sine qua non* of his claim—is that a plurality of the lawful votes was cast for him. Can it be that, by thus showing that he had received a majority or plurality of the votes cast, he placed himself in the category or dilemma in which he could be "properly repelled by the answer that being the elected candidate, and having the clear right to the office by the actual popular vote, he had not adopted the appropriate remedy to recover the office?" This would be the equivalent of the water test, when witchcraft was punished as a crime. It is not uncharitable to conjecture that the hardship of this case exerted some unconscious influence in molding the decision. The result was right, and possibly the court did not severely scrutinize the methods by which it was attained. Possibly the relator's proper remedy in that case would have been a mandamus to compel the commissioner to file the proper report,—the one first made out by him. At all events, we are not able to perceive on what principle their statutory contest was not open to him; and this was a complete answer to the information in the nature of quo warranto, as clearly declared by their statute, (section 3423.) Ten years later the case of *State v. Gossett* was tried and decided in the same court, (9 Lea, 644,) in the same form of proceeding,—information in the nature of quo warranto,—and over the controverted right to the office of sheriff. At that time, William F. Cooper, one of the authors of the Code of 1858, and one of the ablest and most painstaking judges that ever sat on that bench, was a member of the court, and delivered the opinion in that case. The case turned on section 3423 of their Code, identical with section 3177 of ours. The chancellor had entertained the proceeding, and had awarded the office to the relator. In the supreme court, the chancellor's ruling was reversed, and the bill dismissed. Among other things the court, speaking of the case of *State v. Wright*, 10 Heisk. 237, said: "The judge who delivered the opinion of the court adopts the more obvious construction that the jurisdiction under section 889 [the section which provides for a statutory contest] is exclusive, but argues that a bill filed under section 3409, based upon the returns as made, does not dispute

the validity of the election, and is therefore not a contest of the election. It is, in this view, only a struggle over the *prima facie* case, which entitled the apparently successful party to the certificate of election, leaving the contest of the election to be made by a separate suit in the circuit court. The result would be one suit for the form, and another for the substance, the latter being postponed until the protracted litigation of the former had terminated. The argument of the opinion does, moreover, assume that the court, in determining the *prima facie* right to the certificate of election, may go behind the certificate, and look at the original returns upon which the returning officer acted. The case did not, however, require a consideration of this point. \* \* \* The decision of the court was therefore that the commissioner, as the returning officer, had found that the returns showed that the relator was elected sheriff, and had made a certificate of the fact to the relator, and that his subsequent acts were simply void. It was not necessary to go behind his return and certificate. The court merely ascertained the true return, installed the person entitled under it, and removed a usurper, who had no legal certificate. The authorities are uniform that, except in a direct proceeding to try the title to the office, the correctness of the decision of the returning officer cannot be called in question. *McCrary, Elect. § 221; Cooley, Const. Lim. 778.* It is one thing to ascertain that decision, and another thing to impeach it. To go behind it is to contest the election, and such a contest, in the case of a sheriff, must be made under the Code, § 889,—corresponding to our section 396. The foregoing extract—and, more fully, the entire opinion, if consulted—demonstrates that the case of *State v. Wright, 10 Helsk. 237*, has been left without a semblance of authority to support it. See, also, *Batman v. Megowan, 1 Metc. (Ky.) 533; Conner v. Conner, 8 Baxt. 11; Hulseman v. Rems, 41 Pa. St. 396; O'Docherty v. Archer, 9 Tex. 295; State v. Marlow, 15 Ohio St. 114; Clarke v. Rogers, 81 Ky. 43; State v. Berry, 14 Ohio St. 315.* The judgment of the circuit court is reversed, and this court, proceeding to render the judgment the circuit court should have rendered, doth order and adjudge that the proceedings on information in the nature of quo warranto be declared null, and that the same be quashed. Reversed and rendered.

(98 Ala. 515)

JANNEY et al. v. MERCHANTS' & PLANTERS' NAT. BANK OF MONTGOMERY.

(Supreme Court of Alabama. July 27, 1893.)

PLEDGE OF STOCK—CLAIMS OF PLEDGOR AGAINST CORPORATION—ESTOPPEL.

One who pledges stock is not thereby estopped to assert his claims against the corporation for money owing him, and therefore

his assignee for the benefit of creditors can enforce such claims, though it render the stock worthless.

Appeal from chancery court, Montgomery county; John A. Foster, Chancellor.

Suit by the Merchants' & Planters' National Bank against Janney & Cheney for injunction, etc. From a decree overruling respondents' demurrers to the bill, they appeal. Reversed.

Tompkins & Troy and Horace Stringfellow, for appellants. Brickell, Semple & Gunter, for appellee.

COLEMAN, J. Moses Bros. owned 40 shares of the capital stock of the Montgomery Real-Estate Association, a corporation, which they pledged as security for a loan of money obtained by them from the Merchants' & Planters' National Bank. At the time of the loan and pledge of the stock, Moses Bros. were creditors of the Montgomery Real-Estate Association, and, after obtaining the loan and making the pledge, the association became indebted to them for an additional amount. Moses Bros. became financially embarrassed, and made a general assignment of all their effects to Janney & Cheney, for the benefit of all their creditors. The assignees sued in a court of law upon the debts due Moses Bros., and which passed to them by virtue of the assignment, and obtained judgment against the Montgomery Real-Estate Association. Execution upon this judgment was levied upon the property of the Montgomery Real-Estate Association, and the trustees were proceeding to enforce the collection of their judgment by a sale of the property when the Merchants' & Planters' National Bank, appellee, filed the present bill in chancery, the purpose of which was to enjoin the execution sale of the property, and require the trustees to redeem the stock pledged by Moses Bros. before enforcing their judgment against the Montgomery Real-Estate Association by a sale of its property. The bill also prays for a decree for the sale of the stock pledged, and the application of the proceeds to the satisfaction of complainants' debt.

It is averred in the bill that the property levied upon by execution is the entire property of the Montgomery Real-Estate Association, and that its value is not more than sufficient to pay the judgments and other indebtedness of the association, so that its sale under execution will render valueless the stock pledged as a security for complainants' debt. Complainants might properly call upon the respondent to redeem the pledge, and, in the event of its failure to do so, pray for a sale of the pledge, and the application of the proceeds to their debt, and no doubt it would be the duty of the assignees to redeem the stock pledged in the interest of other creditors of Moses Bros.

if it appeared from the bill that the value of the stock exceeded the debt for which it was pledged. But that is not the present case. The question presented by the bill is whether one who is a creditor of and stockholder in a corporation, by pledging his stock to secure an individual liability to a third party, thereby estops himself from collecting his debt against the corporation until he redeems the pledge. The assignees of Moses Bros., by the assignment, acquired no greater rights than Moses Bros. held; and, if the contract of pledge operates an estoppel as to them, their assignees will be estopped. *Insurance Co. v. Kamper*, 73 Ala. 346; *Walker v. Miller*, 11 Ala. 1067. The bill does not pretend that Moses Bros. were guilty of any fraud in the transaction, or made any misrepresentation, or were guilty of concealment, or held out any improper inducements as to the stock, or made any express promises as to their future action, or false affirmation as to existing facts. The rights of the parties, then, are those, and none other, which arise from the contract of pledging the stock. What did Moses Bros. pledge? What is stock, and what rights and privileges compose its constituents? Many writers have undertaken to define "stock." We need not repeat them. All agree that capital stock is a security for the creditors of a corporation. That stock entitles its holder to share in the management of the corporate business, to share in its profits during its existence, and in the surplus assets, after paying all its indebtedness. The claims of creditors have priority of stockholders. They must be first satisfied, even to the exhaustion of the capital stock and all the assets of the corporation, to the utter destruction of the value of the stock, if necessary, before the holder of stock can lay any prior claim to share in the profits or in the distribution of the property of the corporation. In the application of this principle, there is no discrimination against creditors who are also stockholders. Moses Bros., as creditors of the Montgomery Real-Estate Association, were entitled to have the assets of the corporation applied to the payment of their debt, although it rendered valueless every stockholder's interest in the corporate property, including their own stock. Certainly the pledgee of the stock acquired no greater right than the pledgor held and owned as a stockholder. Their rights as creditors remained unimpaired, and these rights passed to their assignees. It is no impairment of the value of the stock to apply the assets of the corporation to the payment of its just debts, in preference to applying it for the benefit of a stockholder or his assignee. Stock is subordinate to the claims of all the creditors of the corporation, and has no intrinsic value superior to their claims. This is the extent of property rights inherent in stock. The pledgee knew, when he received the stock,

all the debts of the corporation must first be paid; and, if the assets were insufficient for this primary purpose, the stock would be valueless. This is what the pledgee contracted for when he agreed to accept and did receive the stock as a pledge, and nothing more. Unless, therefore, Moses Bros. were guilty of fraud, misrepresentation, unlawful concealment, or, by some promise or false affirmation as to existing conditions, have estopped themselves from asserting the rights of creditors, or unless the contract of pledge of itself operates as an estoppel upon them as creditors, complainants' bill in this respect is without equity. There is no averment in the bill of any express act or declaration or omission which would operate an estoppel. Does the contract of pledge by implication create an estoppel upon their rights as creditors to enforce the payment of their debt? Clearly not. Stock does not create the relation of debtor and creditor between the holder of the stock and the corporation. By the pledge, complainants did not acquire a debt against the real-estate association. It was simply stock,—a property interest,—which entitled the owner to share in the management of the corporate affairs, to share proportionately in the dividends, and, when dissolved, in the surplus assets after payment of all debts. It is argued that the pledgor, as in case of a mortgagor, can do no act to impair this property interest after pledging it. We think the proposition sound, but the act complained of—that of a creditor enforcing his claim against the corporation—is not within the operation of the principle invoked. To apply the benefit of this principle to stock would invest it with a value it never possessed,—that of sharing in the distribution of the assets, in preference to that of a creditor. The mere contract of pledge, without more, carries with it no such agreement. If there was a defect in title at the time of the pledge, doubtless a better title afterwards acquired by the pledgor would inure to the pledgee; or the pledgor of the stock might be estopped, by the principle invoked, from interfering with the management of the corporate business, to the detriment of the stock pledged, or from sharing in the dividends, if any were declared, or if in any way he should undertake to prevent the holder from sharing in the surplus on dissolution after payment of all claims. Such conduct affects directly the value of the security pledged, and the doctrine of estoppel would intervene for the protection of the pledgee. Where all these interests are preserved and fully protected, it cannot be said the value of stock as such is diminished. Suppose the pledgee, in the exercise of his undoubted right, should sell the stock, and a third person become the purchaser; the purchaser would succeed to all the rights of both pledgor and pledgee. Moses Bros. would no longer be stockhold-

ers but would continue as creditors of the corporation. If the proceeds of the sale of the stock should prove insufficient to satisfy the debt due the pledgee, must the pledgor pay the balance due, before he can collect his debt from the corporation? Or could the purchaser of the stock require the pledgor to redeem it from him, before he would be permitted to proceed to enforce his judgment? This would seem to be the legitimate conclusion from the argument of the complainants. We find nothing in the contract of the pledge of the stock by Moses Bros. which implied the further pledge by Moses Bros. of their claim against the corporation, then existing or afterwards acquired, or which subordinated their rights, as creditors, to the rights of the pledgee. We do not think such an agreement was contemplated by the parties. The demurrer to the bill was well taken, and the court erred in its decree overruling the demurrer. If the complainant desires the assistance of a court of equity to decree a sale of the stock, the bill might be retained for this purpose. Reversed and remanded.

(100 Ala. 571)

#### TYSON v. CHESTNUT.

(Supreme Court of Alabama. July 27, 1893.)

#### CONTRACT OF LEASE — COVENANT FOR POSSESSION — REFORMATION.

A covenant in a contract of lease, guarantying possession of the premises for the term of the lease, intentionally inserted, will not be reformed so as to be conditional on the premises not being redeemed from a mortgage foreclosure, in the absence of clear and satisfactory proof that such was the intention of the parties.

Appeal from chancery court, Lowndes county; John A. Foster, Chancellor.

Suit by M. M. Tyson against J. C. Chestnut for injunction and reformation of a contract of leasing. The bill was dismissed, and complainant appeals. Affirmed.

J. C. Richardson, for appellant. Gamble & Powell, for appellee.

COLEMAN, J. J. C. Chestnut sued the complainant, Tyson, in a court of law, to recover damages for the breach of a contract of leasing for a term of four years. The lessor, "Tyson, guaranteed to said Chestnut the peaceable and legal possession of the place above mentioned for the time specified," (which was four years,) and it is for an alleged breach of this covenant that the said Chestnut sued. The complainant, Tyson, filed the present bill, praying for an injunction, and the reformation of the contract of lease. The averment of the bill is that, when "said lease and contract was made it was the express intention, contract, and understanding that the lease should be subject to the redemption of Elwing, Dickson, and others, and should not be in force or binding after such redemption; that the

lease should continue in force during the four years, provided said lands were not redeemed. Then and in that event, and from that time, the lease should be inoperative, and the unpaid rent should not be collectible; that the scrivener who drew the notes and lease omitted to insert or make a part of such lease the said provision," etc. The respondent, Chestnut, answered the bill, denying the material allegations as to any omission from the contract of lease, and averred that it was in accordance with the lease contract, as made, and that he required of the lessor the guaranty before he would rent the land for four years. The cause was submitted on the evidence, and the chancery court refused the complainant relief, and dismissed the bill.

We have no doubt of the correctness of the conclusion reached by the chancery court. It is very clear from the evidence of the respondent, and also of the scrivener,—who was the son-in-law, and for drawing the lease, and negotiating the terms of the lease, the agent, of the lessor,—that the guaranty was inserted intentionally. The parties differ materially as to the purpose and effect intended by the insertion and making a part of the lease the guaranty for "peaceable and legal possession." The evidence for complainant tends to show that it was inserted merely to protect the lessee against all loss for any improvements he might place upon the rented premises if the lands should be redeemed within the period of the lease, but contends, and offers evidence to show, that it was not intended to guaranty the possession. Respondent insists that the premises were greatly out of repair, and required the expenditure of a large sum of money to put the premises in condition for habitation and farming purposes, and that he was not willing to lease them for a shorter term, nor without a guaranty for peaceable possession during the entire period of four years. The case made by the bill, and the relief prayed, is that the contract be so reformed that it "will be subject to redemption, and continue in force during the four years, provided said lands were not redeemed, but, if said lands were redeemed, then and from that time the lease should be inoperative," etc. It is evident, not only from the bill of complaint, but from the evidence of both complainant and respondent, the guaranty was not inserted by mistake or fraud. Now, if this contract was reformed in the respect prayed for, the entire contract would be changed. The guaranty would be ineffectual to accomplish the purposes which complainant's evidence admits were intended, and would be wholly inoperative. Equity will reform instruments under proper averments and proof, but, to authorize a reformation of a written contract which is resisted, the proof must be clear, exact, and satisfactory, and the burden rests upon the party complaining. *Campbell v. Hatchett*, 55 Ala.

548; *Alexander v. Caldwell*, Id. 517; *Houston v. Faul*, 86 Ala. 232, 5 South. Rep. 433; *Clark v. Hart*, 57 Ala. 390; *Ohlander v. Dexter*, (Ala.) 12 South. Rep. 51. The evidence satisfies us that the lessor did not anticipate a redemption of the land, and it may be the lessee did or did not. The lessee provided against possibilities in this respect, and the lessor must bear the consequences of her mistaken judgment or neglect. The proof falls far short of that required to authorize the relief prayed for in her bill. There is no error in the record, and the case must be affirmed.

(98 Ala. 528)

**CHAPMAN v. FIRST NAT. BANK OF MONTGOMERY.**

(Supreme Court of Alabama. July 27, 1893.)

**CHATTEL MORTGAGE — LIVERY STABLE KEEPER — EXPENSE OF KEEPING STOCK — PRIORITY OF LIENS.**

Code, § 3089, which provides that any keeper of a livery stable shall have a lien on all stock kept and fed by him, for the payment of his charges, and he shall have the right to retain the stock for the payment of such charges, does not give such keeper a lien superior to the lien of a prior mortgage on stock so kept by him.

Appeal from circuit court, Montgomery county; John R. Tyson, Judge.

Action by the First National Bank of Montgomery against B. F. Chapman for money had and received. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendant appeals. Affirmed.

The cause was tried on an agreed statement of facts, which was substantially as follows: On August 31, 1888, one R. J. Chambers was indebted to the plaintiff in the sum of \$1,500, and to secure this indebtedness the said Chambers executed to the plaintiff a mortgage on certain personal property, including two mules, the proceeds of the sale of which are involved in this cause. This mortgage was duly recorded in the office of the probate judge of Montgomery county on September 6, 1888. The said Chambers was at that time, and has ever since been, a resident of Montgomery county; and said property was owned by him, and kept in said county. Afterwards, in the year 1890, said Chambers, while in the possession of said mules, put them in the livery stable of John H. Clisby, in the city of Montgomery, where the same were kept and fed by the said Clisby as a livery stable proprietor, the said Chambers becoming justly indebted to the said Clisby for the reasonable feeding and keeping of said mules at said livery stable in the sum of \$200. Afterwards the plaintiff and John H. Clisby each claimed to have a prior lien upon said mules. On March 13, 1891, with the consent of R. J. Chambers, the mortgagor, they entered into an agreement in writing by which it was agreed that the mules were to be sold by

the defendant, Chapman, and the proceeds held by him for the benefit of whichever party was held to be entitled to the same. In pursuance of said agreement the said Chapman, on March 18, 1891, sold the two mules, and received therefor the sum of \$200, which he now holds in his possession, and for which the plaintiff now brings this action.

A. A. Wiley, for appellant. Tompkins & Troy, for appellee.

**HARALSON, J.** The only question presented by this record is, has the statutory lien of a livery stable keeper, given by section 3089 of the Code, for the keeping and feeding of stock, precedence over a mortgage on the animals previously given by their owner, the law day of the mortgage having passed, and the animals remaining in the possession of the mortgagor? That section reads: "Any keeper, owner or proprietor of a livery stable shall have a lien on all stock kept and fed by him, for the payment of his charges for keeping and feeding such stock, and he shall have the right to retain the stock, or so much thereof as may be necessary, for the payment of such charges." This question is an undecided one in this state, and there is a conflict in the authorities on it. Mr. Jones, in his work on Liens, with these conflicting authorities before him, says: "A chattel mortgage upon a horse is superior to a subsequent lien of a livery stable keeper, where the horse is placed in the stable by the mortgagor after the making of the mortgage, without the knowledge of the mortgagee," and, as reasons leading to this conclusion, he adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property, by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights, as against the mortgagee, by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent, nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien, without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears, from the language of the statute, to be unavoidable." In support of these views he cites *Jackson v. Kasseall*, 30 Hun, 231; *Bissell v. Pearce*, 28 N.



Y. 252; Charles v. Neigelsen, 15 Ill. App. 17; Sargent v. Usher, 55 N. H. 287; Bank v. Lowe, 32 Neb. 68, 33 N. W. Rep. 482; Easter v. Goynes, 51 Ark. 222, 11 S. W. Rep. 212; McCreary v. Gaines, 55 Tex. 485; Small v. Robinson, 69 Me. 425; Jones, Chat. Mortg. § 474. The contrary construction, sustained by respectable authority, proceeds upon the idea that the animals must be preserved, and that their preservation inures to the benefit of the mortgagee; that the lien is of statutory creation, purely, and a mortgage executed while the statute is of force is taken in subordination thereof, and is subject to such statute, as a general rule of law; that a mortgagee, when he takes a mortgage, takes it, in legal contemplation, with full knowledge of, and subject to, the rights of a person who may keep the property at the request of the mortgagor or other lawful possessor, under the statutory lien, as he would do, to a common-law lien. Hammond v. Danielson, 126 Mass. 294; Colquitt v. Kirkman, 47 Ga. 555; Smith v. Stevens, 36 Minn. 303, 31 N. W. Rep. 55; Case v. Allen, 21 Kan. 217-220; Williams v. Allsup, 10 O. B. (N. S.) 417; The Granite State, 1 Spr. 277.

It is for us to determine which of these conflicting views is more consonant with reason, and the policy of our own statutes. Thus aided, we may the more readily arrive at the intention of the legislature in the creation of this statutory lien. Our registration laws proceed upon the idea that no one with notice of a mortgage on personal property has the right to deal with it, in any wise, to the prejudice of the mortgagee, and that, with knowledge or notice of the existence of the mortgage, he can acquire no rights in or title to the property mortgaged which are not in subordination to those of the mortgagor; and we can perceive no reason, in the absence of a provision of the statute to that effect, to exempt a livery stable keeper, more than any other person, from the force and effect of our registration laws. It is not for us to give these statutes any such construction unless we are constrained to do so by the manifest intention of the legislature. These laws are of universal and unvarying application to all persons and classes not specially exempted by statute. Code, § 1814. Accordingly, we have held that the due registration of a mortgage on personal property is constructive notice to those who deal with the property, as binding on them as actual notice would be, (Hudmon v. Du Bose, 85 Ala. 446, 5 South. Rep. 162; Heflin v. Slay, 78 Ala. 180; Mayer v. Taylor, 69 Ala. 403,) and that a factor or commission merchant, for instance, receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee, if the mortgage has been properly recorded in the county in which the cotton was raised, (Marks v. Robinson, 82 Ala. 70,

2 South. Rep. 292; Hudmon v. Du Bose, supra.) It will hardly be contended that if the mortgagor, when he took the animals mortgaged to the livery stable keeper, had notified him that the plaintiff held a mortgage on them to secure a debt which he owed it, the stable keeper would have been justified and protected, under our statute and decisions, in taking them into his charge and keeping, to the prejudice of the plaintiff, and yet the registration of plaintiff's mortgage was as effective as actual knowledge of plaintiff's rights and interests in the premises. The legislature, in the creation of this lien, did it, we must presume, with reference to our registration statutes, and the general policy of our law for the protection of mortgagees of personal property. In the adoption of the statute, it gave no preference or priority of lien over prior mortgages or incumbrances. The court below did not err in giving the general charge for the plaintiff, and in refusing a like charge for defendant. Affirmed.

(99 Ala. 239)

GOODEN v. MOSES et al.

(Supreme Court of Alabama. July 27, 1893.)

CONTRACT TO LOAN MONEY — BREACH — MEASURE OF DAMAGES — EVIDENCE.

1. A vendee of real estate is entitled to recover nominal damages only of the vendor for a breach of a contract to loan the vendee money with which to build a house on the land, where it does not appear that the vendee made any effort to borrow the money of others, or that for any reason she could not have borrowed it if she had made such effort.

2. In an action by the vendee for a breach of such contract it appeared that it provided that plaintiff should pay a certain sum monthly, and that, if she failed, defendant could annul the contract, and retain a certain part of each monthly payment received as rent, which part was "agreed by the parties to be the monthly rental value of the premises," which was a vacant lot. The contract was introduced in evidence, but there was no evidence of what would have been the rental value of the lot if it had been improved by the erection of a house thereon of the value mentioned in the contract. Held that, if the measure of plaintiff's damages was the difference between the rental value of the lot improved and unimproved, there was no evidence on which to base a recovery.

3. Evidence as to the value of the lot at the date of such contract and at the time suit was brought is irrelevant.

Appeal from circuit court, Montgomery county; J. R. Tyson, Judge.

Action by Carrie Gooden against Moses Bros. for breach of a contract to loan plaintiff a certain sum of money with which to improve a lot bought by plaintiff of defendants. From a judgment in favor of plaintiff for nominal damages only, she appeals. Affirmed.

Brickell, Semple & Gunter, for appellant. Tompkins & Troy, for appellees.

HARALSON, J. This suit is for the breach of a contract, the substance of which, so far

as necessary to recite it, was that the defendants, Moses Bros., agreed to sell to the plaintiff, Carrie Gooden, a certain lot of land in the city of Montgomery at the price of \$622.50, \$150 of which plaintiff was to pay, and did pay, in cash, and the balance was to be paid in monthly installments of \$15 each, with interest; and defendants, on the full payment of the purchase money, were to give to plaintiff a warranty deed to the property. The contract contained the provision, also, that if plaintiff failed to pay said installments of deferred payments of the purchase money, the defendant should have the right to annul the contract, take possession of the lot, and retain out of the money paid \$8.50 as rent per month up to the date of forfeiture, returning the surplus, if any, to plaintiff. The sum of \$8.50 was "agreed and declared by the parties to be the monthly rental value of the premises." The plaintiff agreed to keep the property insured for the benefit of the defendants. After all the foregoing and some other stipulations comes the following and final clause of the contract: "And it is agreed between the parties to this agreement that the parties of the first part [defendants] will advance three hundred dollars to build a house, the said party of the second part [plaintiff] obligating herself to repay the said amount as the lot is paid for, and to keep the building insured." The contract was introduced in evidence by the plaintiff, and she proved that she had complied with her part of it; that the lot was a vacant one, suitable only for a dwelling house, and that, unimproved, the rental value of the lot was nothing; that she took a carpenter to defendants, with estimates for a \$300 house, and defendants said the estimates were too high, and they would get their carpenter to put up a house for that sum, but had never done so, nor advanced her any part of the \$300 they agreed to lend her, though often requested to do so, before the commencement of this suit; that the defendants, after the making of said contract with plaintiff, had failed, become insolvent, and made a general assignment for the benefit of their creditors, including the contract of the plaintiff, and that she has, since said assignment, been making payments for the purchase of said lot to their assignees. The plaintiff offered to prove the value of said lot at the date of said contract for sale and its present value, but the court, on objection of defendants, would not allow the proof, and plaintiff excepted. The court, on the foregoing state of the proof, charged the jury, at the request of the defendants, "that in this case the plaintiff was entitled to recover only nominal damages," to which charge the plaintiff excepted; and it is on these reservations of exceptions that errors are here assigned.

There was no evidence that plaintiff made any effort to borrow from any other person the sum defendants agreed to advance to

her, or that she could not, for any reason, have borrowed it, if she had made the effort to do so. Nor was there any evidence of what would have been the rental value of the lot if it had been improved by the erection on it of a \$300 house. The contract does not show that fact. It fixes the arbitrary sum of \$8.50 as the agreed value of the monthly rental to be paid by plaintiff in case she forfeited her contract, and this, without reference to whether the lot was improved or unimproved, and, as may be supposed, as a stimulus against the forfeiture by plaintiff. We refer to this lack of evidence to show that, if plaintiff's contention in the case were conceded,—namely, that the measure of damages for a failure by defendants to lend this money is the difference between the rental value of the lot, improved and unimproved,—there is no evidence on which to base such an estimate of recovery. The rule is a familiar one that the damages which are recoverable for the breach of a contract must always be the natural and proximate consequence of the injury complained of, which rule excludes the idea of such damages as are merely consequential, remote, or speculative, and limits a plaintiff's recovery in actions *ex contractu* to a just compensation for the actual loss which he has sustained by the defendant's failure to comply with his promise. 2 Greenl. Ev. § 256; *Trustees v. Turner*, 71 Ala. 433; *Clements v. Beatty*, 87 Ala. 239, 6 South. Rep. 151; *Howard v. Taylor*, 90 Ala. 241, 8 South. Rep. 36. The difference of damage for the breach of a contract for the sale and delivery of merchandise and the breach of one for a failure of a party to advance or pay the money he agreed to lend another is, on principle, the same, and scarcely distinguishable. The lending of money is as much of a business, as generally carried on, as the selling of goods. Generally, and except as modified by special circumstances, in the case of a contract for the sale and delivery of ordinary merchandise at a certain place, in a certain time, and at a certain price, the amount of damages that can be recovered for its breach is the difference between the contract price and the market price of the same class of goods at the time and place of delivery, because this enables the plaintiff to make himself whole, without any pecuniary loss, by going into the market and supplying himself with the same class of goods at the same or a different price. Of course, the seller would be liable for any difference in the price at which the goods were contracted to be sold and at which they might be supplied. If, for any reasons, the purchaser may not thus protect himself from loss, the reason of the rule ceases, and can have no application. *Bell v. Reynolds*, 78 Ala. 511; *Rose v. Bozeman*, 41 Ala. 678; *Wood, Dam.* p. 15, § 12. Another well-recognized principle is that when one is injured by the breach of a contract by another he is bound

to protect himself, if he can do so, with reasonable exertion, or at trifling expense, and can recover of the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Iron Works v. Hurley*, 86 Ala. 219, 5 South. Rep. 418; *Culver v. Hill*, 68 Ala. 70; *Strauss v. Meertief*, 64 Ala. 299; *Miller v. Mariner's Church*, 20 Amer. Dec. 341; 1 Sedg. Dam. § 201. The least damages that can be allowed for a clear breach of a legal duty are nominal damages, which are always recoverable when such a breach is shown, and no special damages are proved. *Bagby v. Harris*, 9 Ala. 173; *Adams v. Robinson*, 65 Ala. 593; *Trustees v. Turner*, supra. We conclude, therefore, that, under ordinary circumstances, the damages for the breach of a contract to lend money cannot be more than nominal.

The rate of interest on loans is fixed by law. If one contracts to lend it at a less rate than that fixed by law, and he fails to comply with his contract, and the other party has to borrow it elsewhere, and pay a greater rate, he may recover of the party violating the contract the difference between the rate at which the money was agreed to be lent and the rate he, the borrower, had to pay inside the legal rate. 2 Sedg. Dam. § 622; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. Rep. 177; *Luce v. Hoislington*, 56 Vt. 436. As has been stated, there is an absence of evidence to show that the plaintiff might not have protected herself from loss without more than nominal damages to defendants. This she was bound to do if she could. The evidence sought to be introduced and excluded was irrelevant, and there was no error in the charge of the court to the jury. Affirmed.

(99 Ala. 106)

#### HOOKS v. STATE.

(Supreme Court of Alabama. July 27, 1893.)

MANSLAUGHTER—JUSTIFIABLE HOMICIDE—INSTRUCTIONS—REASONABLE DOUBT.

1. Whether detection by a husband of his wife and another in a compromising position was sufficient provocation to reduce his killing of the man to manslaughter is a question for the jury, no provocation less than detection of the parties in actual sexual intercourse being sufficient as a matter of law.

2. There is no law, in the absence of a statute, which wholly excuses a husband from liability for killing his wife or her paramour, though he kill them, or either of them, while in the act of adultery.

3. In a prosecution for murder, an instruction that "if the jury find from the evidence that the conduct of the deceased, at the time defendant entered into combat with him, was such as would provoke defendant, then, in estimating the degree of provocation, they may look to the fact (if they find from the evidence that it is a fact) that the combat was had at the house of defendant," is properly refused, being argumentative, confused, and misleading.

4. In a criminal case, an instruction that, "if the jury believe all the evidence they cannot acquit defendant," is reversible error, as it does not require them to believe the evidence beyond a reasonable doubt.

Appeal from circuit court, Elmore county; N. D. Denson, Judge.

Indictment against Thornton Hooks for murder. Defendant was convicted of murder in the second degree, and appeals. Reversed.

On the trial the testimony for the state tended to show that defendant cut the throat of deceased, and afterwards shot him with a gun. One of the witnesses for the state testified that on his coming to the deceased, who was then in a dying condition, the deceased said to him, "I am a dying man," and told the witness "that defendant shot and cut him for nothing, while he was trying to stop a difficulty between defendant and defendant's wife; that after he was cut he left defendant's house, and tried to go away; and that he traveled as far as he could, and, being weary and weak, sat down on a stump, and defendant came up while he was sitting there," and shot him, having previously cut him before he left defendant's house. The testimony for defendant tended to show that he came to his house, and, on walking up to the window, saw deceased and his (defendant's) wife just about to have sexual intercourse, whereupon he jumped through the window, got his gun, and started for deceased; that deceased and defendant's wife ran out of the house; and that, in the scuffle and struggle that ensued, defendant cut the throat of the deceased, who ran from him, and defendant followed him, and shot him with the gun. The testimony for defendant further tended to corroborate the above testimony of defendant in his own behalf, by showing that a pallet was found in defendant's house, behind the door, upon which was spread the deceased's oilcloth coat, and that the deceased's hat was found in defendant's house immediately after the difficulty, and, further, by showing that there were signs and indications of a struggle in defendant's yard, about his house. Defendant requested the court to give the following written charges, and separately excepted to their refusal: (1) "If the jury believe from the evidence that the defendant saw his wife and the deceased in such a position, one to the other, as to lead a reasonably prudent man to believe that they were about to commit adultery, and thereupon the defendant entered into a combat with deceased, and before sufficient time had elapsed for the defendant's passion, aroused by such provocation, to cool, he killed the deceased, then the law tenderly regards a homicide thus committed, and makes it only manslaughter." (2) "If the jury find from the evidence that the conduct of the deceased, at the time the defendant entered into combat with him, was such as would provoke the defendant, then, in estimating the degree of provocation, they may look to the fact (if they find from the evidence that it is a fact) that the combat was had at the house of the defendant." (3) "If the jury believe from

the evidence that the defendant, to prevent the deceased committing adultery with his wife, entered into a combat with the deceased, and that at the time he inflicted the wound which produced the death the provocation was so recent and strong that he would not be considered at the time master of his own understanding, then the defendant would be guiltless."

Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was convicted of murder in the second degree. The exceptions reserved arise from a charge given at the request of the prosecution, and the refusal to charge as requested by the defendant. The charge given for the prosecution was as follows: "If the jury believe all the evidence, they cannot acquit the defendant." This charge instructs the jury, in effect, that if they believe the evidence the defendant must be convicted of some offense. The defendant reserved an exception to the giving of this charge. The jury are not required, under this charge, to believe the evidence beyond a reasonable doubt. It is made sufficient for conviction if they only believe the evidence. Prosecuting attorneys should be careful, in the preparation of charges, that plain principles of law be not violated, and the courts should closely scan the phraseology of charges requested. That the proof must satisfy the jury of the defendant's guilt beyond a reasonable doubt, before they are authorized to convict, is an "ancient landmark," and one which should be preserved and always recognized. *Green v. State*, (Ala.) 13 South. Rep. 452; *Pierson v. State*, (Ala.) 13 South. Rep. 550.

Where one person detects another in the act of adultery with his wife, and he immediately slays the adulterer or his wife, as matter of law, the provocation is sufficient to reduce the killing to manslaughter. The law does not declare that anything less than actual sexual intercourse is a sufficient provocation, as a matter of law, to reduce the offense from murder to manslaughter. It may be that the detection of another under circumstances such as testified to by the defendant may provoke and engender passion to such a degree as to overthrow reason; and if, under the influence of passion thus aroused, he immediately attack the offending party, and slay him, before cooling time has intervened, not from malice or unlawfully formed design, but from such passion, thus provoked, the offense may be manslaughter. Whether the party acted under the influence of such a passion, and whether the provocation was sufficient, and whether there had been "cooling time," are questions of fact to be determined by the jury. The principle we announce is that the law does not declare the provocation sufficient unless the parties are detected in the act; but a jury may say whether the compromising posi-

tion of the parties was sufficient to arouse passion in the husband to such a degree as to overthrow reason, just as a jury may say, in some other cases, whether the offense was the result of sudden and sufficient provocation to reduce the offense from murder to manslaughter. Charge 1 requested by the defendant, and refused, was faulty, in that it assumed, as matter of law, that the provocation was sufficient. It should have been left to the jury to say from the evidence whether the provocation was sufficient, and whether he acted under the influence of sudden heat of passion thus engendered, and, before cooling time, took the life of the deceased.

There was no error in refusing the second and third charges requested by the defendant. There is no law, unless made so by statute, which wholly excuses the husband from liability for taking the life of the wife or her paramour, although he slay them, or either, while in the act of adultery. The third charge asserts a contrary principle. The second charge is argumentative, confused, and misleading, and was properly refused. Reversed and remanded.

(101 Ala. 133)

PAIGE et al. v. BARTLETT et al.

(Supreme Court of Alabama. July 27, 1893.)

EXECUTORS AND ADMINISTRATORS — ACTIONS AGAINST — EQUITY — BILL — COURTS — JURISDICTION.

1. Where an administrator fails to make a final settlement, and removes to another state, where he dies, owing the estate, his devastavit constitutes such a breach of his bond as to make it an accrued claim against the estates of his sureties, and put in operation the running of the statute of nonclaim, requiring claims against an estate to be presented to the personal representatives within 18 months after their appointment.

2. A bill to enforce a claim against personal representatives of a debtor does not sufficiently show that the claim was presented to defendants within 18 months after their appointment, as required by the statute of nonclaim, where it merely alleges that the presentment was made by the filing of a bill against them by a certain person, and subsequent amendments by which complainants were made parties, without showing what right or interest such person had in the claim, or what her right of action, as set up in her bill, was, since the allegation of presentment is a mere conclusion of the pleader.

3. A bill to enforce a claim for devastavit against personal representatives of some of the sureties on an administrator's bond, and for a settlement of the estate, and also to enforce against the representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law, is multifarious.

4. A bill against the personal representatives of the sureties on an administrator's bond for a settlement of the estate, and to enforce a claim for a devastavit, which avers that an heir of the decedent is dead, and her estate entitled to whatever amount she would receive if living, but which does not make her heirs nor her personal representative parties, nor aver that there is no heir nor representative, is demurrable.

5. Such is not a case for the appointment of an administrator ad litem under Code, § 2283, providing that when, in any proceeding in

the probate or chancery court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, it shall be the duty of the court to appoint an administrator ad litem whenever the facts rendering the appointment necessary shall appear in the record, or shall be made known by affidavit.

6. Act Dec. 7, 1866, forming Clay county out of portions of Talladega and Randolph counties, since it made no provision to that effect, did not oust the old counties of jurisdiction of suits pending in their courts, including administrations pending in their probate courts, and therefore administration which was pending in the probate court of one of the old counties cannot be removed to the chancery court of the new.

7. Section 5 of the act provides for the transfer of suits pending against defendants from the courts of the old counties into those of the new, but has no reference to administrations pending in the probate courts of the old counties.

8. In an act forming a new county out of portions of old ones, a provision for the transfer of suits pending against defendants from the courts of the old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administration should not be removable.

Appeal from chancery court, Clay county; S. K. McSpadden, Chancellor.

Bill by James H. Paige, as administrator of Martha Harris, deceased, and others, against George W. Bartlett, as executor of James L. Bunhill, deceased, and others. A demurrer to the bill was sustained, and complainants appeal. Bill dismissed.

The original bill was filed on September 26, 1891, by James H. Paige, as administrator of Martha Harris, deceased, formerly Martha Mayes, widow of James E. Mayes, deceased, and others, who were the heirs at law of James E. Mayes, and also against J. L. Hood, as administrator of Jane Halsell, deceased, a sister of said Mayes. The allegations of the bill, briefly summarized, are as follows: James E. Mayes died on June 29, 1862, a resident citizen of Talladega county, and on August 29, 1862, J. W. King was appointed administrator of his estate, and gave bond as such administrator. That J. L. Bunhill, L. M. Burney, J. D. McCann, J. F. Martin, and Thomas Adams were his sureties. The said King, acting as such administrator, received considerable property and assets of the estate of James E. Mayes, deceased, and made several partial settlements; the last being made in the probate court of Talladega county on May 30, 1877. That at the time of this settlement he had in his hands a large amount of money belonging to said estate. That said King, as such administrator, never made a final settlement of his administration, but moved to the state of Arkansas, and died there in the year 1889, owing the estate of said Mayes a large amount of money. The prayer of the bill was for the removal of the administration of James E. Mayes' estate from the probate court of Talladega county into the chancery court of Clay county; to settle said estate in the chancery court of Clay county; and to charge the personal rep-

resentatives of the several deceased sureties on the bond of said J. W. King, as administrator of James E. Mayes, deceased, with his alleged devastavit.

The defendants demurred to the bill. The principal grounds of demurrer were as follows: (1) That there was not shown by the bill a sufficient presentment of the claim on which the suit was founded, under the statute of nonclaim, and no sufficient reason or excuse is averred for the failure of claimants to present such claim. (2) That it was not shown upon what claim or cause of action the suit alleged to have been brought by Mattie Paige on February 8, 1890, was founded, nor what right said Mattie Paige had to present said claim, and that it was shown that said suit was virtually abandoned by amendment, by an entire change of parties complainant. (3) There was no privity shown between J. H. Paige, as administrator, and Mattie Paige. (4) There was not sufficient reason or facts shown in the bill, as amended, to dispense with the further administration of the estate of James E. Mayes, and that the administrator de bonis non of said Mayes' estate was a necessary party complainant to the bill. (5) That the bill was multifarious, in that, as amended, it sought to recover a statutory penalty against W. T. Burney and John H. Short, in their individual capacity, and at the same time also sought a settlement of the administration, and to enforce a charge on the estates of the deceased sureties. (6) That it was affirmatively shown that more than 18 months had elapsed from the appointment of the administrator of Burney's estate before the bringing of the suit by Mattie Paige, on February 8, 1890. (7) That on the facts shown in the bill the court could not appoint an administrator ad litem on the estate of Sarah King, deceased, but her heirs or administrator were necessary parties. (8) That the chancery court of Clay county cannot take jurisdiction of this cause, or the settlement of the estate of James E. Mayes, deceased.

W. L. Hood, for appellants. W. M. Lackey and O. O. Whitson, for appellees.

HARALSON, J. The commission of the alleged devastavit by J. W. King, as administrator of J. E. Mayes' estate, as set up in the bill, would constitute such a breach of his administration bond as to make it an accrued claim against the estates of his sureties on his bond, and put into operation the running of the statute of nonclaim. *Glass v. Woolf's Adm'r*, 82 Ala. 281, 8 South. Rep. 11; *Martin v. Ellerbe's Adm'r*, 70 Ala. 334; *Taylor v. Robinson*, 69 Ala. 269; *McDowell v. Jones*, 58 Ala. 25.

2. The bill shows that James F. Martin, L. M. Burney, Jos. D. McCann, James L. Bunhill, and Thomas Adams were the sureties of J. W. King, on his bond as administrator of the estate of said J. E. Mayes. All

these sureties, as is shown, are dead, and their administrators, except the one of said Adams, are made parties defendant to the bill, sued, as stated, to require them to account for the alleged devastavit of said King as administrator of said Mayes. Thomas Adams, as is shown, has been dead for many years, and one William Hamilton was appointed his executor by the probate court of Clay county, and his estate was finally settled in said court several years ago. The dates of the appointment of the personal representatives of these several sureties on said administration bond were as follows: Henry A. Manning was appointed administrator of J. F. Martin on the 21st of November, 1884; William T. Bishop and John H. Short, of L. M. Burney, on the 29th June, 1888; George W. Bartlett, as executor of James L. Bunhill, on the 7th of December, 1889; and Thomas Northen, as administrator of Jos. D. McCann, on the 18th of September, 1890. In the original bill, as filed, no presentment of the claim sued on in this action was averred to have been made to the personal representatives of these several sureties. The presentment was attempted to be shown by the amendment filed to the bill. For the greater certainty, and that we may not misinterpret the averments on which complainants rely, as showing a presentation of this claim under the statute, we quote the language of the amended bill, as follows: "The complainants charge and aver that the claim for which this suit was brought was on the 8th day of February, 1890, duly and legally presented to John H. Short and W. T. Bishop, as administrators of L. M. Burney, deceased, and to George W. Bartlett, as executor of James L. Bunhill, deceased, by filing a bill in the chancery court of Clay county, Ala., against them, by Mattie Paige, and on the 18th day of September, 1890, by amendment to the original bill, the other complainants presented their claim against defendants, and that complainants presented their claim to Thomas Northen, administrator of Jos. D. McCann, deceased, on the 21st day of July, 1891, by suing him in the chancery court of Clay county, Ala. And complainants aver that on the 25th day of September, 1891, the bill, as originally filed in said case, together with the amendments thereto, was dismissed by the court, on motion of the defendants, because there was a misjoinder of parties, in that, because the only party to the original bill of complaint had been stricken out by amendment to the bill, and because of said amendment, there was an entire change of parties. Complainants further charge and aver that said original bill and amendments thereto were exhibited in this court by those who had a legal right to present their claim to defendants, and that upon the dismissal of their said bill, to wit, on the 25th of September, 1891, the said complainants, or their legal

representatives, did on the 26th of September, 1891, file the present bill in this court, seeking to enforce the collection of their said claims. Orators further charge and aver that the reason their claim was not presented to James H. Short and William T. Bishop, as administrators of L. M. Burney, within 18 months from the time they were appointed such administrators by the probate court of Clay county, Ala., was because the said Short and Bishop did not give notice to creditors as required by law, to present their claims against the estate of the said L. M. Burney, deceased. And orators charge and aver that by the failure of the said Short and Bishop to give such notice to creditors the said Short and Bishop made themselves personally liable to any creditor whose claim would have been good, if presented within 18 months from the date of their appointment. Complainants amend their bill by suing John H. Short and William T. Bishop individually, and so as to strike their names out as originally sued as administrators of L. M. Burney." It will be observed that the presentment of this claim is averred to have been made by the filing of two bills in the chancery court of Clay county,—the first on the 8th February, 1890, by Mattie Paige against John H. Short and William T. Bishop, as administrators of L. M. Burney, and George W. Bartlett, as executor of J. L. Bunhill, and by amendments thereto filed on the 18th of September, 1890, by which complainants were made parties thereto. It will also be seen that what right or interest said Mattie Paige had in and to the claim upon which the present bill is filed, or what her right of action, as set up in said bill as filed by her, was, and her right to maintain said bill, are not averred. Neither is it shown what amount she and the other complainants brought in by amendment claimed in that suit, nor any facts informing defendants of the existence and nature of the claim and of the intention of those in interest to enforce it. Substantially, all that is averred is that a claim, without describing its nature or amount, was presented in that suit, which is a mere conclusion of the pleader, not amounting to a presentation as required by statute. *McDowell v. Jones*, 58 Ala. 25; *Smith v. Fellows*, Id. 467; *Bibb v. Mitchell*, Id. 657; *Floyd v. Clayton*, 67 Ala. 269; *Agnew v. Walden*, 84 Ala. 502, 4 South. Rep. 672. The reference to the second bill, filed on 21st July, 1891, by said Mattie Paige against Thomas Northen, as administrator, which is alleged to have been dismissed on the 25th September, 1891, is just as defective as an allegation of presentment; but that defect is cured by the further allegations that on the 26th of September, 1891, the present bill was filed against said administrator and others, which date is within the 18 months after his appointment, and the claim is sufficiently described in the present bill.

3. The demurrer is confessed as to John H. Short and William T. Bishop, as administrators of L. M. Burney, and by amendment their names, as such, were stricken out of the bill, and added as individuals, so that the suit should stand against them in their individual, and not in their representative, capacity. In this the bill was made multifarious. The claim against them was a personal penalty alleged to have been incurred by them, for which they are answerable at law, and which is a separate and distinct matter, having no necessary connection with the objects of this bill. *Martin v. Ellerbe's Adm'r*, 70 Ala. 335; *Hardin v. Swoope*, 47 Ala. 273; *Clay v. Gurley*, 62 Ala. 14; *Conner v. Smith*, 74 Ala. 121.

4. Of Sarah King it is averred that she was one of the several and only heirs at law of said J. E. Mayes at his death; that she died in 1884; and that her estate is interested in this suit, entitled to whatever amount she would receive, if living, out of the estate of Mayes. But neither her administrator nor her heirs at law are joined as complainants or defendants. The bill also fails to aver that there is no administrator or executor of her estate, or whether or not she left children. It was subject to demurrer on this account, and was not a case made out, under the statute, for the appointment of an administrator ad litem. Code, § 2283; *Fretwell v. McLemore*, 52 Ala. 124; *Sullivan v. Lawler*, 72 Ala. 71.

5. Independent of any of the foregoing principles, there remains a question which determines the fate of the present bill. The county of Clay was formed out of portions of Talladega and Randolph counties by act of the general assembly adopted December 7, 1866. Acts 1866-67, p. 92. The legislature, in the adoption of that act, made no provision concerning the administrations of estates pending in the probate courts of the counties of Talladega and Randolph at or after the formation of the new county. It was its exclusive province to do so. In the absence of any such provisions, such administrations continued in the parent counties, unaffected by the formation of the new county. *Van Hoose v. Bush*, 54 Ala. 346; *Wright v. Ware*, 50 Ala. 549; *Coltart v. Allen*, 40 Ala. 155. The jurisdiction of the old counties in which suits were pending was not ousted in the formation of the new county, either as to the persons or subject-

matter, and this principle was as applicable to administrations pending in the probate courts of these counties as to suits in any of their courts. 4 Amer. & Eng. Enc. Law, 355; *Lindsay v. M'Cormack*, 2 A. K. Marsh. 229; *Drake's Adm'r v. Vaughan*, 6 J. J. Marsh. 147; *Arnold v. Styles*, 2 Blackf. 391; *West's Appeal*, 5 Watts, 87. Mayes resided and died in Talladega county in 1862, and said King was appointed his administrator by the probate court of that county, in that year. If, for any allowable reason, it became necessary or proper to transfer the settlement of the administration of that estate from the probate court of Talladega county into a court of equity, the chancery court of Talladega, in whose probate court said administration was pending, and not the chancery court of Clay county, had jurisdiction, and was the one into which such settlement ought to have been removed. In the absence of legislation authorizing it, the chancery court of Clay had no more jurisdiction of the administration and settlement of the estate than any other chancery court of the state.

6. The fifth section of said act makes provision for the transfer of suits pending against defendants from the courts of the old counties into the new ones, and has no reference to administrations pending in the probate courts of the older counties. Indeed, this provision is to be construed as the expression of a legislative intent that such administrations were not to be removed into the probate court of Clay. From what has been said it follows that the chancery court of Clay county has no jurisdiction of this cause, and a decree will be here entered dismissing the bill. Dismissed.

(108 Ala. 215)

#### STEINER et al. v. PARSONS.

(Supreme Court of Alabama. July 27, 1893.)

CORPORATIONS—APPROPRIATION OF FUNDS BY ITS PRESIDENT—ACTION BY STOCKHOLDER—FAILURE TO APPLY TO DIRECTORS—EXCUSE—COMPLAINT—ALLEGATIONS OF FRAUD—SUFFICIENCY.

1. Where a stockholder of a corporation brings an action against it and its president to compel the latter to account for money of the corporation appropriated by him to his own use, without first requesting the directors to bring such action, the complaint must allege facts showing that such request, if made, would have been refused, or, if granted, the litigation following would necessarily have been under the control of persons opposed to its success.

2. A complaint alleged that the affairs of the corporation were under the complete control of such president, and it could not therefore bring the suit, and that the board of directors were under the control of such president, and interested as guilty parties in the frauds complained of, and on these accounts, and because such directors have always acted and conspired together in defending against charges similar to those herein complained of, it would be futile for complainant to apply to such directors to institute the suit. *Held*, that such averments are mere statements of conclusions, and insufficient to entitle complainant to maintain the action.

<sup>1</sup> Code, § 2283, provides: "When in any proceeding in the probate or chancery court, or other court having chancery jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein," etc.

3. The complaint, after reciting the issuance of bonds and the execution by such corporation (a railroad company) of a trust deed to secure them, and the provision of such deed as to the use of the proceeds of such bonds, alleged that the trust company paid the proceeds of the bonds to the president; that a portion was applied to the uses intended, but a large portion was obtained from such trust company by drafts drawn for the construction of such railroad by use of false certificates attached to the drafts, and, after the money was so drawn, and in the hands of such president, it was, under various pretenses, appropriated by him to his own use. *Held*, that such averments of fraud were too indefinite and uncertain, and a demurrer to such section should have been sustained.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by J. H. Parsons against B. Steiner and the Birmingham, Powderly & Bessemer Street-Railroad Company, of which Steiner is president and complainant is a stockholder, to compel defendant Steiner to account for certain funds belonging to such corporation, alleged to have been appropriated by him to his own use. From an order overruling a demurrer to the complaint, defendants appeal. Reversed.

The bill was filed by the appellee, Parsons, against appellants, B. Steiner and the Birmingham, Powderly & Bessemer Street-Railroad Company, the defendant corporation, in his own behalf, as a stockholder, and in behalf of any other stockholder or stockholders in said corporation who choose to join as parties and contribute to the expense of the litigation. It alleges that the defendant Steiner is a stockholder of the defendant the Birmingham, Powderly & Bessemer Street-Railroad Company, a corporation organized under the general incorporation laws of the state; that said Steiner is in possession of the office of president of said corporation, which office he unlawfully usurps; that there is pending in the circuit court of Jefferson county an action in the nature of a quo warranto to oust him from the office of director and president of said corporation; that I. R. Hochstader, Joseph Beltman, and L. G. Pettijohn, who live in Birmingham, Ala., J. W. Brown and D. H. Gordon, who live in Baltimore, Md., and E. Lesser, whose residence is alleged to be unknown, constitute, with said Steiner, the board of directors of said corporation; that from the 8th day of April, 1889, to the 24th day of February, 1890, said Steiner was regularly and duly elected and qualified as director of said corporation, and was also its treasurer, and, as such, was the custodian of the money and choses in action of the corporation during that period; that, while such treasurer, said Steiner fraudulently appropriated to his individual use \$600 of the money of said corporation, and covered and concealed said fraudulent disposition of the funds by a voucher which purported to be given for right of way for the railroad line, then being constructed, which voucher was false and fraudulent, and he now claims that

said money was expended by him in procuring terminal facilities in the city of Birmingham for said railroad; that in the month of October, 1889, said Steiner was intrusted by said corporation with the sale of 125 \$1,000 bonds of said corporation, secured by a deed of trust on all the property and franchises of the corporation, and said Steiner, as the trusted agent of said corporation, agreed to obtain for said bonds the highest price possible, and account for the entire proceeds of said bonds; that said Steiner sold said bonds in the city of Baltimore, Md., and obtained for them their full face value, \$1,000 for each bond,—amounting in the aggregate to \$125,000, but he reported to said corporation that he had sold said bonds at and for the sum of \$850 for each bond, amounting to \$106,250, and accounted to said corporation for said last-named sum, and fraudulently appropriated to his own use the sum of \$18,750; that complainant, although a director of said corporation at the time of the sale of said bonds, never knew until recently—until within a few weeks before the filing of this bill—that said Steiner had sold said bonds for \$125,000, but believed he had sold them for \$850 for each bond,—\$106,250 for all of them; that in December, 1889, said Steiner claimed to be desirous of advancing the interest of the corporation, procured permission from the board of directors to purchase the necessary steel rails for the construction of the railroad line, and he procured about 700 tons rails for such purpose, and sold them to the corporation for \$33 per ton, and they were actually worth only about \$15 per ton, and said Steiner paid about that price for the same, and actually made a profit of about \$10 per ton on said rails; that they were purchased from the Talladega & Coosa Valley Railroad Company, of which company said Steiner was at the time an officer; that in order to cover up and conceal the said profits on said rails, so that complainant could not know the fraudulent appropriation of them by him, said Steiner obtained bills in the name of the Talladega & Coosa Valley Railroad Company to be made out, falsely showing the price of said rails to be \$33 per ton; that the allegations as to the purchase and sale of said rails to said corporation are made on the information and belief of complainant; that on the 2d of April, 1890, at a meeting of stockholders, at which a quorum was not present, and which it is charged was not a valid meeting, resolutions were adopted by the stockholders present, who did not represent a majority of the said stock of the corporation, authorizing the issue of bonds of the corporation to the Mercantile Trust & Deposit Company of Baltimore, Md., or bearer, for the payment of said amount of money; that said Steiner procured the delivery to himself of said bonds, and, with the aid of said Mercantile Trust & Deposit Company, sold them in the



markets in the city of Baltimore, Md., and said Steiner has appropriated a large proportion of the proceeds of the sale of said bonds to his individual use and benefit, but how much complainant cannot say. It is further charged in section 8 of the bill, in reference to the issue of said series of \$125,000 of first mortgage bonds, that, among other things provided for in the deed of trust which was executed to the Mercantile Trust & Deposit Company by said corporation to secure them, it was provided as follows: "And it is hereby understood and agreed that the proceeds of said bonds, as the same may be sold, shall be held by the party of the second part, to be paid out by the party of the second part for the purpose, first, of preparing and executing said bonds and this deed of trust, and paying all necessary expenses of constructing and equipping the railroad line of the party of the first part, including the purchase of engines, locomotives, rails, rolling stock, and all other materials for the construction and operation of said railroad line, and upon the draft of the president of the party of the first part, supported by certificates or sworn statements of the engineer in charge of construction of the road, that the work for which said bonds are to be issued has actually been done, or upon the draft of the president, accompanied by bills of lading for rail, motive power, or rolling stock, or other material especially for the use of said railroad;" and it is averred that said Mercantile Trust & Deposit Company, from time to time, paid out the proceeds of the bonds of said corporation on drafts drawn by it, which money went into the hands of said B. Steiner; that a great portion of said money went into the construction of said railroad, as was intended, but a large portion of said money was obtained from said trust company by drafts drawn for construction of said railroad by the use of false certificates attached to said drafts, and, after the money was so drawn, and in the hands of said Steiner, it was, under various pretexts, appropriated by the said Steiner to his own use, for which he should be held to account. The further averment is made that the affairs of the corporation are now under the complete control of the said Steiner, and it cannot, by reason of such control, bring this suit. Interrogatories were attached as a part of the bill, requiring defendants to make full, true, and direct answers, which interrogatories covered all the allegations of fraud contained in the bill as having been perpetrated by said B. Steiner; and by the note to the bill the respondents are required to answer the statements of the bill, and the interrogatories thereto attached, under oath. The prayer is for an account, and that said Steiner be charged with and required to pay all sums of money belonging to said corporation which have been appropriated by him, and for general relief.

The bill was demurred to on many grounds, the demurrer sustained, amendments made at different times, to which demurrers were interposed and sustained, until finally, on the 3d of October, 1891, an amendment was allowed, as follows: "That the present board of directors of said corporation, or a large majority thereof, are under the control of the said B. Steiner, and a large majority thereof are interested as guilty parties in one or another of the frauds and wrongs hereinafter [hereinbefore] complained of, and this complainant alleges that on these accounts, and on account of all the litigation growing out of the management of the affairs of this corporation, of which there have been several suits in the chancery court of Jefferson county, the said board of directors have always acted and conspired together in defending against charges and wrongs and grievances similar to the present wrongs and grievances herein complained of, and it would have been utterly futile for this complainant to have applied to said board of directors to institute this suit to remedy the wrongdoings complained of herein in the name of complainant." The defendant Steiner demurred to the bill as thus amended on many grounds, among which was the following: That the bill fails to allege that any request has been made of said railroad corporation to institute proceedings or take steps to redress the alleged grievances set forth in the bill, or to show any sufficient excuse for the failure to make such request, and that no sufficient reason is shown for bringing the suit in the name of complainant, and not in the name of said corporation. To the eighth paragraph, specially, that its allegations are vague and indefinite, and do not advise the defendants of the cause of action which complainant claims to have against them; that said section does not state how much or what particular portion of said fund went into the defendants' hands, or for what, or to designate or describe any particular draft or drafts in which said money or any part thereof was received, or to state which of said drafts were obtained by false pretenses, or what said false pretenses were. The court overruled the demurrer, and the defendant assigns the ruling as error.

White & Howze, for appellants. Lea & Bell, for appellee.

HARALSON, J. 1. The bill in this case makes averments of fraud and usurpation against the defendant Steiner, as the president and managing officer of the defendant corporation, the Birmingham, Powderly & Bessemer Street-Railroad Company, joined as a defendant, which, if true, call loudly for redress. It is filed by a stockholder, in his own behalf, and in behalf of all other stockholders of said corporation who may choose to make themselves parties complainant and agree to contribute to the expenses of the

litigation. All the authorities agree that to justify a suit in this form the bill must show that suitable redress is not attainable through the action of the corporation. The right of the stockholders to file a bill of this character in their own name was well stated in *Hawes v. Oakland*, 104 U. S. 480, where it is said: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." To the same effect are our own adjudications. *Manufacturing Co. v. Cox*, 68 Ala. 71; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747; *Railroad Co. v. Woods*, 88 Ala. 631, 7 South. Rep. 108; *Mack v. Iron Co.*, 90 Ala. 396, 8 South. Rep. 150; *Samuel v. Holladay*, 1 Woolw. 400; 2 Spel. Priv. Corp. § 623.

2. But it is equally well settled by the foregoing authorities, and is generally held, that a stockholder may bring suit in equity in his own name to enforce the right of a corporation, without first requesting the directors to sue, when it is made to appear that, if such request had been made, it would have been refused, or, if granted, that the litigation following would necessarily be subject to the control of the persons opposed to its success; and that where the directors of a corporation are themselves the wrongdoers, or the partisans of the wrongdoer, they are incapacitated from acting as the representatives of the corporation in any litigation which may be instituted for the correction of the wrong which it is alleged they have committed and approved. 2 Beach, Corp. § 886; *Knoop v. Bohmrich*, (N. J. Ch.) 23 Atl. Rep. 118; *Dodge v. Woolsey*, 18 How. 331; *Cab Co. v. Yerkes*, (Ill. Sup.) 30 N. E. Rep. 671; *Miller v. Murray*, (Cal.) 30 Pac. Rep. 46; *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. Rep. 899.

3. It is not pretended that complainant made any request of or effort with the managing body of the defendant corporation to induce them to redress the wrongs complained of, or to institute suit for that purpose. But the complainant attempts to show by averments that he had a good excuse for not making such a request or effort, in that, if made, it would have been refused, or, if

granted, the litigation following would necessarily have been subject to the control of persons opposed to its success. The allegations to this end are "(1) that the affairs of the corporation are now under the complete control of the said Steiner, and that it cannot, by reason of such control, bring this suit; (2) that the present board of directors, or a large majority of them, are under the control of said B. Steiner, and a large majority of them are interested as guilty parties in one or another of the frauds and wrongs complained of, and on these accounts, and on account of all the litigation growing out of the management of the affairs of this corporation, of which there have been several suits in the chancery court of Jefferson county, the said board of directors have always acted and conspired together in defending against charges and wrongs and grievances similar to the present wrongs and grievances herein complained of, and it would have been utterly futile for complainant to have applied to said board of directors to institute this suit." It will be observed that these averments are the statements of conclusions, and not averments of facts upon which they rest. The first averment is purely so, not a fact upon which the allegation that said Steiner has complete control of the corporation being stated; and the second is not far removed from it in this respect. It is not stated how or in what manner a large majority of the directors are interested in the fraudulent transactions mentioned in the bill of which said Steiner is specially accused, nor in which of them, nor is information given as to the character of the suits referred to in the chancery court of Jefferson county in which said board of directors are charged to have acted and conspired together. It is said the wrongs and grievances there sought to be remedied were similar to those complained of here, but of this we have only the conclusions of the pleader. The facts upon which such averments of conclusions rest should have been set out, so that the court might judge intelligently for itself—as it is its high duty to do in such cases—whether the plaintiff had the right to proceed to file the bill in his own name or not. The particularity of averment to be observed in such cases has received extended discussion in adjudged cases, leaving scarcely anything to be added on the subject. *Brewer v. Boston Theater*, 104 Mass. 378; *Hawes v. Oakland*, supra; *Manufacturing Co. v. Cox*, supra, and authorities there cited.

4. Fraud is a conclusion of law from facts stated, and the facts out of which it arises, when desired to be pleaded, whether at law or in equity, must be stated. Mere general averments of fraud or the fraudulent conduct of a party, without the facts, do not constitute a plea upon which the court can pronounce judgment. *Insurance Co. v. Moog*, 78 Ala. 284; *Meadows v. Meadows*, 73 Ala. 356; *Pickett v. Pipkin*, 64 Ala. 520; *Flewellen v.*

Crane, 58 Ala. 627. Tested by this rule, section 8 of the bill falls short of that definiteness of averment of fraud necessary in good pleading, and the demurrer to it should have been sustained. Reversed and remanded.

# MORROW v. NORTH BIRMINGHAM ST. RY. CO.

(Supreme Court of Alabama. July 27, 1893.)

CARRIERS — ACTION FOR DEATH OF PASSENGER — CAUSE OF DEATH — EVIDENCE.

In an action for the death of plaintiff's intestate, caused by defendant railway's negligence, it appeared that deceased died 6½ months after he was injured. A physician who treated him for about a month testified that at the end of that time he became satisfied that deceased would die; that he found, among others, a bruise on the lower part of the back of his head that was dark; that his ailment was hemorrhage on the brain; that before he ceased treating him he saw symptoms of consumption of the bowels, and that such complaint might be produced by such a shock as deceased was shown to have received. The physician who treated deceased during the last two months of his life, and one who treated him a month prior thereto, both testified that deceased died of consumption of the bowels, and that such trouble could not have been produced by a shock. There was evidence that deceased assisted another person, who was injured at the same time, to get on a car, and find a physician, and that he was "a regular drinker." *Held*, that a finding that the death of plaintiff's intestate was not caused by the injuries complained of was proper.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by W. S. Morrow, as administrator of the estate of James E. Davis, deceased, against the North Birmingham Street-Railway Company, to recover damages for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

The injuries sustained by deceased were caused by a collision between one of the defendant's trains, on which the said Davis was a passenger, and a freight train of the Richmond & Danville Railroad Company, which was at the time on the track of the Kansas City, Memphis & Birmingham Railroad Company. The circumstances of the collision were that, as the defendant's train, composed of two passenger coaches, was proceeding to one of its points of destination, and was within about 100 feet from the track of the Kansas City, Memphis & Birmingham Railroad Company on which the freight train was running, it came to a stop, and gave its signal for the crossing; that, when the train stopped, the Richmond & Danville train was within about 100 feet of the intersection of the two roads, backing very slowly; that the defendant's train was started again, and when all the train except the last coach was across the track the rear box car of the freight train collided with the said last passenger coach, striking it about the center. The substantive al-

legations of the complaint are: First, that the said collision was caused by the negligence of the defendant's servants in charge of its train on which plaintiff's intestate was a passenger; second, that plaintiff's intestate, to "escape imminent, deadly peril, jumped from said defendant's car, and fell to the ground, from which fall he received severe bodily hurts and bruises, external and internal, from the effects of which hurts he died," etc. Issue was joined on the plea of the general issue, contributory negligence, and that the plaintiff's intestate's death was not caused by the injuries he is alleged in the complaint to have received.

On the trial of the cause the testimony introduced was without conflict that the injuries resulted from the negligence of the defendant's employees. One Boseley was introduced as a witness for the plaintiff, and testified that he was with deceased at the time of the accident, and, after giving the circumstances of the collision, testified that just before the collision, when they saw that it could not be avoided, both he and deceased jumped from the train; that he was injured by being struck on the head by a car which was shoved against him, and when he recovered consciousness the deceased was standing near him, and was pale and very nervous; that the deceased assisted him on the train, and went with him to see a physician, and that as they were near the city the deceased complained to him of pains in his back and head. This witness further testified that on the next day after the collision he saw Davis walking with a stick, and a few days later said Davis was on crutches, and continued so while he remained in Birmingham, and that he did no more work. This witness on cross-examination testified that the deceased sometimes drank intoxicating liquors, but that he (witness) had never seen him intoxicated. Dr. Russell, a physician, stated that he had been in practice eight years; that Davis came to him on July 30, 1891, for treatment, complaining of pains in the head and back and hips; that he examined Davis, found a bruise on the lower part of the back of his head, which was recent, and the blood under the skin had turned dark, but it had not bled externally. There were other slight bruises and scratches on his hands, arms, hips, and legs. Russell continued to treat Davis, and, in his opinion, his ailment was hemorrhagic internal pachymeningitis, or a clot of blood on the brain. This condition could have been produced by a severe shock or fall. Davis was then suffering from no other disease, and there were no symptoms of consumption of the bowels or lungs. He gradually grew worse, became emaciated, and, in the opinion of the witness Russell, his condition was caused by repeated flows or hemorrhages of blood on the brain; and finally, in September, 1891, witness became satisfied he would die, and

advised him to go to his relatives. Witness also, towards September, 1891, saw symptoms of consumption of the bowels. This witness gave it as his opinion that consumption of the bowels might be caused by a shock, but could not tell how long it would take consumption of the bowels to develop from a blow on the head. Davis was shown by the testimony of Lavette, who had worked with him, to have been in poor health in July, 1891, and for several years previous to have had severe spells of coughing and expectorating, sometimes interrupting his work; that he drank a good deal, and had a running sore for several years before 1890. The witness Black had known Davis several years, and stated he was a regular drinker, and occasionally went on sprees. He had seen an old running sore on Davis' leg, about the size of the hand, at different times from 1885 to 1890. The mother of Davis stated that he returned to Columbus, Ga., where she lived, September 4, 1891; that he complained then of a misery in his head and spine and hips, running up into his head, complaining most of pain in his spine; and that he had no cough nor expectoration during his illness. Davis remained in Columbus, Ga., from September 4 to November 19, 1891, without medical attention. On that day Dr. E. B. Schley, a physician of 31 years' experience, was called to see him, and made a diagnosis of his case, and prescribed for him. He complained of bowel trouble, and a pain in his hip. Dr. Schley found no bruises or marks of fall on his head; and, in his opinion, and according to his diagnosis, he was suffering from consumption of the bowels. Dr. Schley testified that "from his condition at the time I prescribed for him, and the complaints that he made, and his appearance, I should say, from the best of my knowledge and belief, that his death was caused from consumption of the bowels." "The disease had obtained a firm hold on him, and when advanced to that stage it is difficult to control, and likely to produce death. His symptoms indicated consumption of the bowels, and his suffering was such as usually arises from that trouble. The pain complained of by him in his hip and back could have been caused by a shock or fall, but the trouble for which I treated him, to wit, consumption of the bowels, could not have been caused by shock or fall." On the 15th December, 1891, Davis called on Dr. W. T. Gantier, of Columbus, Ga., a physician of 16 years' practice, who examined him thoroughly, and made a thorough diagnosis of his case on the 20th December, 1891, and treated him until his death, on February 10, 1892. This witness testified: "When I treated him he complained of pain in his back and bowels, and diarrhea. I found that he was suffering from *tabes mesenterica* (commonly known as 'consumption of the bowels.') The direct and immediate

cause of his death was *tabes mesenterica*, which was caused by the *bacillus tuberculosis*, which is the germ of consumption. His symptoms were pain in the bowels and back, light fever, and vomiting. He did appear to be suffering with pains, and did complain of pain, and did make sounds and groans. He complained that he had pains in his back and bowels, and had diarrhea. In my opinion, the symptoms I have described were caused by *tabes mesenterica*, or commonly called 'consumption of the bowels.' Such symptoms as he had could have been caused by a shock or fall. While under my treatment, Davis complained of pain in his back. I did treat him for such complaint. The pain in the back was not the immediate cause of his death. I did make a thorough examination of him on the 20th December, 1891. I did not observe any external signs of injury or blow." The certificate of death given by Dr. Gantier shows Davis' death to have been caused by consumption of the bowels, on February 10, 1892, 6 months and 12 days after the collision on July 29, 1891, at 36 years of age. The cause was tried before the city court judge without the intervention of a jury, and upon the submission of the cause on the evidence the court rendered judgment for the defendant.

W. R. Houghton and Shugart & Embry, for appellant. Garrett & Underwood, for appellee.

**HARALSON, J.** The bill of exceptions states that the judge who tried the cause without the intervention of a jury, when the argument of counsel was about to begin, relieved them from the discussion of the question of negligence, and stated that there was but one question in the case; that he was satisfied the defendant had been negligent in the act leading to the collision, but the point was whether the intestate's death had been caused by the collision; and on this issue he found for the defendant. We have carefully examined the record, and agree with the court below that the defendant's employees were negligent in the discharge of their duties, contributing to bring about the collision of the two trains, in which the plaintiff's intestate, as is claimed, was injured. Our conclusion also is that the disease of which the intestate died has not been shown by satisfactory evidence to have been caused by the alleged injury he received in said collision, and that the lower court did not err in so finding. Affirmed.

(39 Ala. 309)

**OSBORN v. D. JOHNSON WALL PAPER CO.**

(Supreme Court of Alabama. July 27, 1893.)

**MECHANICS' LIENS—ENFORCEMENT—IMPAIRING REMEDY—AMENDMENT OF LIEN LAW.**

An amendment to a mechanic's lien law which provides that any person holding claims

under the statute shall give notice to the owner 10 days before filing his lien, stating the amount of his claim, and that he looks to his lien for payment, does not impair the remedy for enforcing a lien growing out of a contract made before the amendment, within Const. art. 4, § 56, prohibiting any law impairing the obligation of contracts by destroying or impairing the remedy for their enforcement.

Appeal from circuit court, Jefferson county; James B. Head, Judge.

Action by the D. Johnson Wall Paper Company against J. A. Osborn to enforce a contractor's and material man's lien. Judgment for plaintiff. Defendant appeals. Reversed.

The plaintiff claimed of defendant \$61.50, with interest from the 23d of February, 1891, due and owing by the defendant to plaintiff, as an original contractor, for work and material furnished to defendant under contract made on February 1, 1891, for building and improvements on a lot of land described in the complaint, which claim was filed as a lien on the property described, for the payment thereof, in the probate office of Jefferson county within two months from the time when said indebtedness accrued. No question is raised as to the sufficiency of the complaint. The defendant pleaded two pleas, the second of which was "that the ten days' notice required by law, that he looked to the property mentioned in said complaint for the payment of said work or improvements, was not given to defendant, his agent or architect, nor left at his residence, and hence plaintiff has no lien on said property." The plaintiff demurred to this plea on the ground "that the contract for the work for which a lien is claimed under the complaint was made before the passage of the law requiring ten days' notice, as set out and referred to in said 2d plea, to wit, February 1, 1891. Said ten days' notice was never required under the law in force when the contract was made." The evidence tended to show that the contract under which the work was done was made on the 1st February, 1891; that it was to be done for \$61.50, and that it was not well done; that the work did not commence until after the 12th February, 1891, and was finished about the 17th of the month; and a paper was introduced, written by defendant 90 days after the completion of the work, in which he promised to pay for the same. It was also shown, without conflict, that plaintiff complied with the mechanic's lien law, in a manner to perfect a lien thereunder, as it existed prior to the act of the general assembly enacted the 12th February, 1891, (Acts 1890-91, p. 578,) providing for and regulating mechanics' and material men's liens; and that plaintiff did not give notice to defendant, his agent or architect, 10 days before filing his claim for a lien, that he looked to his lien on the house and property described in the complaint for the payment of his said claim against defendant. The first plea

was that the work was so badly done that it was worthless. Issue was joined on this plea. The demurrer was sustained to the second, and, the cause coming on to be heard by and before the presiding judge, a jury having been waived, judgment was rendered for the plaintiff, and a lien declared on the property mentioned in the complaint for the payment of the same.

Bulger & Heflin, for appellant. Wade & Vaughan, for appellee.

HARALSON, J. The only question presented for our review in this appeal is whether the claim of the plaintiff for a lien must have been asserted under the mechanics' and material men's lien law as amended by Act Feb. 12, 1891, (Acts 1890-91, p. 578,) or under the Code as it stood before the amendment. That said act was a mere amendment of the former law, and not a repeal of the old, and the adoption of a new, system on that subject, we have had occasion at this term to decide. *Birmingham Bldg. & Loan Ass'n v. May & Thomas Hardware Co.*, 13 South. Rep. 612, and *Colby v. St. James Colored M. E. Church*, Id. 515. If the former, and not the amended, statute applies, it is conceded the plaintiff was entitled to the declaration and enforcement of a lien as awarded by the court; but, if by the latter, the ruling and judgment of the court are erroneous. The repeal of a number of the sections of the Code, and their substitution by said amendatory act, was an enlargement of the rights of mechanics and material men, and was designed to make a better and more perfect system of laws on that subject, and not to take away or render less valuable the remedies for the enforcement of such statutory liens.

The only point of controversy grows out of section 5 of the amendatory act; the plaintiff's contention being that a new right or duty was therein prescribed, which impaired his contract and lien, and was therefore void as to him, leaving him for the assertion of his rights under the former statute; and that of the defendant that said section did not have any such effect, and plaintiff was bound to pursue the remedy supplied under the amended law, which he did not do, and therefore lost his lien. A builder's and mechanic's lien, as has been everywhere held, is of purely statutory origin. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it. While every lien of this kind has a contract as its foundation, it is created rather by the law than by the contract of the parties, is analogous to the vendor's lien for the purchase money of land, and is based on a like reason,—that it is unconscionable for the vendee to retain the vendor's property, and not pay the price he agreed to pay for it. It is the work of mechanics and laborers, or ma-

terials furnished by them and others, by which value is added, or supposed to be added, to property, which in all good conscience the proprietor ought to pay for, which constitute the foundation of the lien under the statute. *Copeland v. Kehoe*, 87 Ala. 597; *Chandler v. Hanna*, 73 Ala. 391; *Wudsworth v. Hodge*, 88 Ala. 503, 7 South. Rep. 194; *Davis v. Alvord*, 94 U. S. 545; *Phil. Mech. Liens*, § 1. In keeping with these principles, we have uniformly held that, in order to avail himself of this right and remedy, the lienor must comply substantially with the requisitions of the statute in respect to filing a just and true account of the demand, properly verified, in the office of the judge of probate within the time required. It must be perfected in the manner authorized. The jurisdiction and the remedy, being prescribed, can be exercised and pursued only in the tribunals and in the mode provided by the statute. *Chandler v. Hanna*, supra; *Corrugating Co. v. Thatcher*, 87 Ala. 458, 6 South. Rep. 366; *Phil. Mech. Liens*, § 21; 1 *Jones, Liens*, § 106. The authorities hold, also, that a statute creating a lien may be modified or repealed by statute; the only difference between them being as to the effect such changes or repeals may have on existing contracts. In *Curry v. Landers*, 35 Ala. 290, for instance, this court said that the constitutional power of the legislature to abrogate a lien upon real estate given by the pre-existing law, by the repeal of the law, is a conceded question, and that it regarded the exercise of such a power by the legislature as affecting the remedy only, and not as impairing the obligation of the contract. To the same effect are *Martin v. Hewitt*, 44 Ala. 435, and *Ex parte Pollard*, 40 Ala. 88, and authorities in those cases. These decisions were under the constitutions of this state prior to our present constitution, which, in addition to the prohibition in former constitutions against the right of the state to pass a law impairing the obligation of contracts, contained the provision that "there can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement." Article 4, § 56.

We have examined and collated the decisions of the supreme court of the United States bearing on the construction of this clause of our constitution, and our conclusions are, as drawn from those decisions, that a remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation, and any subsequent law of the state which so affects that remedy as substantially to lessen the value of the contract is forbidden by the constitution, and void; that if a particular form of proceeding is prohibited, and another is left or provided which affords an effective and reasonable mode of enforcing the right, the obligation is not impaired;

that the legislature has the control, and may enlarge, limit, or alter modes or proceedings and forms to enforce a contract, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the right; that the remedies for the enforcement of obligations which exist when the contract was made must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. *Edwards v. Williamson*, 70 Ala. 145; *Edwards v. Kearney*, 96 U. S. 600; *Tennessee v. Sneed*, Id. 74; *Kring v. Missouri*, 107 U. S. 233, 2 Sup. Ct. Rep. 443; *Antoni v. Greenhow*, 107 U. S. 798, 2 Sup. Ct. Rep. 91; *Mobile v. Watson*, 116 U. S. 305, 6 Sup. Ct. Rep. 398; *Selbert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190; *Denny v. Bennett*, 128 U. S. 495, 9 Sup. Ct. Rep. 134.

The fifth section of the amendatory act of 1891 reads: "That any person holding claims under this statute shall give notice to the owner or proprietor, his agent or architect, ten days before filing his lien, giving the amount of his claim, and that he looks to his lien on the building, improvement, article, or utility for the payment of his claim: provided, that if such notice is left at the residence or place of business of the owner or proprietor, his agent or architect, it shall be deemed a full compliance with this section." This section does not impair the remedy for enforcing a lien growing out of a contract made before the enactment of the amendatory act, or lessen the value of the contract on which it is based in any degree. The remedy is as perfect as before. The object of this section was not to diminish the rights of the lienor under the law, but, without doing so, to require justice to be done to the proprietor, to save him loss and damage. With such a notice as here prescribed, the proprietor might retain from the contractor, and save himself, and pay on demand or notice, without cost and litigation, and this with as complete and unimpaired a remedy as the contractor enjoyed before.

The court erred in sustaining plaintiff's demurrer to the second plea, and in rendering judgment for plaintiff below. Reversed and remanded.

(100 Ala. 551)

#### HAMBRICK v. NEW ENGLAND MORTGAGE SECURITY CO.

(Supreme Court of Alabama. July 27, 1893.)

MORTGAGES—SALE UNDER POWER—PURCHASE BY MORTGAGEE—RIGHT TO POSSESSION.

Where, on default in a mortgage, the mortgagee, under a power, sells the land, and becomes the purchaser, though no conveyance is made under the sale, it has both the legal and equitable title, and can recover possession, the mortgagor not having taken steps to redeem.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Action by the New England Mortgage Security Company against Joseph M. Hambrick to recover possession of land. Judgment for plaintiff. Defendant appeals. Affirmed.

Humea, Sheffey & Speake and A. J. Bentley, for appellant. Caldwell Bradshaw and D. Irvin White, for appellee.

HARALSON, J. On the 25th March, 1887, the appellant, the defendant below, executed a mortgage on lands therein described to secure to appellee, plaintiff below, the sum of \$5,600 that day loaned to defendant by plaintiff. The note was payable on the 25th March, 1892, and, for the accruing interest, five coupon notes were attached to said principal note,—the first for \$196, payable on 1st December, 1887; three others, for \$250 each, payable, respectively, on the 1st days of December, 1888, 1889, and 1890; and the last, for \$380, payable on the 25th of March 1892,—the date of payment of the principal debt. The mortgage contained the stipulation that if the mortgagor should make default in the payment of said note, or of any coupon thereto attached, within 20 days after the same became due, the whole sum of money secured should, at the option of the holder of said note, become due and payable at once, and the mortgagee, its agent, attorney, or assignee, might enter upon and take possession of the lands described in the mortgage, and proceed to sell the same in a manner and on terms therein provided. On the 6th of April, 1891, after having advertised the lands for public sale under the power in the mortgage, and in the manner specified therein, the plaintiff sold said lands in Huntsville, Ala., to the highest bidder for cash, and itself became the purchaser of them, through its attorney, D. I. White, at the sum of \$3,690, but no conveyance seems to have been made under said sale. On the 24th February, 1892, the appellee brought this action in the circuit court of Madison county against the appellant to recover the possession of said lands. The defendant pleaded not guilty, which was the only plea interposed, so far as appears. On the trial of the cause the mortgage and notes were introduced and read in evidence by the plaintiff, and the sale under the power in the mortgage, as above stated, was shown. Judgment was rendered for the plaintiff for the possession of the lands sued for, and costs.

There are three assignments of error. The first has reference to the evidence of a witness, Bentley, examined by defendant. His evidence, as given, was simply "that the defendant elected to disaffirm the sale," and on the objection by plaintiff that it was illegal, incompetent, and not the best evidence of a disaffirmance, the court excluded it. This was no evidence of a disaffirmance of the sale under the mortgage by the mortgagor, such as affected the rights of plaintiff

under its mortgage. The only remedy defendant had against plaintiff, under its mortgage, was to pay the debt secured therein. Mortgage Co. v. Sewell, 92 Ala. 169, 9 South. Rep. 143. We have before now held that so long as the foreclosure sale under a mortgage stands, and no affirmative legal steps are taken to avoid it, the purchaser, although he is the mortgagee, must be regarded as the owner of the land. Not being competent to make a conveyance to himself, his title may be only equitable, and, standing alone, might be insufficient to support ejectment; but, by virtue of his title as mortgagee, both the legal and equitable title become vested in him, and constitute a perfect title, subject only to the right of the mortgagor, seasonably expressed, in a court of equity, to be let in to redeem, and this he cannot do without offering to do, and doing, equity. Mortgage Co. v. Turner, (Ala.) 11 South. Rep. 212; Same v. Sewell, supra. The plaintiff company, under its mortgage, having the legal title, had the unquestionable right to maintain the suit, and, on the proof offered, to the judgment it recovered. 3 Brick. Dig. p. 651, § 257. The court correctly gave the general charge in favor of the plaintiff, and refused a like charge for the defendant, on which rulings the remaining assignments of error are based. Affirmed.

(100 Ala. 603)

#### TAYLOR et al. v. KOLB.

(Supreme Court of Alabama. July 27, 1893.)

MANDAMUS—WHEN LIES—OFFICERS—QUALIFICATIONS.

1. The duties to be performed by the judge of probate, sheriff, and clerk, under Code 1886, § 352, requiring them to appoint three inspectors of election, "two of whom shall be members of opposing political parties, if practicable," are not purely ministerial, but require judicial judgment and discretion, and consideration of evidence; and therefore mandamus, while it lies to compel them to act, does not lie to control their action.

2. Where the statute requiring officers to appoint inspectors of election does not require the persons appointed to have educational qualifications, the courts cannot add such requirement, and annul an appointment of persons who cannot read or write.

Appeal from circuit court, Madison county; Henry C. Speake, Judge.

Petition by Reuben F. Kolb for a writ of mandamus to Thomas J. Taylor and others. The writ was granted, and respondents appeal. Reversed.

Oscar H. Hundley and Tancred Betts, for appellants.

COLEMAN, J. Reuben F. Kolb filed the present petition for a writ of mandamus, the purpose of which is to have vacated and annulled the appointment of certain parties as inspectors of an election, made by the judge of probate, sheriff, and clerk of Madison county, and to command them to ap-

point others in their stead. The petition is filed under section 352 of the Code of 1886, which provides that these officers or any two of them, "must, at least thirty days before the holding of any election in their county, appoint three inspectors for each place of voting, two of whom shall be members of opposing political parties, if practicable," etc. The petition, throughout, shows that it is filed by the petitioner in behalf of himself and no other person. The respondents moved to quash the petition for insufficiency, and also demurred to the petition, assigning various grounds for cause of demurrer.

The first question presented is whether the petitioner shows that there were two opposing political parties interested in the election, within the meaning of the statute, to one of which he belonged, and that the officers whose duty it was to appoint inspectors failed to comply with the statute. The petition is verified by affidavit, and the facts averred are sufficient, in our opinion, to show that there were two opposing parties, to one of which petitioner belonged. It states there were two state conventions held, and each convention nominated a full state ticket for all state officers, except that the party of petitioner made no nomination for judges of the supreme court; that one convention nominated Thomas G. Jones for governor, and that petitioner was the nominee of the other convention; and that no other party had candidates before the people for election. The petition shows that the officers appointed three inspectors for each place of voting, but avers that neither of the three belonged to the party which nominated petitioner for governor. It may be admitted that, as between petitioner and the respondents, petitioner shows a clear, legal, specific right, and a disregard of this right by respondents, but does it show a case for mandamus? In *Ex parte Du Bose*, 54 Ala. 280, we adopted, as a sound principle of law, "that cases may arise where the court will not grant a mandamus, when the granting thereof will, in a collateral manner, decide questions of importance between parties who are not parties to the proceedings, and have had no notice or opportunity to interpose their defenses. \* \* \* Although it were certain that the party applying had a legal right, and that it has been been violated, and that the law would afford him a remedy, and which remedy is conceded to be mandamus, \* \* \* the court will not interfere in a case involving in a collateral manner the right of parties who have no opportunity of defending their interests." There is an extremely difficult question presented by the record. Does the appointment of inspectors involve judgment and discretion, or is it the exercise of a merely ministerial duty? The trial judge held that it was purely ministerial, and that the writ would lie, and yet the judgment rendered upon the

proceedings was that which pertains to a judicial question. It is sometimes difficult to determine whether an act is judicial or ministerial. The general principle is as clearly stated in the case of *U. S. v. Guthrie*, 17 How. 304, as in any we have found, and is the rule in this state. It is as follows: "The only acts to which the power of the courts, by mandamus, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer; but that, wherever the right of judgment or discretion exist in him, it is he, and not the courts, who can regulate the exercise." "It seems to be held by all the authorities that the writ of mandamus can only issue to some officer required by law to perform some mere ministerial act, or to a judicial officer to require him to take action, but not, in a matter requiring judgment or discretion, to direct or control him in the exercise of either." *Ex parte Echols*, 39 Ala. 698; *Ex parte Hurn*, 92 Ala. 103, 9 South. Rep. 515. And in *Ex parte Thompson*, 52 Ala. 98, it is thus stated: "When the power is clearly defined and enjoined, does not involve the exercise of discretion or judgment, and no alternative is left to the officer charged with its execution; when he must act without inquiry, and without evidence, and the mode of action is expressly declared,—the power is purely ministerial. When, however, the power involves the exercise of judgment and discretion; when it is to be exercised only in an ascertained event, and on the occurrence and existence of particular facts, and the officer charged with the execution of the power must determine whether the event has arisen, or the facts exist requiring its exercise,—then the power is judicial, or in its nature judicial." *Ex parte Harris*, 52 Ala. 87. The case of *Grider v. Tally*, 77 Ala. 422, properly construed, does not conflict with these well-settled principles. When the act to be performed is purely ministerial, mandamus not only requires action, but specifically defines the particular act to be done, and the manner in which it shall be done, so that the court or judge issuing the writ may know whether its order has been obeyed. If the writ leaves a discretion to the officer, room to exercise judgment as to whether and in what manner the mandate shall be carried out; if it be necessary to hear the evidence to determine whether the mandate has been performed,—then the mandate, in such form, for the performance of a ministerial act, is imperfect and irregular, and is of that character to be rendered where judicial action is ordered. *State v. Mobile & M. Ry. Co.*, 59 Ala. 321; *Davidson v. Washburn*, 56 Ala. 596.

The judge, acting upon the petition, annulled and vacated certain appointments which had been made, but ordered the officers to proceed to appoint others. The order



did not name the parties whom the respondents should appoint as inspectors, but left it to them to determine who should be appointed. In fact, he decided that the appointments which had been made were not in accordance with the statute, and vacated and annulled them, and then simply compelled action. Now, if the act to be performed was purely ministerial, the judge issuing the mandate knew precisely the persons to be appointed, and would have named them and ordered their appointment. The very fact that he did not know, and could not ascertain, except by evidence allunde, and the exercise of judgment upon that evidence, conclusively resolves that the question is of a judicial character, and not purely ministerial. How is it to be determined whether a person belongs to one party or another? Can it be ascertained without evidence, and the exercise of judgment and discretion? What are the tests? It not only requires evidence to fix the status of party affiliation, but we see difficulties rising in the solution of this question, which, under our system of popular elections, calls for the interposition of legislation. Questions not hitherto adjudicated in this state, and none exactly similar in other states, so far as we have been able to discover by investigation, arise under the statute, the decision of which involve, not only judgment and discretion, but the application of new principles. The statute requires the appointment of inspectors for each voting place, "two of whom shall be members of opposing parties, if practicable," etc. When this statute was first adopted, there were but two opposing parties, the Democratic and Republican, and it is possible that these two parties alone were in the legislative mind at its adoption, but we consider its verbiage and spirit extend to any and all opposing parties. The difficulties arise in defining what constitutes a political party, and what is the test of membership of a party. In the case of *U. S. v. Paxton*, 40 Fed. Rep. 136, a question arose whether one J. O. Farnell was a well-known member of a political party opposed to the party to which the clerk of the court belonged, under the act of congress of June 30, 1879, which provided that the judge should appoint a jury commissioner who should be a well-known member of the principal political party in the district opposed to that to which the clerk might belong. The court heard the evidence, which in some respects was conflicting, and decided the question upon the facts. Says the judge who rendered the opinion: "I think it must be admitted that it has always been understood that those who have acted with a political party, voted its ticket, maintained its doctrines, and attended its meetings, were members of the party." The court further said: "Will that act permit the court to *exercise its discretion*, [italics are ours,] and appoint," etc. In the subsequent case of

*U. S. v. Chaires*, Id. 820, considering the same statute, the court uses this language: "The judge, in the exercise of a sound discretion under the responsibilities of his office, directed by the statute, passes upon the qualifications of the jury commissioner he appoints." In *Re Supervisors of Election*, 43 Fed. Rep. 859, application was made for the appointment of supervisors. The provision of the statute required that the supervisors should be "citizens residents of the city or town or of the election district or parish, who shall be of different political parties," etc. The court makes use of this language: "But in all cases there should be evidence, whether obtained from one source or the other, showing that applicants or persons recommended possess the statutory qualifications as supervisors." These cases are cited to show that in determining the statutory qualifications—in the one case, that of jury commissioner; in the other, that of a supervisor of elections; in both, the persons to be appointed should belong to opposing political parties—the judge or court exercised discretion, and acted upon evidence. Where the act to be performed involves the introduction of evidence, and the exercise of judgment and discretion, the act is judicial, and not ministerial, and mandamus will not lie to control judicial discretion. The authorities are uniform to this proposition.

The petitioner further complains that some of the inspectors appointed can neither read nor write. It may be that inspectors of elections could better perform the duties of inspectors if they possessed an educational qualification, but the statute does not require it, and the courts cannot add to the statute. The objection of petitioner, based upon these averments, cannot be maintained. By section 355 of the Code, contingencies may arise when there are no qualifications for inspectors, except that they be "qualified electors entitled to vote at that polling place, in the election then to be held." Our conclusion is, the duties to be performed under section 352 of the Code by "the judge of probate, sheriff, and clerk," in the appointment of inspectors, are not purely ministerial, but require judicial judgment and discretion, and the writ of mandamus will not lie to control their action. If they refuse to act, mandamus will lie to compel action, but, having acted, if error or wrong was committed, it cannot be remedied by mandamus. If error or wrong was willful, or from corrupt motives, it may be that the parties subjected themselves to impeachment, or possibly to a criminal prosecution for some offense, but these questions are not before us. As we said in a former part of this opinion, further legislation may be needed, but we can now only consider the statute as we find it. An order will be here made quashing the petition. Reversed and rendered.

(98 Ala. 448)

**MOTLEY v. JONES et al.**

(Supreme Court of Alabama. July 27, 1893.)

**JUDGMENT—LIEN—EXECUTION SALE—TITLE OF PURCHASER—HOMESTEAD—WAIVER.**

1. Where a judgment is filed and registered in the office of the judge of probate, as required by Act Feb. 28, 1887, and acts amendatory thereof, making the judgment in such case a lien on all defendant's property in the county, subject to levy and sale on execution, from the date of registration, the lien of the judgment takes precedence of a conveyance of land by defendant which was executed before, but not recorded until after, the judgment was registered, and of which the judgment creditors had no notice.

2. A judgment registered before a prior conveyance of land by the debtor is recorded or notice thereof brought home to the judgment creditors, being a lien on the land, a purchaser of the land at an execution sale under the judgment acquires title as against the conveyance, as he succeeds to all the rights of the judgment creditors, notwithstanding his knowledge of the conveyance.

3. The possession of a wife, to whom her husband has executed a deed which is not recorded, is not notice of her title, where she merely continues to live on the land with him as they did before the deed was made.

4. The right to a homestead exemption in certain land is waived where the land is not included in the claim of homestead filed.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Cora D. Motley against J. D. Jones and another to recover land. There was a judgment for plaintiff for a part only of the land, and she appeals. Reversed.

Motley & Fleming, for appellant. Denson, Bilbro & Burnett, for appellees.

**HARALSON, J.** The plaintiff, Cora Motley, who is the appellant, instituted this action in the city court of Gadsden against the defendants, J. D. Jones and his daughter, Mollie Jones, to recover possession of—First, lot 11, in block 13; and, second, all that part of the east half of lot 7, in block 13, lying back of the store of M. P. White, in Attala, describing it by metes and bounds. The case was tried by the court, a jury having been waived, on the plea of not guilty, and judgment was rendered for the plaintiff for the lot last described above. It was shown by plaintiff without conflict that Alter, Pickard & Co. recovered a judgment against the defendant J. D. Jones in the circuit court of Etowah county on the 5th day of April, 1887, for \$240 and costs, which judgment was duly filed and registered in the office of the judge of probate of said county on the 30th of January, 1888, as provided by the act of the legislature of February 28, 1887, (Code 1886, p. 635, note;) that an execution issued on said judgment on the 18th of February, 1893, which, coming to the hands of the sheriff on the 20th of February following, was by him levied, on the 3d of March, 1893, on the lands described in the complaint; that, after having advertised the

same for sale, as required by law, on the 10th of April, 1893, he sold the same at public outcry to the highest bidder for cash, and the plaintiff, Cora D. Motley, became the purchaser at and for the sum of \$50, bid by her for the land; that said sheriff, on the same day, by deed duly executed, and in consideration of said sale and purchase by her, conveyed to plaintiff all the right, title, interest, and claim of the defendant J. D. Jones in and to said land, and that written notice for the possession was served on the defendants, and notice of the levy given to said J. D. Jones. The defendant introduced a deed dated November 2, 1882, executed by him, conveying to his wife, Emeline Jones, in consideration of \$50, the lot first described in the complaint, which was withheld from record, and not filed and recorded until the 27th of March, 1893. To the introduction of this deed the plaintiff objected, on the ground that it was void as to the judgment creditors, Alter, Pickard & Co., in whose favor said judgment was rendered under which said lands were sold to the plaintiff; but the court admitted the same, and plaintiff excepted.

The defendant testified that he executed said deed to his wife in consideration of a lot she owned and had turned over to him; that he gave notice to the sheriff when he levied on it that it was his wife's property, who had died in the summer of 1887; that they had resided on the property together, and the debt for which the judgment had been rendered against him was contracted in the year 1880; that lot 7 was near the one on which he lived, there being an alley between the two; that he lived on lot 11, and rented out lot 7; that defendant Mollie Jones was his daughter by his said wife, Emeline. It was further shown that defendant and his wife lived on lot 7 in the years 1881, 1882, and 1883. The defendant then introduced the record of his declaration of claim to certain real and personal property as exempt from levy and sale, filed in the office of the judge of probate of Etowah county on the 4th day of March, 1893. In this claim of exemption no part of the property sued for is claimed, except lot 7 in block 13, and the real and personal property claimed was valued at \$1,200. This being all the evidence, the court rendered a judgment, as the bill of exceptions states, for the plaintiff for the lot last mentioned in the complaint, and for the defendant for the other. The judgment entry recites a finding and judgment for the plaintiff for the lot last described, No. 7 in block 13. The plaintiff appeals, and assigns as error the admission against her objection and exception of said deed of defendant to his wife, Emeline, and the failure and refusal of the court to render judgment in her favor for lot 11 in block 13, as well as for the other lot.

We may dispose of the claim of exemption from levy and sale of said lot 11, by stating

that the claim as filed in the office of the probate court did not mention this, but other, real estate. If defendant made no claim to the homestead exemption, he waived it. *Clark v. Spencer*, 75 Ala. 57.

As we have seen, *Alter, Pickard & Co.* recovered their judgment on the 5th April, 1887, which they filed and had registered in the office of the judge of probate of said county on the 28th January, 1888, in the manner required by said act of 28th February, 1887, and the acts amendatory thereof. The effect of this filing and registration of said judgment, by the terms of said act, made it a lien upon all the property of the defendant in said county, which was subject to levy and sale under execution, which lien should continue for 10 years from the date of such registration. The deed from defendant J. D. Jones to his wife, Emeline, was executed, as has been shown, on the 2d of November, 1882, and was withheld from record until the 27th of March, 1893, long after the judgment had been rendered against him in favor of said *Alter, Pickard & Co.*, and after it had been recorded in the probate office of said county. It was therefore void as to the plaintiffs in that suit, unless they had notice of said deed, of which there is no evidence in the record. *Wood v. Lake*, 62 Ala. 489; *Watt v. Parsons*, 73 Ala. 202; *Chadwick v. Carson*, 78 Ala. 116; *Robertson v. Durden*, 89 Ala. 500, 7 South Rep. 769; *McGhee v. Bank*, 93 Ala. 193, 9 South. Rep. 734. This want of notice to the plaintiffs in execution, *Alter, Pickard & Co.*, protected the purchaser at execution sale. She succeeded to their rights, and as the purchaser at said sale was entitled to all the advantages which accrued to them as judgment creditors from a lack of notice of said unrecorded deed. The notice, therefore, which the defendants gave at the time of the levy and sale, that the property belonged to Emeline Jones at her death, and which was constructively given to plaintiff in the record of said deed, was without any effect on her. *Cahalan v. Munroe*, 56 Ala. 303; *Bartlett v. Varner*, Id. 580; *Moog v. Strang*, 69 Ala. 98; *Vanceleave v. Willson*, 73 Ala. 387; 3 Brick, Dig. p. 640, § 96. Nor can it be said that the possession of Mrs. Jones, after the deed by her husband to her, was notice to any one of her title under said deed. As there was no record of the conveyance by her husband to her, and no change of possession, the fact that the parties continued to live on the lot as before the deed operated no notice, actual or constructive, that the title had passed out of said Jones to her. *McCarthy v. Nicrossi*, 72 Ala. 332; *Watt v. Parsons*, 73 Ala. 202; *Troy v. Walter*, 87 Ala. 237, 6 South. Rep. 54. The deed from Jones to his wife was improperly admitted as evidence against the plaintiff. It was void as to her, and, the claim of exemption being without effect, we discover no reason why plaintiff was not en-

titled to recover the entire property sued for. The court erred in not so finding. Reversed and remanded.

(99 Ala. 234)

### BEALL v. STATE.

(Supreme Court of Alabama. July 27, 1893.)

BILL OF EXCEPTIONS — SIGNING — DEFAMATION — CRIMINAL PROSECUTION — EVIDENCE.

1. A bill of exceptions not signed within the time limited by statute, or provided by stipulation, will be stricken from the record.

2. Under Crim. Code, § 8773, providing that any one who speaks, writes, or prints of another any accusation, falsely and maliciously, importing the commission of a felony, shall on conviction, etc., to authorize a conviction the jury must be satisfied, beyond a reasonable doubt, that the accusation was false and malicious.

Appeal from circuit court, Calhoun county; Le Roy F. Box, Judge.

Frank Beall was convicted of defamation, and appeals. A motion to strike from the record the bill of exceptions is granted, and the judgment is affirmed.

John H. Caldwell, for appellant. Wm. L. Martin, Atty. Gen., for the State.

COLEMAN, J. The defendant was convicted of the offense of defamation. There is a motion to strike from the record the bill of exceptions, because not signed within time. Sixty days were agreed upon, in writing, as the time within which the bill of exceptions might be signed. This agreement bears date May 10, 1892. The bill of exceptions has two indorsements signed by the judge who presided at the trial. The first is, "Received by me through mail at Ashville July 9th, 1892." The second is, "Bill returned to deffts. counsel at his request, and afterwards, to wit, Aug. 18th, '92, again sent to me through the mail." The bill of exceptions bears date November 3, 1892. It is evident the bill bears date long after the time had expired within which it should have been signed. The statute fixes the time within which a bill of exceptions must be signed, and regulates the manner in which the time may be extended. Unless the statute is complied with, and the bill of exceptions is signed as therein provided, we cannot consider it, on appeal in this court. See act of February 22, 1887, p. 126, bottom of page 610 of the Code; *Rosson v. State*, 92 Ala. 76, 9 South. Rep. 357; *Powell v. Sturdevant*, 85 Ala. 243, 4 South. Rep. 718. It is manifest that the judge had no authority, in the present case, to sign the bill of exceptions, at the time it was signed. There had been no order or agreement made by which the time had been extended beyond the 60 days agreed upon.

Having failed to sign the bill within the 60 days, if the appellant was free from fault, he should have proceeded to establish the bill of exceptions in this court, as pro-

vided in the statute. The motion to strike the bill of exceptions must prevail, and this order leaves the appellant without an exception, and we are powerless to revise the ruling of the court in its refusal to charge the jury as requested by the defendant. Under the circumstances, probably, it is best to construe the statute under which the defendant was prosecuted. Section 3773 of the Criminal Code, under which the indictment was prosecuted, declares that "any person who speaks, writes or prints of and concerning another any accusation falsely and maliciously, importing the commission by such person of a felony, or any other indictable offense, involving moral turpitude, must on conviction," etc. To constitute the offense, the accusation, whether spoken, written, or printed, must have been "false and malicious;" and, to authorize a conviction under this statute, it is necessary to satisfy the jury, beyond a reasonable doubt, that the accusation was false and malicious. The state is not required to show, under this statute, by direct proof, that the defendant entertained ill will or hatred towards the person against whom the accusation was made, or a purpose to injure him. The jury may infer malice from the character of the accusation, and the absence of probable or reasonable grounds for making it. *Haley v. State*, 63 Ala. 83. The prosecutor could ask for an explanatory charge, or the court, of its own motion, might very properly explain the definition of "malice," as intended by the statute, without committing any error, but there can be no violation of the statute unless the accusation was falsely and maliciously made. **Affirmed.**

(98 Ala. 154)

**SMITH v. EAST TENNESSEE, V. & G. RY. CO.**

(Supreme Court of Alabama. July 27, 1893.)

**APPEAL FROM JUSTICE—CHANGING NATURE OF ACTION.**

Plaintiff, after commencing an action on contract in a justice court, cannot, on appeal, file a complaint in tort.

Appeal from city court of Anniston; *B. F. Cassady*, Judge.

Action by *J. D. Smith* against the East Tennessee, Virginia & Georgia Railway Company. Judgment for defendant. Plaintiff appeals. **Affirmed.**

*Methvin & Kelly*, for appellant. *Knox, Bowie & Pelham*, for appellee.

**COLEMAN, J.** The action began in the justice court, and, so far as the transcript shows, judgment was rendered for plaintiff upon an "account stated, \$10.00." The cause was brought to the city court by statutory writ of certiorari, and stood for trial de novo. The cause of action filed in the circuit court was that "plaintiff claimed of

the defendant ten dollars due by account June, 1891, for calf killed;" and that was amended by adding, "by engine East Tenn., Va. & Ga. R. R., and that by the negligence or carelessness of the engineer on said engine." The defendant moved to strike the complaint from the file, and also filed a demurrer to it, upon the ground that the amended complaint was a total departure from the original cause of action. By a judgment of the court, entered May 24, 1892, both the demurrer and the motion to strike were overruled. The defendant then pleaded the general issue, and also the statute of limitation of six months, under section 1150 of the Code. October 19, 1892, there seems to have been, by leave of the court, another amended complaint filed by the plaintiff, and on the same day a judgment of the court was rendered, sustaining the demurrer of the defendant, and his motion to strike the complaint from the files. There seems to have been no other amendment to the complaint or cause of action filed. The record then states that, the "cause being submitted to the court, it is considered that the issues are in favor of the defendant," and judgment was rendered for the defendant. The record also contains a bill of exceptions.

We have recited the pleadings and judgment entire, and cannot tell from the record upon what cause of action the case was submitted for trial. Our opinion is that the plaintiff was not entitled to recover, in any event. Pleadings in justice courts are not governed by technical rules. If the summons shows the nature of the cause of action, or if the same is indorsed upon the summons, or otherwise is made manifest, that is sufficient; and yet pleadings in justice courts are subject to such regulations as are necessary to promote justice, and prevent undue advantage to either party. Section 3313 of the Code declares that "suits before justices of the peace shall be governed by the same rules and provisions, so far as they are applicable, as suits in the circuit court." Assumpsit and tort cannot be united in the same cause of action, either in one count or in separate counts in one complaint. The authorities are numerous and unanimous to this proposition. *Railroad Co. v. Williams*, 53 Ala. 600; *Insurance Co. v. Randall*, 74 Ala. 176; *Capital City Water Co. v. City of Montgomery*, 92 Ala. 366, 9 South. Rep. 343; *Chambers v. Seay*, 87 Ala. 558, 6 South. Rep. 341; *Wilson v. Stewart*, 69 Ala. 302; *Whilden v. Bank*, 64 Ala. 1. It would necessarily follow that an action ex contractu cannot be converted by amendment into an action on the case, and vice versa, and this rule applies to actions brought by appeal or certiorari from justice courts to the circuit court. The case of *Freeman v. Speegle*, 83 Ala. 191, 3 South. Rep. 620, does not assert a contrary doc-

trine. In fact, it is an authority in support of the general rule. In that case the action began in a justice of the peace court, and affidavit and summons both showed the suit was in detinue. At the trial before the justice a cause of action in assumpsit was filed. On appeal to the circuit court the plaintiff filed his complaint in detinue. This court held that the complaint in detinue was not a departure; that the summons and affidavit in the justice court showed that the original action was in detinue; and that the irregularity in filing a separate statement in the justice court in assumpsit did not change the suit in detinue, as brought, into a suit in assumpsit, and that on appeal it was proper to complain in detinue. The present suit, as begun in the justice court, was in assumpsit, on an account rendered, and the plaintiff was not at liberty, on appeal, to file a complaint in tort. If we consider the case in the city court as having been an action ex contractu, upon the account rendered, there is no evidence to sustain a promise or undertaking, express or implied, to pay the account. On the other hand, if the court tried the case upon the amended complaint in tort, the statute of limitations of six months had effected a complete bar. When a case is tried by a jury under the instruction of the court, it is sufficient that the bill of exceptions states the tendencies of the evidence, to enable this court to pass upon the legality of instructions given to the jury; but when the court tries the facts without a jury the bill of exceptions should set out enough of the testimony to show that the court erred in its conclusion. The bill of exceptions does not show enough to put the court in error upon the merits of the case, whether we consider the action ex contractu or ex delicto. Affirmed.

(100 Ala. 584)

**KELLY v. RICHARDSON. RICHARDSON v. CARROLL. CARROLL v. RICHARDSON.**

(Supreme Court of Alabama. July 27, 1893.)

**WILLS—CODICILS—GENERAL AND SPECIAL BEQUESTS—DEVISES—LIABILITY FOR INDEBTEDNESS OF ESTATE—CONTRACT BETWEEN LEGATEES—PROPERTY INCLUDED—DUTY OF EXECUTOR.**

1. The second clause of a will, commencing: "Second. After paying all my just debts,"—gave to M. all testator's personal property, except certain specific articles, which it gave to H. and B. A codicil, commencing: "Additional to page 1, from second clause. Second. After paying all my just debts,"—gave to M. all testator's property, except a stock of merchandise, which it gave to C. *Held*, that the codicil was a substitution for the second clause of the will, and revoked the legacies to H. and B.

2. An instrument executed by testator after making his will recited that in consideration of kind services, and a nominal sum, receipt of which was thereby acknowledged, he gave to K. certain real estate, reserving to himself the use and possession thereof during his life; "then this conveyance to be delivered to" K.

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*Held* that, if executed with the formalities requisite to a will, it would operate as a codicil.

3. A bequest of all testator's personalty, with certain specific exceptions, is a general legacy.

4. A bequest of \$500 in cash to each of certain persons is a general legacy.

5. Where one bequeaths all his personalty to one person, excepting a stock of merchandise, books, accounts, notes, store fixtures, and everything belonging in a certain store, which he gives to C., the bequest to C. is a specific legacy.

6. All devises, whether by specific description or by residuary clauses, are specific, except in so far as they may include real estate acquired after the execution of the will, as to which the devises will be general, unless such after-acquired property is so described as to admit of its identification by the devisees.

7. A bequest to a person, of a mercantile business, with a provision that the legatee shall assume all the liabilities thereof, is not relieved of liability for the general indebtedness of the estate, but as to that stands on the same footing as other special legacies.

8. If the property included in a bequest of a mercantile business, with a provision that the legatee shall assume the liabilities thereof, is not sufficient for the payment of all such liabilities, the balance will be paid in the same manner as the other indebtedness of the estate.

9. General devises contribute ratably with general legacies to debts of the estate and expenses of administration, and, if they are exhausted before the debts are liquidated, then specific devises and specific legacies abate pro rata.

10. A bequest to K. of all of testator's personal property, except a stock of merchandise, books, accounts, notes, store fixtures, and everything in a certain store, which was given to C., was followed by a bequest of \$500 in cash to each of certain persons. Testator also devised all his real estate. *Held*, that the bequests to K. and C. excluded all money in the store and all money in hand, as otherwise there would be no fund from which to pay the pecuniary legacies.

11. Under an agreement by which C., a legatee, purchases the interest of K., another legatee, and agrees that the executor shall hold his interest in the estate in pledge for K. till he has paid K., and further agrees that the executor shall not pay or surrender to him any sum or property from the estate till K. is paid, the executor may, if at any time he has in his hands money going to C. out of the estate, and as incident merely to the administration, pay it to K., to the extent of C.'s debt to her, but he cannot convert property specifically devised to C. into money, for the purpose of paying C.'s debt to K.

12. A contract by which K. sells to C. all her interest as legatee and devisee will not embrace land described in an instrument supposed to be a deed from testator to K., but which was in reality a codicil devising the land to K.

Appeal from chancery court, Butler county; John A. Foster, Chancellor.

The bill in this case was filed by J. C. Richardson, as the executor of J. T. Perry, deceased, against Sarah E. Kelly, J. M. Carroll, and others, the persons to whom the said J. T. Perry, by his last will, bequeathed his personal property and devised his realty, and prayed that the administration of said estate be removed into the chancery court, that the will be construed, and that the executor be directed as to his administration of the said last will and testament. There are

three separate appeals from the decree of the chancellor. Sarah Elizabeth Kelly brings one appeal; J. C. Richardson, as executor, brings the other; and J. M. Carroll brings the other. Each one of the appellants, respectively, assigns errors. Hermann Dohrmeier also assigns errors. The appeal of Sarah E. Kelly is affirmed, that of J. C. Richardson is reversed and remanded, and that of J. M. Carroll is affirmed.

The original bill was filed on December 9, 1887. The prayer of the bill is sufficiently stated in the opinion. The facts of the case, as shown by the original and amended bills, the answers thereto, and the testimony, are substantially as follows: J. T. Perry died at Greenville, Ala., on the 24th of June, 1887, leaving an estate consisting of real and personal property. No wife or child survived him. His next of kin are his sisters, M. I. Rothenhofer, Mary Elizabeth Kelly, (also called Sarah Elizabeth Kelly,) and Martha A. Fulmore. After his death, two instruments in writing were found; the one purporting to be his last will and testament, with a codicil thereto, and one purporting to be a deed conveying certain realty to Sarah Elizabeth Kelly. This deed is not shown to have been delivered to Mrs. Kelly, nor to any one for her, during the life of Perry, nor by his authority. Mrs. Kelly claims, however, that the deed was handed to J. M. Carroll by Perry, and that J. M. Carroll, after the death of Perry, gave it to her. Under this deed she entered into the possession of the property shortly after the death of Perry, and has since received the rents thereon. Mrs. Kelly is insolvent. On the 27th of July, 1887, M. I. Rothenhofer and J. M. Carroll propounded the instrument which purports to be the said last will and testament, and the codicil thereto, in the Butler probate court, for probate and record, as the last will and testament of the said J. T. Perry, deceased. These instruments, so propounded for probate and record, are copied in the opinion. On the 21st day of July, 1887, Sarah Elizabeth Kelly filed her grounds of contest to said will and codicil in the Butler probate court. On the 27th of July, 1887, said Mrs. Kelly and Mrs. Rothenhofer and J. M. Carroll executed a contract in writing, by the terms of which Mrs. Kelly withdrew her contest of the said will and codicil, and Mrs. Rothenhofer conveyed her pecuniary legacy of \$500 to Mrs. Kelly, and Mrs. Kelly then conveyed the same to J. M. Carroll; and J. M. Carroll agreed to pay Mrs. Kelly \$1,550 for her interest, rights, claims, and property in any and all property owned or held by J. T. Perry at the time of his death, or to which she was or might be entitled as the legatee, devisee, or otherwise, of said Perry, and for the \$500 legacy conveyed to her by Mrs. Rothenhofer, and her claims against Carroll under section 3 of the will and codicil; and J. M. Carroll further agreed that the executor should hold his entire property and inter-

est in said estate in pledge for Mrs. Kelly until he had paid Mrs. Kelly the \$1,550, and contracted that the executor should neither pay nor surrender to him any sum or property from the said estate until Mrs. Kelly was paid. After the execution of this contract, on the 28th day of July, 1887, the will and codicil were probated and recorded in the Butler probate court, and letters testamentary issued from said probate court to said J. C. Richardson, authorizing him to take upon himself the execution of said will and codicil. Immediately upon said Richardson's appointment as said executor, Mrs. Kelly presented to him said contract which she had made with J. M. Carroll, and notified said Richardson that she would hold him liable if he failed to hold for her the property in pledge under the said contract until her debt was paid by J. M. Carroll, which has yet never been paid. The property of the Perry estate was duly appraised, and appraisement and inventory delivered to Richardson. Under an order of the probate court, said Richardson sold the stock of merchandise, and some other personal property, as soon as valid claims had been presented to him, equal to the value of the personal property belonging to the estate. On the 15th of October, 1887, when said Richardson was commencing such sale of the personal property in accordance with the mandate of the order of the probate court, there was served on him an original bill of complaint filed by Mrs. Rothenhofer and the Dohrmeier devisees against him (said Richardson) and J. M. Carroll, seeking, among other things, to enjoin the sale then about to be made, and to contest the codicil of the will, and to discover an alleged large amount of the assets of the Perry estate, alleged by the bill to be in the hands of J. M. Carroll. By consent of the complainants to said bill, said Richardson desisted from selling certain portions of the said personalty, and proceeded with the sale as to the balance. On the 29th of October, 1887, J. M. Carroll also filed an original bill of complaint in the Butler chancery court against said Richardson, to require him to turn over to him (Carroll) the property bequeathed to him (Carroll) by the alleged codicil, and the money arising therefrom, and for an account of damages for the sale of such property by said Richardson as executor of Perry. The codicil was at that time being contested on and by the original bill, then pending, of Mrs. Rothenhofer, filed on the 15th of October, 1887, against J. M. Carroll and said Richardson, as Perry's executor. On the 23d of June, 1889, appellee Martha A. Fulmore, one of the respondents to said Richardson's bill of complaint, filed an original bill in the circuit court of the United States for the middle district of Alabama against said Richardson, as the executor of J. T. Perry, and the legatees and devisees under the will and codicil, and also against the next of kin of said J. T. Perry, seeking

by her said bill (1) to contest, annul, and set aside the alleged will and codicil, and the probate thereof; (2) to have the estate of said J. T. Perry distributed under the Alabama statute of descent and distribution; (3) and for the removal of the estate of J. T. Perry into the circuit court of the United States, and there have said Richardson, in the federal court, distribute said estate; and (4) for a final settlement of said estate in said federal court by said executor. This proceeding of Mrs. Fulmore in the United States circuit court was made known and pleaded in the court below by an amendment or supplementary bill filed January 13, 1890. On the 5th of January, 1891, said Richardson, in the court below, amended his original bill, to which he made all the original respondents parties. By that amendment it was shown that on the 13th of December, 1890, the said United States court decided said cause adversely to the said Martha A. Fulmore, from which decision she has served notice on said Richardson of an appeal by her to the supreme court of the United States. On January 14, 1891, one J. R. Porterfield, as guardian of some of the devisees, and the guardian ad litem of the others, who were minors, filed their petition, addressed to the chancellor, and prayed to have turned over and delivered to them the immediate possession of the real property which was devised and bequeathed to them under and by the will and codicil of J. T. Perry, deceased. This petition was submitted to the chancellor together with the cause, and on January 30, 1891, the chancellor rendered a decretal order granting the relief prayed for in said petition of Porterfield and others, and directing that the respective devisees be turned over to the devisees or their guardian, "subject to the further orders of this court, without selling or incumbering the same." On the same day the chancellor rendered his final decree, which, so far as pertains to the issues involved in this appeal, was in the following language: "There is no doubt of the legal proposition that the debts must be paid. They must be paid out of the property not bequeathed, if there be any such. If there be no such property, then the debts must be paid out of the property given to the residuary legatee, or devisee. If there is no residuary legatee, then they must be paid out of the general legacies. But, if there are not general legacies, then the debts must be paid by contribution from the legatees whose legacies are specific. It is the duty of the executor to exhaust all other remedies, and resort to all other means, before he will devote a specific legacy to the payment of the debts; and, when it becomes necessary to resort to the specific legacies, he must do so in such a way as to make the burden fall equally on all of the specific legacies, proportionately and equally, if possible. If the executor is about to select the property of one

of the specific legatees, and appropriate it to the payment of debts, there is a remedy in this court. By reference to the will, it is my construction that the bequest to Mahala I. Rothenhofer of all his personal property, with the exception named, makes her a residuary legatee, and the personal property named therein is principally liable for the payment of the debts, except for the mercantile; the legacy to J. M. Carroll being primarily liable for the mercantile debts. The legacy to Henrietta Dohrmeyer of the piano, and of the parlor set of furniture to Bessie Dohrmeyer, are specific legacies, and can be required to contribute to the payment of debts when a resort to residuary and general legacies is insufficient to pay the debts. He gives \$500 to each of his sisters, to be paid in 12 months after his death. This is a general legacy, and cannot be paid by any contribution of the specific legacies. It must be paid out of the residuary legacy, if there be no property which is not bequeathed to any person, out of which to pay it. The devise of the two brick storehouses to J. M. Carroll is specific, and can be made to contribute to the payment of debts only in the event that there is not enough of the residuary legatees' property to pay them. The bequest in the fourth paragraph of the will is a specific devise of realty to Fannie Belle Dohrmeyer, and should be delivered to her without impairment, if there is any means to pay the debts without resort to specific devises. The same is true of the bequest to Henrietta Dohrmeyer in the fifth paragraph of the will. The same is true of the bequest to Bessie Dohrmeyer in the sixth paragraph of the will. The same is true of the bequest to Eva Dohrmeyer in the seventh paragraph of the will. It is a very important question, in this case, whether the bequest to Hermann Perry Dohrmeyer is a specific or a residuary legacy or devise. If Mrs. Rothenhofer is given a residuary legacy of personal property, and Hermann Perry Dohrmeyer a residuary devise of lands, then resort must be had first to her legacy, and, after exhausting that, then to the residuary devise of land to said Hermann. I would fain conclude that the testator failed to make, as he intended, the legacy or devise to Hermann a specific devise, as he had made those of his sisters. I am inclined to the opinion that the testator intended to use the words, 'All other real property of which I may die seised or possessed, or that I may be entitled to at the time of my death,' as only a short way to describe the property which he intended to bequeath to Hermann. I do not think that he intended to charge this devise to Hermann with the payment of debts, any more than he did the devises to the other nephews and nieces. But, very reluctantly, I must conclude that the language used by the testator will not permit me to hold that the devise to Hermann Perry Dohrmeyer is specific. The codicil of the will makes a specific

devise to J. M. Carroll of the mercantile business, charged with the payment of the mercantile debts. Whatever remains after the payment of the mercantile debts is a specific legacy to him. This legacy must contribute, as all the other specific legacies, to the payment of debts, after the exhaustion of the residuary devises and legacies to them, and not before. It is my opinion that the \$1,500 found in the vault after the death of the testator are not embraced in the legacy to J. M. Carroll, but that it should go to the residuary legacy to Mrs. Dohrmeier, [Rothenhofer?] which is primarily subject to the payment of the debts. This is different as to the \$300 found in the safe in the store, which is a part of the mercantile business given to J. M. Carroll. After the exhaustion of the residuary legacy to Mrs. Rothenhofer, and of the residuary devises to Hermann Perry Dohrmeier, then all the specific legacies and devises of personalty and realty must contribute pro tanto to the payment of debts. Let the costs of this suit be paid by the executor out of such funds of the estate which are in his hands, and his receipt shall be a voucher on the settlement of the estate." It is from this decree that the present appeals are prosecuted.

Stallings & Wilkinson, for appellants. J. C. Richardson, for appellees.

McCLELLAN, J. J. C. Richardson, as executor of the last will and testament of J. T. Perry, deceased, filed his bill in the chancery court of Butler county against Sarah E. Kelly, J. M. Carroll, and others, the devisees and legatees thereunder, praying that the administration of the decedent's estate be removed from the probate into the chancery court, and there managed, administered, and settled; that the will of the deceased be interpreted and construed by the chancery court, and that rights, interests, and duties of the executor, devisees, and legatees thereunder be declared; that the duties and liabilities of the executor in respect of a certain contract made by and between said Carroll and said Kelly be determined; that a certain "pretended deed" signed by the testator shortly before his death, and found in the hands of Carroll, purporting to convey a lot or parcel of land to said Kelly, be annulled and canceled, or held to be a part of said will, etc. The bill also contains the general prayer for relief. There is some suggestion in the bill, made by a reference to the averments of another bill, in a different case, where the charge was directly advanced, that Carroll had wrongfully and fraudulently gotten possession of a large sum of money which Perry had at the time of his death, and upon this suggestion the present bill sought a recovery from Carroll of this alleged fund. Evidence was adduced in that connection, but no decree was entered on this part of the case, and no

question connected with it is now presented for our consideration. The fact that some question is raised as to the validity of a codicil to the will is also stated in the bill, and the chancery court is asked to determine whether the codicil is valid or not, but this inquiry is not pursued beyond this suggestion and prayer. The will and codicil were duly probated and established in the probate court. No decree on the validity of either was passed by the chancery court, but that court treated and considered the will and codicil together as constituting the last testament of the deceased, and so we will consider them. No objection is here urged to the decree of the chancellor, in so far as it removed the administration of the estate from the probate into the chancery court. The propriety of and necessity for that action appear to have been conceded by all parties on the hearing.

The questions of chief importance raised by this record bear upon the construction of the testator's will and codicil, and, that these may be the more clearly presented, those instruments, omitting their formal parts, are here copied, as follows:

"First. My will is that all my just debts and funeral expenses, including a monument over my grave, be paid out of my estate as soon after my death as convenient. Second. After paying all my just debts and funeral expenses, as heretofore described, I give, devise, and bequeath to my beloved sister Mahala I. Rothenhofer all my personal property except my piano, which I give, devise, and bequeath to my niece Henrietta Dohrmeier, and my parlor set of furniture, including carpet and parlor pictures of every kind, that is in my parlors, to my niece Bessie Dohrmeier. Third. I give, devise, and bequeath five hundred dollars in cash to each of my sisters Mahala I. Rothenhofer, Martha I. Fulmore, and my sister-in-law Georgiana V. Carroll, which shall be paid over to them by my executors within twelve months after my death, or sooner, if practicable. Real estate: I give, devise, and bequeath to my nephew J. M. Carroll my two brick stores and lots on the corner of Commerce and Bolling streets, each fronting 25 feet on Commerce street, and running back 125 feet; but if he should die without issue, before the reversion or remainder shall come into his possession, then I give, devise, and bequeath the same to my niece Fannie Bell Dohrmeier, her heirs and assigns, forever. Fourth. I give, devise, and bequeath to my niece Fannie Bell Dohrmeier my hotel and lot known as the 'Perry House,' on the north side of Commerce street, fronting about 50 feet on Commerce St., and running back 100 feet. Also, I give, devise, and bequeath to my niece Fannie Bell Dohrmeier my two one-story brick stores and lots west and adjoining the Perry Hotel and the L. and N. R. R. right of way. Fifth. I give, devise, and bequeath to my niece Henrietta Dohr-



meier my two brick storehouses and lots on the south side of Commerce street, described as follows, i. e. the third and fourth stores from the corner of Commerce and Bolling Sts., and immediately east and adjoining the two stores that I have given to J. M. Carroll, fronting 20 ft. on Commerce St., and running back 125 feet each, one now occupied by Prof. J. P. Steele, and the other by H. Potter. Sixth. I give, devise, and bequeath to my niece Bessie Dohrmeier, my two two-story brick stores on the south side of Commerce street, known as the 'Sol Erlick Dry-Goods Store' and 'Lichten & Co. Drug Store,' each fronting 20 ft. on Commerce St., and running back 100 ft., immediately east and adjoining the two stores that I have given to Henrietta Dohrmeier, they being the fifth and sixth stores from the corner of Commerce and Bolling Sts. Seventh. I give, devise, and bequeath to my niece Eva Dohrmeier my two one-story brick storehouses and lots on the north side of Commerce St., fronting about 45 ft. on Commerce St., and running back 100 ft., immediately east and adjoining the hotel known as the 'Perry House,' and now occupied by J. O. Bryan as a billiard and drinking saloon. Eighth. I give, devise, and bequeath to my nephew Herman Perry Dohrmeier all other property which I may die seised and possessed of, or that I may be entitled to at the time of my death. And I hereby appoint my nephew J. M. Carroll, Edward Crenshaw, and J. C. Richardson to be the executors of this, my last will and testament; and I hereby authorize them, or the survivors of them, to do all things necessary to carry out the terms of this will, and to avoid, if possible, the necessity of going into any of the courts to settle up this will. It is my wish, too, in case of disagreement between any of the parties to this will, that the same shall be settled by arbitration, instead of going into chancery or any other court with it. The said executors, or such of them as act, shall give bond and security in the sum of ten thousand dollars for the faithful performance in carrying out the terms and provisions of this will; said bond to be taken and approved by the probate judge of this county. To all of which I set my hand and seal this the 10th day of Feby., 1887."

The codicil: "Codicil. Additional to page 1, from second clause. Second. After paying all my just debts and funeral expenses, as heretofore described, I give, devise, and bequeath to my beloved sister Mahala J. Rothenhofer all my personal property, excepting stock of merchandise, books, accounts, notes, store fixtures, and everything belonging in said store now occupied by me on corner of Commerce and Bolling streets, to my nephew J. M. Carroll, who will assume all the liabilities of the store, and continue the business as heretofore, and he would [will?] provide for the welfare of my beloved sister Elizabeth Kelley, and my sis-

ter-in-law Georgiana V. Carroll, as long as they live and will accept."

It is clear, we think, that this codicil was intended, not as an addendum, merely, to the second clause of the will, but as a revocation and expurgation of that clause, in its entirety, and the substitution of the new provisions in lieu of it. The codicil is stated to be "additional," not to clause second, but "to page 1, from [or commencing with] second clause." With this identification of the point in the original paper where the codicil is to be inserted in the reading of both as one instrument, the body of the addition to page 1 is denominated "Second." There being only one clause in the codicil, this word could have been used only for the purpose of referring it to its proper place, as clause second in the original will; and this idea finds further support in the fact that the language of the codicil, down to the exception stated therein, is precisely that of the original clause down to the exception. The original clause, in other words, bequeathed all of the testator's personalty to Mrs. Rothenhofer, with certain exceptions in specie to Henrietta and Bessie Dohrmeier, respectively. The codicil, in identical terms, bequeathed all of the personalty to Mrs. Rothenhofer, with certain specific and entirely different exceptions to J. M. Carroll. Each of the provisions, in terms, covers all of the testator's personal estate, and disposes of it. It may well be that the testator, having determined upon the provision for Carroll, and seeing that thereby the value of his bequest to Mrs. Rothenhofer would be greatly lessened, had in mind to maintain the quantum of her legacy to the extent that could be done by striking out the exception originally embraced in the clause "second," and revoking the legacies thereunder given to the Dohrmeliers. Certain it is that these clauses cover the same field, and to the same extent the personalty, and all the personalty of the estate. Certain it is, also, that they are wholly inconsistent with each other as respects their several exceptions from the general bequests of all personalty, and their specific legacies out of and embracing in each instance all of the property excepted from the general bequest to Mrs. Rothenhofer; and of course the codicil must be upheld, the effect being a revocation of the specific legacies to Henrietta and Bessie Dohrmeier. The chancellor erred in his decree upon this matter.

There is another instrument brought to light in this case, which in our opinion must, if and when probated, as it may be, operate as a codicil to the will of J. T. Perry. We refer to the paper executed by the testator on June 21, 1887, which is in the following language: "State of Alabama, Butler county. Know all men by these presents, that I, John T. Perry, of the county and state aforesaid, for and in consideration of kind and valuable services rendered to me by Eliza-

beth Kelly, of the county and state aforesaid, and also for the further consideration of \$5.00 to me in hand paid, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, and by these presents do give, grant, bargain, sell, and convey, unto the said Elizabeth Kelly, the following described lot or parcel of land, viz.: One house and lot known as the 'Conley Place,' bounded on north by Commerce street, on south by Geo. W. Bryan's lot, on the east by an alley, on the west by Mrs. Rothenhofer's lot,—containing one-half acre, more or less, situated in the city of Greenville, county and state aforesaid, together with, all and singular, the hereditaments and appurtenances thereunto belonging, to have and to hold the aforegranted premises unto the said Elizabeth Kelly, her heirs and assigns, as against myself, my heirs and assigns, and against all persons claiming or to claim the same by or through me in any manner whatever, but reserving unto myself the use, occupation, and enjoyment and control of the same for and during the term of my natural life, and I am to retain the possession of this conveyance during the term of my natural life; then this conveyance to be delivered to the said Elizabeth Kelly. In witness whereof, I hereunto set my hand and seal this 21st day of June, 1887. J. T. Perry. [Seal.] In presence: S. J. Bolling, J. M. Carroll." It is most clear that this instrument is inoperative as a deed. It conveyed no estate in possession or in title during the life of Perry. He was not only to retain "the use, occupation, enjoyment, and control" of the land for the term of his natural life, but by the express terms of the paper there was to and could be no delivery of the instrument, in escrow or otherwise, until after his death, and in legal contemplation posthumous delivery is no delivery at all. *Richardson v. Iron Co.*, 90 Ala. 266, 8 South. Rep. 7. On this state of case the instrument is void as a deed, but if, as seems probable, it was executed with the formalities requisite to a will, it may, when proved as a codicil to the will, operate as a testamentary disposition of the house and lot described in it to Mrs. Kelly. *Crocker v. Smith*, 94 Ala. 295, 10 South. Rep. 258; *Trawick v. Davis*, 85 Ala. 342, 5 South. Rep. 83; *Kyle v. Perdue*, 87 Ala. 423, 6 South. Rep. 290.

Putting the codicil first considered in the stead of the second clause of the will, and adding to the will this paper of June 21, 1887, as a codicil thereto,—which we will assume, for the purpose of this opinion, has been probated as such,—it is now to be considered what is the character of its several bequests and devises, in respect of the first being specific, demonstrative, or general, and of the second (devises) being specific or general, with a view to determining in what order they shall be abated or adeemed through contribution to the payment of the debts of

the estate, and the expenses of its administration. The principles of law in this connection are plain and familiar, for the most part, and, in the main, of easy application to this case. "A specific legacy is a bequest of a particular article or specific part of the testator's estate, which is so described and distinguished from all other articles or parts of the same as to be capable of being identified." "A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund in such way as not to amount to a gift of the corpus of the fund, or to evince an intention to relieve the general estate from liability in case the fund fail, and so described as to be undistinguishable from other things of the same kind." "A general legacy is a bequest chargeable upon the general estate, and not so given as to be distinguishable from other parts of the estate of the same kind." Or, as otherwise defined, "a general legacy is one of quantity, merely, and includes all legacies not embraced within the definitions of specific and demonstrative legacies." 13 Amer. & Eng. Enc. Law, p. 10 et seq., and notes; 1 Brick. Dig. pp. 594, 595, § 127 et seq.; *Myers' Ex'rs v. Myers*, 33 Ala. 85; *Harper v. Bibb*, 47 Ala. 547; *Maybury v. Grady*, 67 Ala. 147. A bequest of all the testator's personal estate is a general bequest. Nor is its character in this regard changed by the fact that a specific part is excepted out of the general bequest, and given to another. 13 Amer. & Eng. Enc. Law, pp. 23-25, notes; *In re Ovey*, 20 Ch. Div. 676. Under these definitions, the bequest of personality in gross to Mahala J. Rothenhofer, and the pecuniary bequests to Mesdames Kelly, Carroll, and Fulmore, are general legacies, and the bequest to J. M. Carroll, of certain merchandise and other property pertaining and belonging to the mercantile business carried on by the testator in his lifetime, is a specific legacy. No demonstrative legacy is given by the will.

As to the character of the devises contained in the will: At common law, all devises of land, whether given by particular description or residuary clauses, were specific. The soundness of this doctrine—its logical correctness—is manifest when reference is had to that rule of the common law by which wills were held to speak as of the date of their execution, and to embrace only such property as then belonged to the testator, and was within the terms of the testament. Under that rule, as has been well said, "a devise of lands operated in the nature of an appointment upon the land held by the testator at the time of its execution. Hence, whether the land devised was described specifically, or only by way of residue, for practical purposes, it was equally well ascertained," since the residue then held by the testator was as capable of identification, and was already, indeed, as fully identified in his mind and intention, as the

part segregated therefrom by particular description, he being held to know what property he is seised of. And therefore the doctrine we have stated, that even residuary devisees are specific, because it is to be assumed the testator had the residue of the land then held by him in his mind, and to have intended it to go to the residuary devisee as specifically as he had intended the lands particularly described to go to other devisees. Some modification of this doctrine has been admitted in American courts, in view of statutory provisions which have the effect of making wills speak from the death of the testator instead of from their execution. Our statute on the subject is the following: "Every devise made by a testator, in express terms, of all his real estate, or in any other terms denoting his intention to devise all his real property, must be construed to pass all the real estate he was entitled to devise at the time of his death." Code, § 1948. Considering that testators could not have had property acquired after the execution of their wills in their minds at that time, and that it is only by force of statute, and wholly apart from the testator's intent, that such property passes at all, and hence that they could not and did not specifically intend that residuary devisees should take such property, the tendency of American decisions has been—though the rule is different under similar statutory provisions in England—to hold that no devise of after-acquired real estate is specific, unless the land is described with sufficient particularity to enable the devisee to identify it. *Farnum v. Bascom*, 122 Mass. 282; *In re Woodworth's Estate*, 81 Cal. 595; 13 Amer. & Eng. Enc. Law, p. 27, note. This modification has never been considered in Alabama. No case has arisen involving the character of a devise of after-acquired land in this respect; but, while the general doctrine that devisees are specific has been adjudged by this court, nothing that has been said is opposed to the limitation of it to property held by the testator at the time of executing the will, and property the acquisition of which was then in contemplation, and which is so described in the will as to enable the devisee to identify it. *Maybury v. Grady*, 67 Ala. 147, 153, citing *Wallace v. Wallace*, 23 N. H. 149, and *Aldrich v. Cooper*, 2 Lead. Cas. Eq. pt. 1, p. 323 et seq., note. There being nothing in our own adjudications to the contrary, and conceiving the modification to be sound in principle, we adopt it, and hold, in so far as wills pass real property acquired after execution, the devisees are general, and not specific, unless such after-acquired property is so described as to admit of its identification by the devisees. 2 Woerner, Adm'n, p. 967; 3 Redf. Wills, 367, note (36); 4 Kent, Comm. 541, note (1.) Applying the foregoing principles to the will before us, the result is to declare that each of the devisees it contains,

including the residuary devise to Hermann Perry Dohrmeier, and, of course, the devise by codicil to Mrs. Kelly, is a specific devise, with this possible qualification in respect of said residuary devisees: If any part of the land covered thereby was acquired by the testator after the execution of the will, to the extent of such land, and in respect of it only, the devise is general; such after-acquired land, if any there was, not being described in the instrument.

Coming now to consider the order in which the legacies and devises of this will are to be abated or adeemed by contribution to the debts of the estate and expenses of its administration, it is first to be observed that by the special terms of the codicil the indebtedness incident to the testator's mercantile business is charged upon the specific legacy of the stock of goods, etc., bequeathed to J. M. Carroll. If this property suffices to pay this indebtedness, with a balance of property remaining, the question is whether such balance is subject to the general indebtedness of the estate, along with other legacies of its class. We think it would be. This property, in the first place, was subject to the general debts of the estate, including the liabilities incurred in the mercantile business; and the general rule is that expressly subjecting property "to certain charges to which it was before liable does not exempt it from its primary liability for other debts not so expressly imposed upon it, upon the principle of 'expressio unius est exclusio alterius.'" The contrary intent of the testator must be plainly manifested before a different conclusion is authorized. *Brydges v. Phillips*, 6 Ves. 567; *Davies v. Ashford*, 15 Sim. 42. We find no expression or clear indices of any other intent on the part of the testator than a purpose to specially charge the legacy to Carroll with the mercantile debts. There is, indeed, no intimation, and scarcely room for persuasive inference, that he had any purpose to exempt this property at all from the burdens of his estate, further than the law implies from the specific terms in which the legacy is given, the effect of which has relation solely to the order in which it may be subjected to general debts. And we accordingly hold that if the store debts are paid by Carroll, or out of this property, he holds the remnant of it subject to the other debts and to the expenses of administration, as a special legacy is subject thereto. On the other hand, if this property is exhausted without full payment of the mercantile indebtedness, the unpaid balance, of course, is to be paid, like other debts, out of the general property of the estate.

It is the policy of our laws that both real and personal property are equally liable for the debts of decedents, and that realty devised and personalty bequeathed shall, where the devise and legacy are of the

same character, abate ratably when there is a failure of assets undisposed of by the will, to pay debts. It is in keeping with this policy that the rule by which specific legacies and specific devises are abated ratably by the necessities of contributions to the debts of the estate has come to be established. It follows logically from this policy and this rule in respect to specific dispositions of realty and personalty, respectively, that general devises should contribute ratably with general legacies to debts and expenses of administration, and we so hold. That specific devises and specific legacies abate pro rata when there is necessity for either to contribute to debts is a proposition sustained by the weight of authority and reason, and which has been expressly announced by this court. 13 Amer. & Eng. Enc. Law, p. 130 et seq., and notes; Aldrich v. Cooper, 2 Lead. Cas. Eq. pt. 1, p. 325 et seq., note; Maybury v. Grady, 67 Ala. 147; 1 Rep. Leg. 358.

As we have seen, there is no residuary bequest in this will. There are general legacies of "all my personal property," with a certain exception, to Mrs. Rothenhofer, and \$500 in money to Mesdames Fulmore, Carroll, and Kelly, severally. There may also be, as we have pointed out, a general devise of after-acquired land to Hermann Perry Dohrmeier. Beyond these, the remaining legacy—that to J. M. Carroll—and all of the devises are specific. The order of abatement is this: The personalty bequeathed to Mrs. Rothenhofer, the pecuniary legacies of \$500 each, and the land acquired after the execution of the will, and embraced in the residuary devise to Hermann Dohrmeier, if any such land is embraced therein, must first, after exhausting assets undisposed of by the will, be taken and made to contribute ratably—that is, in proportion to respective values—to the liabilities of the estate. If, through the full abatement of these general legacies, and this general devise, if any, the liabilities of the estate are not satisfied, the specific legacy to Carroll and each of the specific devises, of which land held at time of executing the will and embraced in the residuary clause to Hermann constitutes one, shall in like manner be made to contribute *pari passu* to the debts and expenses of administration, and, to the extent of their respective contributions, be abated. If the paper of June 21, 1887, cannot be, or is not, probated as a codicil to the will, the land embraced in it will necessarily go in specific devise to Hermann Dohrmeier, and in his hands be subject, with other specific devises and the specific legacies, to abatement, *ad valorem*, by contribution to debts, etc.

The inquiry as to the source from which the pecuniary legacies are to be derived involves a question of some embarrassment. Clearly, these legacies are not charged upon the realty. Clearly, also, it was the purpose of the testator that they should be paid,

and if this intent is to be effectuated it must be out of the personalty of the estate. Yet the terms of the bequest to Mrs. Rothenhofer are sufficiently broad, standing by themselves, to pass to her all of the personalty, including money in hand, belonging to the testator, except that covered by the bequest to Carroll; and we know of no rule of law which authorizes the payment of one general legacy by the abatement of another general legacy or of a specific legacy. So that, if the bequest to Mrs. Rothenhofer is given the broad effect its language admits of, there is no property upon which the pecuniary legacies can be charged, and no fund, even leaving debts out of view, out of which they could be paid; and the intention of the testator as to these legacies would be utterly defeated by his own will, as expressed in another part of the instrument, clearly expressing also this intention. He, as we have said, is holden to a knowledge of the condition of his estate, and it is also to be conclusively presumed that he intended the benefits he has declared to each and all of the legatees named in his will. It appears that both at the time of executing the will, and at the time of his death, he had very considerable tangible personal property, as well as realty, and that he also had money on deposit in bank, (as at the first date,) or in his private depository, (as when he died.) If he bequeathed this money in part to Mrs. Rothenhofer generally, and in other part to Carroll specifically, he must have known that his beneficent purposes with respect to his sisters, Mrs. Kelly and Mrs. Fulmore, and his sister-in-law, Mrs. Carroll, would be entirely thwarted. To hold that he so intended would be to convict him of the most puerile and absurd trifling with these natural objects of his bounty. A construction of the instrument which will avoid such a conclusion, and leave a field for the effectuation of all his testamentary purposes, so far as the exigencies of his estate will admit of, ought to be adopted, if the language he has employed is susceptible of it. We think it is, and that the desired result may well be reached by construing the bequest to Mrs. Rothenhofer to cover and pass only that part of his tangible personal property, not excepted to Carroll, exclusive of money in hand, and by construing the bequest to Carroll not to embrace money in the safe in the store. Under all the circumstances, these interpretations appear to us reasonable, and we adopt them. This view is especially forceful in respect of the bequest to Carroll, since it is entirely improbable that the testator, if he had intended the considerable sum of money then in the store safe to pass,—and the will, in this particular, was executed just before his death,—would have omitted it from the enumeration of various items of property in the store, and given to Carroll, or have supposed he was carrying it by the general

phrase, "and every thing belonging in said store." We hold, therefore, that, as to all money belonging to J. T. Perry at that time, he died intestate, and that the pecuniary legacies were payable out of these funds, not, of course, as demonstrative legacies, but as undisposed-of assets of the estate; and in so far as such assets, together with the tangible property bequeathed generally to Mrs. Rothenhofer, were insufficient to pay the liabilities of the estate, and all the general legacies, in full, such legacies—that is, the value of the personalty bequeathed to Mrs. Rothenhofer, and these pecuniary legacies—must abate pro rata.

In reference to the executor's rights and duties under the contract between J. M. Carroll and Mrs. Kelly, it will suffice here to say that if at any time he has in his hands money going to Carroll out of the estate, and as an incident, merely, of the administration, he would, in our opinion, be authorized to pay it, to the extent of \$1,550, to Mrs. Kelly; but he is under no duty or obligation, and has no power or authority, to convert the property, personal or real, specifically bequeathed or devised to Carroll into money for the purpose of paying the latter's contract debt to Mrs. Kelly, or into any property so bequeathed or devised to Mrs. Kelly in specie. It may not be out of place to say, further, in respect of the rights inter se of Mrs. Kelly and Carroll under their agreements, that the land described in the separate paper which was supposed to be a deed from Perry to Mrs. Kelly—and which we have held must operate as a codicil to Perry's will, if it can be and is probated as such—is not within the terms of said agreements, and will not pass to Carroll thereunder, although thereby Mrs. Kelly released and assigned to him all her interests as devisee and legatee under the will. It was not supposed that this land constituted a devise, and it was clearly not in the contemplation of the parties in entering into this contract.

We have no fault to find with the chancellor's decretal order as to the surrender of devises to the devisees. The case made by the petition to that end, the answer of the executor, and the facts adduced, justified the action taken; and the surrender or delivery of possession to the devisees is so conditional and so limited by the terms of the order that no possible detriment can result to the estate, the creditors, or the executor. We have discussed several matters which, though involved in the case, as submitted to the chancellor, were not adjudicated by him. This we have done in the hope of expediting the administration and settlement of the estate. In several of the matters adjudged by the chancellor, and presented by the appeal of J. O. Richardson, executor, etc., we have reached conclusions different from those declared by the decree below. On the appeal of Richardson, therefore, that decree

must be reversed, and the cause will be remanded; costs of appeal, including all cost of transcript, to be paid out of the assets of the estate. Neither Mrs. Kelly nor J. M. Carroll take anything by their cross appeals, and they will, respectively, be taxed with the costs thereof, except cost of making transcript. No appeal was taken by Hermann Dohrmeier, and the assignments of error made by him are stricken out. The questions sought to be presented thereby, however, have been passed upon on the appeal of the executor. Reversed and remanded.

(101 Ala. 488)

# BIRMINGHAM RAILWAY & ELECTRIC CO. v. BAYLOR.

(Supreme Court of Alabama. July 27, 1893.)

## INJURIES TO RAILROAD EMPLOYE—PLEADING AND EVIDENCE—DEFECTIVE SWITCH.

1. In an action for personal injuries to an employe of defendant caused by a train going through an open switch, under a count in the complaint charging negligence on the part of persons in the employ of the defendant, who had charge of the switch, in leaving it open, there was evidence that the switch was provided with a suitable lock, and that the section foreman, conductors, and engineers each had a key. The switch was used about 30 minutes before the accident, and the engineer then using the switch testified that it was properly secured before he left it. *Held*, that there was evidence to go the jury under such count.

2. Where a count charges that the injury was caused by the negligence of persons in defendant's employ, who had charge of the switch, in failing to properly secure it so as not to come open, and by the negligence of persons in defendant's employ, who had charge of the train, to properly supply it with equipments for bringing it to a quick stop, by reason of which failures said switch did come open, defendant is entitled to the general affirmative charge thereunder, in the absence of evidence of negligence in both of these respects.

3. In an action for injuries to a railroad employe caused by the train on which he was employed running through an open switch, where there was evidence that locks had been used on defendant's switches for six months, and other evidence that a lock had never been put on the switch in question, it is proper to permit a witness to testify that he was employed by defendant till two months before the accident, and that there were then no locks in use on the road.

4. In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to previously pass through the switch should not be allowed to testify that it was secure when he passed through it, without first stating its condition and how it was secured.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by James H. Baylor against the Birmingham Railway & Electric Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

On the examination of J. J. Kennedy, as a witness for the plaintiff, he testified that he was a locomotive engineer, and had been about 14 years; that the plaintiff was injured while running as fireman on the same

dummy on which he was engineer. After testifying as to the accident which resulted in the injury to the plaintiff, he testified that he examined the switch after the wreck, and it was at that time open to the side track, and was all right except for the absence of a switch lock, but that there was no one at the switch to undertake to signal that there was danger from the switch being open. The plaintiff then asked the witness the following question: "I will ask you if you know what the custom is of well-regulated railroads as to the manner of securing switches." The defendant objected to this question, on the ground that the witness was not shown to know the custom upon the kind of railroad or dummy line that was operated by the defendant, upon which plaintiff was injured. The court overruled the defendant's objection, and defendant duly excepted. The witness stated that he knew what the custom was upon well-regulated railroads, and that the custom was to have locks on the switches. The defendant also moved to exclude this answer on the same grounds, and duly excepted to the court's overruling his motion. On the examination of L. M. McLemore as a witness for the plaintiff, he testified that he had been in the employ of the defendant, and knew the location of the switch at which the accident occurred; that he did not know whether there was a lock on said switch when he was running on the train of the defendant; that he did not see any; and that, two months before the plaintiff was injured, he ran into the same switch. The defendant moved to exclude that portion of this witness' testimony in which he testified that two months before the accident he ran into the switch at the place of the accident; but the court overruled the defendant's motion, to which ruling the defendant duly excepted. The defendant introduced as a witness one M. M. Dill, who testified that he was an engineer on the defendant's road, and that on the night of the accident he passed on the side track, at the switch where the accident occurred, for the purpose of letting the engine on which the plaintiff was fireman pass by, going on to Bessemer, which was about 30 or 40 minutes before the accident occurred; that, after this train had passed on, he moved out of the side track onto the main line, and went on to Birmingham. The defendant then asked the witness the following question: "Tell the jury the condition of the switch after you moved out,—whether it was safe or not." Plaintiff objected to this question, in that it called for a conclusion of the witness, which objection the court sustained, and the defendant duly excepted. The defendant then asked the witness to "state whether it would be reasonably safe for a train to pass over the switch left as you left it that night." The court sustained the plaintiff's objection to this

question, and the defendant duly excepted. The defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (4) "I charge you that the law does not require the defendant to use the latest improvements or inventions in the operation of its road, but that the law is satisfied if the switch is reasonably safe for its employees; and I charge you that, if you believe from the evidence that on the morning of the accident the defendant's switch was reasonably safe if properly used, that you must find for the defendant." (5) "If you believe from the evidence that on the morning of the accident the section boss left the switch locked in the condition testified to by witness Aldrich, and that he did not have occasion to, and that his duties did not require him to, examine the switch afterwards during the day, and that he did not know but that the switch was locked at the time of the accident, then you must find for the defendant upon the first and second and third counts of the complaint." (16) "I charge you that, under the evidence in this case, you must find in favor of the defendant."

R. H. Pearson and John F. Martin, for appellant. Lane & White, for appellee.

COLEMAN, J. The plaintiff, Baylor, a minor, sues by his next friend, under the employers' liability act, (section 2590 of the Code,) to recover damages for injuries sustained while in the employment of defendant as fireman. As the case must be reversed for causes hereafter considered, we deem it proper to consider the sufficiency of the complaint, lest our failure to do so be construed as an admission that the complaint is free from error. It is proper to add in justice to the trial court that the defendant did not demur to the complaint, and trial was had upon the general issue. It is necessary to clearly understand and keep constantly in view the several causes of action as laid in each count, to test the correctness of the rulings of the court upon questions of evidence and instruction to the jury. We have heretofore declared many of the principles embodied in the employers' act, and defined rules of pleading to be observed in framing the complaint and pleas thereto. In the case of Railroad Co. v. Dusenberry, 94 Ala. 419, 10 South. Rep. 274, it was declared that "when the plaintiff, in a single count, shifts his right of action from one ground to another, and states several breaches of duty in the alternative or disjunctively, so that it is impossible to say upon which of several equally substantive averments he relies for the maintenance of his action, then there is such confusion and obscurity as to the ground upon which a recovery is claimed that the defendant is not clearly informed of the matter to be put in issue, and a count

so substantially variant and contradictory is demurrable. \* \* \* Inextricable confusion of issues would result from the blending in one count of a number of distinct breaches of duty as independent grounds of recovery, to be chosen from and relied upon at the election of the plaintiff. Perspicuity and certainty in his pleadings are not exacted of the plaintiff if he is permitted to put forward in one count several independent causes of action, stated in such ambiguous terms as to leave the defendant wholly in doubt as to what alleged breach of duty is really made the grounds of the charge of liability." These rules were declared as applicable to the complaint then under consideration, an examination of which showed that several causes of action and distinct breaches of duty, arising under separate subdivisions of section 2590, were united and blended in one count, and in some instances averred in the alternative. The rule declared in the Dusenberry Case in regard to the pleadings was recognized in the case of *Railroad v. Burton*, (Ala.) 12 South. Rep. 90. In the case of *Railroad Co. v. Mothershead*, (Ala.) 12 South. Rep. 714, referring to the Dusenberry Case, supra, we said: "It was not held that where the several causes of action averred and relied on for recovery arose under the same subdivision of section 2590 of the Code, were stated separately, but not disjunctively, and each averment contained a substantive cause of action, such a count was demurrable. A count of this character fully informs the defendant that each substantive averment is relied upon, and he may prepare his defense accordingly. Proof of either will authorize a recovery. The distinction must be kept in mind where a single count contains several distinct, independent averments, each presenting a substantive cause of action, and a count containing several averments, all of which combining together make up the one cause of action averred. As to the former, proof of either will authorize a recovery, whereas in the latter it is necessary to prove each of the averments in order to sustain the cause of action as laid." Mere redundancy will not vitiate a complaint. The redundant portion may be stricken out, or rejected as surplusage. Let us apply these principles to the several counts of the complaint, and also examine the ruling of the court upon the several instructions refused with reference to the evidence as applicable to the several counts. The negligence charged in the first count is "of persons in the employment of the defendant, who had charge of the switch, \* \* \* in leaving said switch open," etc. The cause of action here averred is that given by subdivision 5 of section 2590. The question arises as to who was in charge of the switch, and what is meant by "charge or control of a switch."

The defendant introduced evidence as follows: "Mr. Aldrich had charge of looking after the switches and keeping them in or-

der. He was the section boss or road master. Aldrich was the man that looked after the switches. The sections were seven or eight miles." Turning to Aldrich's testimony, and he states that he was section foreman; that he went his rounds the morning of the day on which plaintiff was injured at night. "I did not have occasion to pass there any more during the day. I had no notice of or reason to think that the lock had been taken away up to the time that Baylor was hurt." We do not think the section foreman was a person in charge of the switch in such sort that it was his duty to attend to and watch the switch and see that it was properly closed or opened. His duty was rather that of a superintendent under subdivision 2, and he was required to superintend and see that the ways, works, machinery, and plant, so far as these terms embraced his duties, were kept in order; and, if it could be said that he was in charge of the switch in any sense, it would be for this purpose, and not for the purpose of attending to the closing or opening of the switch. See *Burton's Case*, supra. No special person was put in charge of the switch, and yet we are satisfied that, under the evidence, there were persons in charge of the switch, within the meaning of the statute. The evidence for the defendant is that the switch was provided with a suitable lock, and that the section foreman, conductor, and engineer each were provided with a key to this lock. If the foreman, Aldrich, was not charged with the duty of attending to the opening and fastening of the switch, and no one was specially appointed to this duty, and the spur track connected to the main line by this switch was in constant use in order that the trains might pass each other, and the engineers and conductors were provided with keys for this purpose, there is no other conclusion open but such persons pro hac vice were in charge of the switch. The evidence shows that William Dill, an engineer in charge of an engine, used the spur track about 30 minutes before the accident. True, he testifies that he saw that the switch was properly secured (not shown to be locked) before he left it, but the evidence is conclusive that the next train passing along, and upon which plaintiff was injured, left the main track, and went through the switch on the spur track, in about 30 minutes afterwards. We think there was sufficient evidence to submit to the jury plaintiff's demand under the first count of the complaint. There was no error in refusing the 4th, 5th, and 16th charges requested by the defendant.

We come now to the second count, and this count brings up for consideration the principles of pleading referred to in a former part of this opinion. It is averred in this count that the injury was caused by "the negligence of persons in the employment of the defendant, who had charge of the switch, \* \* \* in failing to properly fasten or secure



said switch so that the same would not come open, and by reason of the negligence of persons in the employment of the defendant, who had charge of said train, to properly supply it with equipments for bringing the same to a quick stop, by reason of which said failures [plural] said switch did come open, thereby," etc. "Plaintiff avers that he was aware that persons superior to him, engaged in the service or employment of the defendant, knew that said switch was not properly fastened or secured, and that said train was not properly equipped for coming to a quick stop," etc. This count, considered as a whole, is very confused. The negligence first charged consists in a failure to "properly fasten or secure said switch," and, as we interpret it, arises, as in the first count, under subdivision 5 of the act. The negligence next charged is the failure to properly supply the train "with equipment for bringing the same to a quick stop." This charge is for defect in the ways, works, machinery, or plant, and arises under subdivision 1 of the act; and it is averred that the failure to provide "equipments for bringing the same to a quick stop" was by reason of the negligence of the persons "who had charge of the train." The conductor had charge of the train at this time, and there is no averment nor proof that it was his duty to supply "proper equipments." Moreover, the act itself provides that the master or employer is not liable, under subdivision 1, for defect in the ways, works, machinery, or plant, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with this duty, etc. The count contains no sufficient averment to show a liability for negligence under subdivision 1. If we consider the words "in failing to properly fasten or secure said switch, so that the same would not come open," as referring to a defect in the switch itself, and therefore as charging a defect in the ways, works, and machinery or plant under subdivision 1, so as to bring both charges under the same subdivision, and relieve it of the objection that two substantive causes of action, arising under different subdivisions, are blended in one count, the count is objectionable, for failing to make the necessary averments to show a liability under subdivision 1, in that the "defect arose from, or had not been discovered or remedied," etc., as required by the act. We have said the count was not demurred to, but the general issue was pleaded. It becomes necessary to determine in what the cause of action charged in this count consists. We are of opinion, whether it be regarded as uniting a cause of action under subdivision 5 with one under subdivision 1, or whether as brought wholly under subdivision 1, the count does not contain two substantive dis-

tinct causes of action, proof of either of which will authorize a recovery; but it combines "the negligence of the person in charge of the switch, in failing to properly fasten or secure it," with the negligence of the person in "charge of said train, in failing to properly supply it with equipments for bringing the same to a quick stop," and the negligence of the two co-operated and together made the one cause, causing the injury. The count proceeds: "By reason of which said failures [both of them] said switch did come open," which caused the injury. The count further proceeds: "Plaintiff avers that he was aware that persons superior to him, engaged in the service or employment of the defendant, knew that said switch was not properly fastened or secured, and that said train was not properly equipped for coming to a quick stop," thus continuing to combine the two causes as contributing to make up the one cause, charged as producing the injury. The rule is very clear that, to authorize a recovery under such a count, the plaintiff is required to establish the negligence as laid, and, without proof of both, there could be no recovery under this count. There is not only no proof that it was the duty of persons in charge of the train to supply it with the "equipments" referred to, but there is an entire absence of proof that there was any defect in the respect charged. The court, therefore, erred in refusing to give the second charge asked by the defendant, which requested an affirmative charge under this count. Pleadings should be brief, perspicuous, and in an intelligible form. We think there is much room to improve the second count under these rules.

As we construe the third count, it was brought under subdivision 5. It is averred that the injuries were caused "by the negligence of some person in the employment of the defendant, who had charge of the switch, \* \* \* in failing to have properly fastened or secured the said switch, so that the same would not come open, \* \* \* the engineer in charge of said engine negligently failing to use all proper means and appliances to stop said engine, so that," etc. From the reading of the count, we are unable to determine whether the pleader intended in this count to aver that the negligence of the person in charge of the switch, and the negligence of the engineer, combined together, formed the one cause, which caused the injury. If it was intended to charge two distinct substantive causes of action, it was easy to frame the count in such manner as to be easily understood. If the pleader had averred that the injuries were caused—First, by the negligence of the person in charge of the switch in failing to properly fasten the switch so as to prevent it from coming open when struck by the train; second, by reason of the negligence of the engineer in charge of said engine in failing to use proper means and appliances to stop said engine,



etc.—it would be readily understood. Other phrases or statements would do equally as well as the one suggested as an illustration.

No pleas were filed to the fourth and fifth counts. We presume the case was tried throughout upon the general issue. The fourth count charges a defect in the ways, works, machinery, and plant, in this: that the switch was without a lock by which it could be securely fastened and left; and this count also charges negligence in the engineer in the rapid running of the train, and a lack of skill or proper effort, etc. If the purpose was to rely upon each as a substantive cause of action,—that averred under subdivision 1, and that under subdivision 5, each independent of the other,—good pleading would require a separate count for each. *Burton's Case*, supra. But if it was intended to charge the two as one cause, it should be clearly expressed. We have stated what is necessary in either case to authorize a recovery. We have also stated what averments are necessary to show a liability under subdivision 1.

The fifth count charges the engineer with negligence in the rapid rate of speed at which the engine was run as the cause of the injury. We cannot tell what the evidence will be in this respect on another trial, and will make no comments. We know of no reason why corporations or persons engaged in operating dummy lines like that of the defendant should not be required to observe rules and regulations, and adopt and use appliances and safeguards, which are in use and deemed necessary, by well-regulated railroads of the ordinary character. The evidence shows that the engines of defendant are capable of great speed; that it is engaged in running both passenger and freight trains, has regular stations and section foremen, and traverses a large section of country. We considered the responsibility of those operating dummy engines to some extent in the case of *Railroad Co. v. Jacobs*, 92 Ala. 187, 199, 9 South. Rep. 320; and in the more recent case of *Birmingham Electric Co. v. Allen*, (Ala.) 13 South. Rep. 8, one cause of action charged was the negligence of the defendant in failing to provide locks for switches, and we held there could be no difference in the application of the principle to dummy engines and engines of the ordinary character.

There are two assignments of error based upon exceptions to the ruling of the court as to the admission and rejection of testimony. There was no error in permitting the witness to state the condition of the switch two months prior to the injury. One of the disputed questions was whether the defendant had ever supplied the switch with locks. There was evidence tending to show that locks had been continually used for a period of six months, with the exception of two or three days. The witness testified that he was in the employ of the defendant up to two months before the injury, and there were

no locks in use. There was other evidence from which a jury might infer that a lock had never been put on this switch, while there was evidence offered by defendant to the contrary. In fact, the section foreman testified he locked the switch on the morning of the day of the injury. These disputed facts can be determined only by the jury. It was not proper for the witness William Dills to state, in the first instance, that the switch was safe after he moved out from it. It was proper to permit him to state its condition, how it was secured, and then state whether or not it was secure. The evidence showed that he was competent as an expert to give his opinion. Whether it was negligence per se not to provide locks for switches, under the evidence in this case, was a question for the jury. This record shows that one of defendant's witnesses, J. B. Downey, a master mechanic, testified that "the switches are not safe unless they are locked down. The jostling of the train throws them over." There is other evidence in conflict with this testimony. The truth must be ascertained by the jury. The plaintiff, his mother and stepfather, are all living. It will be an easy matter on another trial to furnish the necessary proof, if it exist, to show that plaintiff may recover for time during his minority. We have given this case careful consideration, and think we have said all that is necessary in order to have the pleadings put in proper form for another trial, and for a just determination of all the questions which will arise. Reversed and remanded.

(45 La. Ann. 1047)

STATE v. FOREMAN. (No. 1,430.)

(Supreme Court of Louisiana. July Term, 1893.)

CRIMINAL LAW—CHANGE OF VENUE—CERTIORARI—APPLICATION AFTER SUBMISSION—JURY—SUMMONING TALESMEN—BILL OF EXCEPTIONS.

1. Although applications for certiorari to supply deficiencies of record ordinarily come too late after submission, yet under the particular facts of this case, and considering that defendant's assignment of errors availing of these defects was itself filed only after submission, the application is allowed, on the ground that defendant's laches excuse the laches of the state.

2. Applications for change of venue on the ground of local prejudice are addressed to the sound discretion of the trial judge, and if he has not manifestly abused that discretion this court will not interfere with his ruling. When the evidence taken is contradictory, and inconclusive, and when the judge bases his ruling, not only on the evidence, but on his own knowledge of the facts and circumstances, it would require a very extreme case to authorize our interference.

3. Section 7 of Act No. 44 of 1877 imposes no duty on the district judge as to requiring the jury commission to draw additional jurors as talesmen, but simply authorizes him to do so "whenever he thinks proper," and of course his refusal to make such an order is not reviewable.

4. The other bills of exception are based on statements embodied in the bills which are de-

nied by the trial judge, who makes his own statements, which entirely destroy the exceptions, and which must be accepted by this court. (Syllabus by the Court.)

Appeal from district court, parish of La Fayette; A. C. Allen, Judge.

Willie Foreman was convicted of crime, and appeals. Affirmed.

Wm. Campbell and J. A. Chargois, for appellant. E. B. Dubuisson, for the State.

FENNER, J. This case stood second on the docket of the court at the opening of the term, and was called and submitted immediately after the court opened its first session. After said submission, counsel for defendant filed an assignment of errors apparent on the face of the record, among which, that the transcript failed to show the arraignment of the defendant, and his presence during the trial. The district attorney thereupon promptly filed an application for certiorari to complete the record, alleging that the case had been submitted prematurely and in error, and that in the hurry and press of official duty the defects in the record had escaped attention, and were only discovered when defendant's assignment of errors was filed, which was only done after the submission. The petition for certiorari was duly notified to defendant's counsel, and the writ was issued without prejudice. Though said counsel verbally stated in open court, in answer to a question of the court, that they did not consent to the certiorari, they have not made any formal objection, or submitted any grounds of opposition thereto. In answer to the certiorari the clerk of the district court has sent up a certified copy of the proceedings, which were omitted from the original transcript, and which completely supply all the defects complained of. They make it clear that in point of fact the proceedings in the lower court were in all respects regular, and that the appearance to the contrary on the face of the original record was due simply to the omission of the clerk to include therein a copy of the minutes of the proceedings. There is no question of the right of the state to correct such omissions by timely application for certiorari, and, under the circumstances of this case, and in consideration of the fact that the defendant's assignment of errors was only filed after submission, we think the premature submission should not deprive the state of the right of correction. Defendant's own laches excuses the laches of the state, and precludes him from objecting to have the validity of the proceedings under which he was tried determined according to the truth and fact thereof, and not according to a false simulation of nonexistent irregularities, appearing as the result of mere official negligence of the clerk.

The errors complained of are presented on four bills of exception, which we will consider in their order:

The first bill is reserved to a ruling of the court refusing the change of venue, on the ground of prejudice in the community which would prevent a fair trial. Evidence was taken, which is brought up as part of the bill of exception, and we have carefully considered it. It is contradictory and inconclusive, and the judge, in his reasons, states: "The evidence adduced, and my knowledge of the facts and circumstances surrounding the case, convinced me that the defendant could obtain a fair or impartial trial in the parish of La Fayette." Applications for change of venue are addressed to the sound discretion of the trial court, and, unless an abuse of such discretion be clearly shown, his decision will not be interfered with. *State v. Gonsoulin*, 38 La. Ann. 459; *State v. Daniel*, 31 La. Ann. 91; *State v. White*, 30 La. Ann. 364. We could not say, on the face of the evidence itself, that the judge had abused the discretion vested in him; and his conclusion, being also based on his own knowledge of the facts and circumstances, is entitled to additional weight and consideration, which entirely prevent our disturbing it.

The second bill is taken to the refusal by the judge of a motion to require the jury commission to draw additional jurors as talesmen, which denial is claimed to be in violation of section 7 of Act No. 44 of 1877. The point is meritless. A reference to the section shows that the propriety of such requirement is subjected to the unqualified discretion of the judge, and is only to be exercised "whenever the district judge thinks proper." The judge gives excellent reasons why he did not think it proper in this case, but if he had given none his action would not be subject to review by this court.

The third bill, which was taken to the sustaining of a challenge for cause of a juror by the state, whatever merit it might have under the statement embodied in the bill, is absolutely shorn of all force under the statement made by the judge, and does not need further discussion.

The fourth and last bill was taken to a ruling permitting the district attorney to contradict and impeach one of defendant's witnesses by admitting proof that said witness had made a certain statement, when the witness had not denied the making of such statement, but had only said that he did not remember making it; but the judge says he had, in effect, denied making the statement, because, after saying he did not remember, he added: "When I say I do not remember a thing, I mean that it is not so. When I say that I do not remember what you ask, I mean that I did not say that to Clark." This is the entire equivalent of an absolute denial, and opened the door to contradiction.

A careful scrutiny of the record reveals no ground for reversing the proceedings. Judgment affirmed.

(45 La. Ann. 1081)

REID et al. v. MAYO et al. (No. 1,431.)  
(Supreme Court of Louisiana. July Term,  
1893.)

**SALE BY LESSEE IN POSSESSION—RIGHTS OF PURCHASER—NOTICE OF TITLE—EVIDENCE.**

1. A lessee, in possession of a newspaper plant and paraphernalia thereto appertaining, cannot convert himself into an owner thereof without the knowledge or consent of his lessor, and by the unique and simple process of changing his name and capacity from editor and publisher to editor and proprietor.

2. One purchasing such plant from the person who has thus sought to convert himself into an owner has the duty imposed upon him of scrutinizing the claims of the vendor, particularly if he has been advised of the previous existence of the relations of landlord and tenant.

3. If, in addition, the proof shows that such purchaser has been fully advised and informed by the vendor of the source of his title, and of the negotiations through which he acquired title, he cannot found any equity or plead any estoppel raised on the aforesaid apparent change of proprietorship of the paper.

(Syllabus by the Court.)

Appeal from district court, parish of Calcasieu; G. A. Fournet, Judge.

Action by D. Y. Reid and another against Thadeus Mayo and others. From a judgment for defendants, plaintiffs appeal. Reversed as to plaintiff Reid. Rehearing refused.

W. F. Schwing, for appellants. A. P. Pujo and Mitchell & Mitchell, for appellees.

**WATKINS, J.** This suit has for object the recovery of a newspaper plant, styled the "Lake Charles Echo," and the paraphernalia appertaining thereto. It is directed against Mayo, as the party in possession claiming ownership, and against R. O. Gilliland, as lessee, the relief demanded being the restitution of the property, and the cancellation of the lease. The property was sequestered by the plaintiffs, and bonded by Mayo, Gilliland making no defense, and no one representing him at the trial. The defense is a general denial, coupled with an averment that Mayo purchased from R. O. Gilliland on March 16, 1892; and in the answer is incorporated a plea of estoppel, by way of exception, to the effect that plaintiffs were precluded by their laches and negligence from asserting and setting up title in themselves. Upon these issues, the cause was tried, and decided against the plaintiffs, the judgment rejecting the plaintiffs' demands, dissolving the sequestration, and reserving defendants' right to sue for damages. Plaintiffs Reid and Andrus claim to have acquired the property in controversy in 1890, from J. W. Bryan, for a valuable consideration actually paid by Reid, though title was executed in favor of Thomas Klimpeter, who subsequently executed title to Reid for 28-30, and to Andrus for 1-30, Klimpeter retaining title to 1-30 thereof; that the three organized a company or copartnership, styled the "Lake Charles Echo Pub-

lishing Company," and in that capacity operated the plant; that, subsequently, Reid acquired the interest of Klimpeter, and on the 23d of June, 1891, the company leased the outfit to R. O. Gilliland for the term of one year, with the privilege of renewal for another year, at \$100 per month during the term of the lease, the lease being evidenced by a written agreement that was left in the possession of the lessee. Petitioners declare that they are still the rightful and legal owners of the plant and property; that Gilliland has paid no part of the rent or lease price thereof, and has violated and broken all of his engagements, and absconded, abandoning the property; and that Mayo has by some means acquired possession thereof, and is claiming ownership, operating same to their detriment and injury, and is endeavoring to dispose of it, against their will. In the brief of defendants' counsel we find the following admissions of fact, viz.: That James W. Bryan sold and delivered the newspaper plant in controversy to Thomas Klimpeter, for the price of \$5,500, of which \$3,250 was paid in cash, and for the residue notes of the purchaser were executed, maturing during the year thereafter ensuing, the sale being evidenced by a notarial act, and same being duly recorded in the conveyance records of the parish; that upon the same day (March 14, 1890) Klimpeter conveyed to Reid and Andrus 28-30 interest in the plant, as stated in the petition; and that, subsequently, the three parties named formed themselves into a company for the publication of the newspaper, as plaintiffs allege. They further admit that on June 23, 1891, plaintiffs leased to R. O. Gilliland the Echo, (newspaper,) and that Gilliland went into possession as "Editor and Publisher," with his name promulgated as such in the title-page of the paper until the issue of February 5, 1892; but they aver that in the issue of the paper under date February 12, 1892, Gilliland announced himself to be "Editor and Proprietor," and that this announcement remained until the time of the sale by Gilliland to Mayo, on the 18th of March, 1892, it being followed by the subsequent publication of Mayo's salutatory in the issue of the paper, under date of March 18, 1892. It is further alleged and insisted upon that during the interval that intervened between the dates of the two announcements, "Mayo remained in quiet, open, undisputed possession of said paper as owner, without molestation, until the institution of this suit on the 3d of May, 1892." Up to this point the averments and admissions conclusively establish the plaintiffs' title, and the possession of Gilliland, as lessee, under plaintiffs, on the 23d of June, 1891, and continuously thereafter to the 12th of February, 1892, at least. It just as necessarily follows that defendants' claim of title arose subsequently, and they must defend upon facts subsequently arising.

Looking into the record, we find the indicia of defendants' title to be as follows, viz.: First. A receipt which is concluded in the following terms, namely: "New Orleans, March 8th, 1892. Received of R. C. Gilliland, representing J. H. Gilliland, the sum of five hundred dollars, first payment on Lake Charles Echo newspaper. [Signed] C. McD. Puckette." Second. A bill of sale from R. C. Gilliland to Thadeus Mayo for the price of \$2,000 cash, expressing full warranty, bearing date March 18, 1892. There is nothing to connect the title of Puckette with that of Reid, Klimpeter, and Andrus, nor is there anything pointing to the source of his title as being derived from any other person than the plaintiffs. In this situation it is manifest that the sole reliance of the defendants to cure this apparent defect is upon this plea of estoppel. In fact, counsel for defendant Mayo do not make any mention in their brief of his alleged title from Gilliland and Puckette, but rest their defense exclusively upon their plea of estoppel, founded upon the plaintiffs' laches and negligence in asserting their claims. It is quite true that in the answer there is an averment to the effect that, from the 12th of February, 1892, "Gilliland [Mayo's vendor] was in peaceable, public, and undisturbed possession of said Lake Charles Echo, as editor and proprietor thereof," and, further, to the effect "that said Gilliland represented himself to the defendant as owner thereof, and, believing such to be the case, he purchased from him in good faith," etc. Yet in argument and brief no stress is laid or point made upon the title he obtained from Gilliland and Puckette, and without which the possession and pretensions of Gilliland are vain and nugatory.

Roundly stated, we have for consideration and solution the proposition that Gilliland, as lessee of the plaintiffs, in June, 1891, and continuously thereafter, until February 12, 1892, converted himself into an owner of the plant and property leased, during the term of his lease, and without the knowledge or consent of the lessor, and by the unique and simple process of changing the name of the responsible head of the paper from "R. C. Gilliland, Editor and Publisher," to "R. C. Gilliland, Editor and Proprietor;" that, forsooth, because the plaintiffs did not observe that alteration and immediately protest against it, and, failing to have this protest heeded, to have at once brought suit, they are guilty of such laches and negligence as to preclude the assertion of their rights, defendants founding their claim upon this apparent change in the proprietorship of the newspaper, and the alleged assertion of Gilliland's ownership. As a proposition of law, the foregoing is altogether untenable; for, as a lessee of the plaintiffs, Gilliland was wholly without legal right to so alter or change his relations towards his landlord, during the term of his lease, as to acquire

the ownership of the thing leased, without the knowledge or consent of the lessor; and he could convey no better right to a stranger. But Mayo confesses, and his counsel admit, that Gilliland occupied and operated the newspaper plant as lessee of the plaintiffs up to the 12th of February, 1892, and, consequently, he was put upon his guard in reference to Gilliland's right to sell. The district judge, in his reasons for judgment, states that, inasmuch as the law pronounces the nullity of the sale of a thing that belongs to another, the court would be at once satisfied of plaintiffs' ownership if no plea had been interposed in bar of their recovery, and then states his conclusions to be that the following difficulties are in their way, viz.: (1) That, prior to the institution of this suit, neither of the plaintiffs had declared their names as owners of the paper. (2) That, construing their acts logically, they had purposely concealed any proprietary interest they had therein. (3) That they at first substituted Klimpeter as the ostensible owner, and thereafter disguised their real ownership behind the mask of the Lake Charles Echo Publishing Company. (4) They then placed it under the control of R. C. Gilliland as editor and manager, and afterwards the paper passed to R. C. Gilliland as editor and proprietor, who assumed that title at the head of the editorial columns of the paper without attracting attention, and, with respect to third persons, without objection on the part of plaintiffs. (5) That when the plaintiffs were informed that the defendant was bargaining for the purchase of the property, they maintained silence, and made no protest against the accomplishment of an act in which he would have had such manifest interest if he had been owner. His observations are thus concluded: "Not only before the sale was effected did he fail to warn defendant Mayo, and put him on his guard, when he had an opportunity to do so, but that he preserved the same policy of silence after the sale to Mayo, and made no demand for the restitution of the property, and allowed the defendant to quietly take possession of the property, and for nearly two months failed to signify, by word or deed, that he laid any claims to the property." As opposed to the foregoing inferences which the judge a quo has drawn from the evidence in substitution of the defendants' plea of estoppel, the testimony shows that the plaintiffs had not observed the change Gilliland had made in the apparent proprietorship of the paper, and that same had been made without his knowledge or concurrence; yet Mayo was informed of the fact on the very day same occurred. It further shows that, just as soon as Reid was advised of Gilliland's contemplated sale of the plant, he interviewed him on the subject, and the latter disowned any such intention, in the strongest possible language. Assuming this statement to be true, what was the

necessity for Reid to have taken the additional precaution of forewarning Mayo, when no sale was contemplated by Gilliland? Considering it to have been a fact that Mayo was advised of the ostensible change in the proprietorship of the paper, was it not his duty to have mentioned to Reid his contemplated purchase from the person whom he knew to have been his tenant? And if Reid acted improperly in not disclosing his ownership, did not Mayo act just as imprudently in not making proper inquiry into Reid's claim of ownership? These questions must receive an affirmative answer.

But there are other facts that must be taken into account, also, in determining the efficacy of the defendants' plea of estoppel. In the first place, Bryan sold the newspaper plant to Klimpeter in 1890, and executed a notarial act of transfer, and caused same to be recorded in the conveyance office; and Mayo, being clerk of court at the time, was aware of that fact, confessedly. More than a year previous to his purchase of Gilliland, Mayo was informed that Klimpeter had sold the paper, and was likewise advised that the plaintiffs were the persons composing the Lake Charles Echo Publishing Company. As a witness, Mayo states that seeing the name of Gilliland at the head of the paper was the first direct information that he had that he was owner of the paper. But this question is not open to inference, as the judge a quo submits, for the plain reason that the testimony of the defendant is full upon the subject. He makes the statement that he asked Gilliland if the paper belonged to him, and that he answered that his father, J. H. Gilliland, was negotiating for the paper, and, as soon as the trade was made, he would let him know, and that he was expecting his father every day; that his father came a short time afterwards, and R. O. Gilliland came to him, and asked him to go around and see his father at the Howard House, his father having come in late the night before, and wanted to get off to New Orleans on the 11 A. M. train; that he went with him, and met his father, J. H. Gilliland, who informed him that he was then on his way to New Orleans to close his trade for the Lake Charles Echo, and that, if he made the trade, he would let R. C. Gilliland, his son, know, and any trade he (Mayo) might make with his son would be all right. Several days afterwards R. O. Gilliland informed him that the trade was made, and he (R. C. Gilliland) announced his name as editor and proprietor; "that he then commenced negotiations with R. O. Gilliland for the paper, which were finally consummated on the 16th of March, 1892." This testimony clearly indicates that, instead of Mayo having been deceived by appearances in regard to Gilliland's apparent ownership, and the silence and inaction of the plaintiffs, he acted with great deliberation, and was fully advised by Gilliland of all his plans, antecedent to the

change of ostensible proprietorship of the paper.

But the Puckette receipt, under which Gilliland sets up his claim of title, discloses that he had the negotiations referred to at least three weeks subsequent to said change of proprietorship; and that Mayo was fully advised of these negotiations, his own testimony will attest. "Being shown document No. 2, [the Puckette receipt,] says he, the first he saw of it was in New Orleans on the 8th of March, 1892. It was shown to him by R. C. Gilliland. He had furnished him \$600 to consummate the trade for the Echo. That was on Monday, the 7th of March, 1892. That he [Gilliland] went around to get a bill of sale from Puckette, as he told me, promising to meet me between 2 and 3 o'clock. He had with him a bill of sale,—a notarial act,—which was signed by C. McD. Puckette, conveying to Gilliland the Lake Charles Echo newspaper, for, I think, \$600 cash, and the balance on one, two, and three years' time, stating that this act had been left at the notary's office for him and Gilliland to sign. That he looked at this act of sale, and told him that, if he purchased under that sale, he had no use for the paper, and would not buy it, as it contained a vendor's lien. He [Gilliland] then left him, and said he would go back, see Puckette, and get a different kind of a sale. That he saw him no more on that day, but the next day, the 8th, he met him, \* \* \* when he showed him the receipt marked 'No. 2,' stating that he had saved \$100 by holding on, but that Puckette refused to give any other kind of a sale than the one drawn up the day before." This interview occurred nearly one month subsequent to the alleged change of proprietorship of the paper, and fully advised Mayo that Gilliland had no title at that date, nor for three weeks afterwards. It gave him the fullest and most complete knowledge that Gilliland pretended to have no claim to the paper at the time the published announcements were made that he was proprietor, and that he did not claim to have any for nearly three weeks thereafter. Taking this evidence into consideration, there is no foundation for defendants' plea of estoppel.

But the learned judge a quo also makes reference to the published circular that Reid issued, and in which it is said he expressed, in a public and unequivocal manner, more than a month after the sale and delivery of possession of the Echo to the defendant, that his opponents had bought up all the Lake Charles newspapers, and alludes to Mr. Thadens Mayo, the defendant, as present editor and proprietor of the Lake Charles Echo, and other similar statements. In the first place, this evidence does not respond to defendants' plea of estoppel, which rests exclusively upon the plaintiffs' alleged laches and negligence; but, giving

these recitals full force and effect, they do not go to the extent that is contended for them. The principal recitals that are relied upon are to the effect that Reid's political opponents had, by the lavish use of money, "bought up all the Lake Charles newspapers," and that he had no newspaper to reply to his many attacks, etc. These statements were made with reference to the then existing campaign, and the influences that had been brought to bear on his canvass; and, among other things, he evidently referred to the editorial control of the parish newspapers, generally, being adverse to his interest. Some are not inconsistent with the plaintiffs' ownership of the property, and are fully explained by other evidence already adverted to and considered.

A careful and painstaking examination of the transcript, and a full investigation of the whole evidence, has satisfied us that the plaintiffs have fully substantiated their claim of ownership, and that they should have judgment for the property in dispute. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plaintiffs be decreed the owners of the newspaper plant and property in controversy, and placed in possession; that the sequestration be sustained and enforced; and that the defendants be taxed with the costs of both courts, the plaintiffs' demand for the revocation of lease being dismissed as of nonsuit.

#### On Rehearing.

Our attention has been, for the first time, called to the fact that the plaintiff Andrus did not perfect his appeal by signing an appeal bond, and that in respect to him no alteration can be made in the judgment appealed from; and, consequently, our decree should be corrected in this particular. The motion for rehearing has been examined and considered on other grounds thereon assigned, but a careful examination of the record and our opinion has satisfied us that the appellees' complaint is not well founded. It is therefore ordered, adjudged, and decreed that the judgment and decree herein rendered be so amended as to affirm the judgment appealed from in so far as the plaintiff Andrus is concerned, and that in all other respects same remain undisturbed, plaintiffs and appellants to be taxed with the costs of appeal. Rehearing refused.

(45 La. Ann. 1040)

STATE v. RODRIGES et al. (No. 1,450.)  
(Supreme Court of Louisiana. July Term, 1893.)

CRIMINAL LAW—CHANGE OF VENUE—POSTPONEMENT OF TRIAL OF MOTION—SERVICE OF VENIRE—VALIDITY—CONTINUANCE—DISCRETION OF COURT—EVIDENCE—OFFER OF COMPROMISE.

1. There is no occasion for the postponement of the trial of a motion for a change of venue, to enable an accused to obtain the at-

tendance of an absent witness, and cause his testimony to be reduced to writing, for the purpose of having same annexed to a bill of exceptions, when the trial judge concedes the statement as made, and actually incorporates same into defendant's bill of exception. Had there been a difference of opinion as to the facts such witness would swear to if present, the accused would have had the right he claimed.

2. In case the accused desires a witness to be called and sworn on the trial of such a motion, and it appears that he is at the time on a jury having under consideration an important criminal case, the judge exercises proper discretion in refusing such application; the testimony being of like character as that of numerous other witnesses residing in the same ward of the parish, who had been already sworn, and therefore only cumulative.

3. An immaterial and trifling variance between the copy of the venire that is served on the accused, and the original jury list, will not vitiate the service.

4. The allowance vel non of a continuance of a criminal cause is matter for the sound judicial discretion of the trial judge, upon the case made on the defendant's motion, and its exercise will not be disturbed except for cogent and manifest error.

5. An offer of compromise of a crime, unaccepted by the prosecutor, may be proven by the state as an admission of guilt, or as disclosing possession of the property which is the subject of the burglary and larceny charged in the indictment.

6. The ruling of the trial judge, disallowing a new trial, will not be examined and passed upon unless a bill of exceptions is reserved to its refusal.

(Syllabus by the Court.)

Appeal from district court, parish of Acadia; W. C. Perrault, Judge.

Theogene Le Boeuf and Octave Le Boeuf were convicted of burglary and larceny, and appeal. Affirmed.

Philip S. Pugh and Chas. W. Du Roy, attorneys for appellants. E. B. Dubuisson, E. P. Veazie, and P. J. Chappins, for the State.

WATKINS, J. The two defendants Theogene Le Boeuf and Octave Le Boeuf were jointly indicted with J. B. Rodrigues for the crimes of burglary and larceny, in one count, tried jointly, found guilty, and sentenced to seven years' imprisonment, at hard labor, in the state penitentiary. Rodrigues having turned state's evidence, the complaint, as to him, was nolle pros'd. The two convicted defendants prosecute this appeal, relying on several bills of exception taken at different stages of the proceedings.

1. The first bill of exception relates to the absence of a witness of the defendants, whose testimony they desired to procure on the trial of their application for a change of venue. Said witness being called, and found absent, their counsel desired that a note of evidence on the evidence book be left open until the testimony of the absent witness could be procured, or the motion be assigned for a different day for that purpose, it having been ascertained that the witness' absence was occasioned by the sickness of his wife. This application having been refused, counsel retained a bill of ex-

ceptions; and the trial judge assigned as his reason for this ruling that the facts stated were known to the court and admitted by the state, and that they would be incorporated in a bill of exceptions, when presented, and hence it was unnecessary to waste the time of the court in taking testimony upon admitted facts. He further stated that he refused to defer the trial of the motion to another day because there was a number of witnesses summoned and in attendance on the court, and from the same portion of the parish as the absent witness, whose testimony was of like character as that which was attributed to him, and consequently his statement would only be cumulative. In this we can perceive nothing of which the accused have any ground of complaint.

2. The second bill relates to the judge's refusal of the request of the accused to have a certain other witness called to the stand to testify on the same motion, notwithstanding said witness was in the courthouse at the time. The judge assigns as his reason for refusing this request that the witness mentioned was at the time a juror on the regular panel, and was a member of a petit jury setting on the trial of an important criminal case, which had been submitted to them, and which was then undetermined, and he consequently deemed it improper to have him called into court, and disturb the jury in their deliberations, when the testimony of this witness would have been of like character and tenor as that of numerous other witnesses who had already been heard, his testimony being merely cumulative. Of this ruling the accused had no just ground of complaint.

3. The third bill relates to the declination of the judge to postpone the trial of the cause on the ground that a true and correct copy of the venire had not been served upon them, in that the name of one of the jurors on the copy served was written "Aniste Dupont," whereas it appears on the original as "Lavaniste Dupont;" and, further, that said alleged copy of the jury list, as served, did not have the proper certificate; and, further, because the name of George E. Brooks, one of the jury commissioners, was styled "George E. Burke" on the copy that was served upon them. These objections to the service were held inadmissible by the judge, and the trial was ordered to be proceeded with, for the following reasons, viz.: (1) Because a certified copy of the indictment and of the venire had been served. (2) Because same had been properly certified. (3) Because the complaint of the name of the jury commissioner Brooks being incorrectly given as "Burke" was a mere typographical error, and could not result injuriously to the defendants, and in addition the certificate of the jury commissioners did not form any part of the venire which the law required to be served on an accused, and hence this part of the objection is friv-

olous. (4) That the name of the juror Lavaniste Dupont having been written "Aniste Dupont" on the copy of the venire which was served on the accused is inconsequential, and could not affect the legality of the service, because the name was correctly written on the original venire, and that the omission of the first syllable of the name, to wit, "Lav," was the result of accident. But, even if this objection were otherwise fatal to the service, no possible injury could have resulted to the accused, because this particular juror did not serve on the jury of trial; citing *State v. Ballerio*, 11 La. Ann. 81; *State v. Dubord*, 2 La. Ann. 732; *State v. Turner*, 25 La. Ann. 578; *State v. Boyce*, 39 La. Ann. 229, 1 South. Rep. 450; *State v. Sopher*, 35 La. Ann. 975. In our opinion the trial judge satisfactorily and correctly disposed of the objections urged, and properly declined to postpone the trial of the cause.

4. The fourth bill relates to the judge's refusal to grant the accused a continuance, when the case was called for trial, because of the absence of certain of their witnesses. For this ruling the trial judge appends to the bill the following as his reasons, viz.: (1) Because, in his opinion, the application was made simply for delay, and not to enable the accused to obtain substantial justice. In substantiation of his opinion he cites and relies upon the various pleas that were urged by the counsel for the accused, and which had already been overruled by the court, and among them those discussed in the preceding bills of exception, and all of which he styles "trivial pleas and objections." He further states, as an additional reason for his ruling, that one of the absent witnesses named was an uncle of one of the accused, who was absent at the time in an adjoining parish, on a fishing excursion, and had thus absented himself a week prior to the date at which defendants' counsel had made his order for summonses to issue for their witnesses, and to the knowledge of the defendant for whose account he was to be summoned, and possibly at his suggestion. He further states that the accused was not prejudiced by the absence of another witness named, for the reason that another witness was summoned for the purpose of proving the same state of facts as that alleged to have been within the knowledge of the absent witness, and consequently, if this testimony was obtained, it would only be cumulative and corroborative; citing *Primeaux's Case*, 39 La. Ann. 678, 2 South. Rep. 423. He further states that two other witnesses named were citizens and residents of another parish, and to the knowledge of the accused at the time application for a continuance was made, because said witnesses resided at no great distance from the accused; and, considering the great importance of the testimony of said witnesses to the accused, "they were guilty of gross negligence in not ascertain-

ing the parish wherein they resided, and did not use ordinary diligence, much less due diligence, to procure their presence;" citing *State v. Williams*, 36 La. Ann. 854; *State v. Bradley*, 6 La. Ann. 554; *State v. Allemand*, 25 La. Ann. 525; *State v. Nelson*, 28 La. Ann. 46; *State v. Ryan*, 30 La. Ann. 1178; *State v. King*, 31 La. Ann. 179; *State v. Hornsby*, 33 La. Ann. 1110; *State v. Revels*, 34 La. Ann. 381; *State v. Chevallier*, 36 La. Ann. 81; *State v. Kane*, Id. 153; *State v. Coudier*, Id. 291; *State v. Morgan*, 39 La. Ann. 214, 1 South. Rep. 456; 1 Bish. Crim. Proc. § 951. He further states that neither of the accused had prefaced their application for a continuance with an application for compulsory process against said absent witnesses, for the purpose of obtaining their attendance, and consequently it was matter within the competency and discretion of the court to determine whether a proper case for continuance had been made on the defendant's application, and in his opinion there was no such proper case made out; citing *State v. Nicholson*, 14 La. Ann. 785; *State v. Nelson*, 28 La. Ann. 46; *State v. Fulford*, 33 La. Ann. 679; *State v. Clark*, 37 La. Ann. 128; Whart. Crim. Pl. § 547. The judge cited other reasons that influenced his decision in part, but those already recapitulated being, in our opinion, ample, it is unnecessary to state them. We think it evident that the trial judge, in refusing to grant a continuance to the accused, under the facts and circumstances detailed, acted within the bounds of his judicial discretion, and committed no error in so doing.

5. The fifth bill of exceptions appertains to the judge's declination to reject and disallow proof of a proposed compromise of the prosecution that was alleged to have been made by one of the accused, and which proof the state offered to make, as an acknowledgment of the guilt of said accused; the proposed compromise having been altogether unsolicited on the part of the prosecutor, and having also been declined by him. The objection of the defendant's counsel was that this testimony, if received, would have a tendency to show the accused in question guilty of having received stolen goods,—a crime not charged in the indictment,—instead of showing him to be guilty of burglary and larceny, as charged against him in the indictment. The judge assigns as his reason for overruling the defendant's objection, and admitting the testimony, that the proposed compromise was, in effect, a confession voluntarily made, and was consequently admissible against this particular accused, the jury having been instructed to the effect that it could not be considered as having any application to the other accused. He further assigns as a reason for his ruling that it is competent at all times, in a prosecution for burglary and larceny, for the state "to show that the property stolen was found in possession of a defendant re-

cently after the commission of the crime, whereupon the onus is [placed] upon him to satisfactorily account for the way he [became] possessed of the property; and, in the absence of such satisfactory account, guilt is presumed." It is quite evident that this testimony was legally admissible on either one or both of the grounds that the trial judge assigned for its reception. If a contrary rule were established, it would be an easy matter for persons thus accused to attempt to purchase immunity from prosecution, and, failing of success, to suppress the testimony the offer afforded of their guilt.

6. The sixth bill relates to the refusal of the trial judge to permit the introduction in evidence of certain proofs of misconduct of certain members of the jury of trial, in the course of the disposition of defendant's application for a new trial. This ruling is of no consequence,—and it is one of several rulings, of like character, that are complained of,—in view of the conclusions we have reached in reference to the next and last objection that is urged upon our attention.

7. After a tedious and protracted trial, and the rendition of a verdict of guilty, the accused made an elaborate application for a new trial, assigning various grounds; but an examination of the record discloses that no bill of exceptions was retained by the accused to its rejection, and disallowed by the trial judge. In the brief furnished by the district attorney, our attention is called to that fact, and also to the decisions of this court to the effect that in such case the ruling of the trial judge will not be examined, notwithstanding the evidence that was adduced on the trial of such application is in the transcript; it being an indispensable prerequisite to an examination of such evidence that a bill of exceptions should have been taken and retained to such ruling, and the evidence thereto annexed, or substantially embodied in the bill. That such has been, and now is, the accepted course of decision by this court is sufficiently attested by the opinions we find collated on his brief: *State v. Given*, 32 La. Ann. 782; *State v. Nelson*, Id. 845. Also, *State v. Ross*, Id. 856, 857; *State v. Hudson*, Id. 1052; *State v. Comstock*, 36 La. Ann. 310; *State v. Vincent*, Id. 770; *State v. Jackson*, 37 La. Ann. 467; *State v. Williams*, 35 La. Ann. 742; *State v. Wire*, 38 La. Ann. 634; *State v. Darrow*, 39 La. Ann. 677, 2 South. Rep. 387. To this list might be added quite a number of other cases, but it is deemed unnecessary. After a careful examination and analysis of the various bills of exception, and of the reasons assigned by the lower judge, we have reached the deliberate conclusion that the accused have had a fair and impartial trial. This large and voluminous record attests that the accused were vigorously prosecuted, and earnestly and well defended, but



it discloses no relievable error for which they are entitled to relief at our hands. Judgment affirmed.

(46 La. Ann. 1126)

**THEBODEAUX et al. v. THEBODEAUX.**  
(No. 1,438.)

(Supreme Court of Louisiana. July Term, 1893.)

**APPEAL BOND—SUFFICIENCY.**

1. An appeal bond which is executed by the defendant in his individual and personal capacity does not respond to an order of appeal granted in favor of the same person in his fiduciary capacity of administrator of a succession.

2. An appeal bond, in the recital of which no mention is made of the suit in which the judgment appealed from was rendered, either by number, title, amount, character, or court, specifically or in substance, does not conform to the requirements of the law.

3. Were an adverse judgment rendered against the appellant by this court, there would be nothing discoverable on the face of the bond which could connect such decree with the one appealed from, or which would enable the lower court to fix the liability of the securities of the appellant.

(Syllabus by the Court.)

Appeal from district court, parish of St. Martin; Edward Simon, Judge.

Action by Carmélite Thebodeaux and others against Valéry Thebodeaux, administrator, to restrain a judicial sale of succession property. There was judgment for plaintiffs, and defendant appealed. Plaintiffs moved to dismiss the appeal. Motion granted.

Robert Martin and C. H. Mouton, for appellant. J. E. Mouton, for appellees.

**On Motion to Dismiss Appeal.**

WATKINS, J. The motion is grounded on certain alleged radical defects in the confecton of the appeal bond, which render it nugatory. They may be enumerated as follows, viz.: (1) That whereas a judgment was rendered against Valéry Thebodeaux, administrator, and an order of appeal was granted in his favor as such administrator, the bond is drawn and signed by Valéry Thebodeaux individually. (2) That no mention is made, either in the caption or the body of the bond, of the title or number of the suit, or the number or name of the court which rendered the judgment that is appealed from. (3) That no mention is made, either in the caption or body of the bond, of the date, nature, or character of the judgment, nor of any indicia by which the said bond could be identified with the judgment appealed from, or the suit in which it was rendered. The following is a synopsis of the bond, viz.: "State of Louisiana, 19th judicial district, parish of St. Martin. Know all men by these presents, that we, Valéry Thebodeaux, as principal, and \* \* \* as securities, are held and firmly bound unto Alexander V. Fornet, clerk, \* \* \* in the sum of \$250.00," etc. " \* \* Now,

the condition of the foregoing is such that whereas the said principal herein has obtained an order for a devolutive appeal from the judgment rendered by said 19th judicial district court on the — day of — to the honorable supreme court of Louisiana, next to be holden at Opelousas, La., on the 1st Monday of July, 1893. \* \* \* Now, this bond is given as security that said principal, as appellant, shall prosecute the said appeal, and that they shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate," etc. This bond is signed by Valéry Thebodeaux, in his individual capacity, and by his securities, and not as administrator. A casual inspection of the foregoing is quite sufficient to satisfy the judicial mind that each and every one of the charges that are preferred against the bond are true, in every particular. Indeed, it would be difficult to conceive of an appeal bond more completely barren of all sacramental and essential formalities than the instant one is. This is an injunction suit in restraint of a judicial sale of succession property, based upon the averment that the defendant administrator was in sufficient funds to pay off the debts of the deceased, and hence there was no necessity for a sale, and that a large part of the immovable property advertised for sale constituted an asset of the matrimonial community theretofore existing between the deceased and their ancestor, one undivided one-half interest in which was not liable for the individual debts of the deceased. The plaintiffs are the children and grandchildren of Aspasia Le Blanc, deceased wife of Treville Thebodeaux, deceased, of whose joint succession the defendant is administrator; and the property, sale of which is enjoined, belongs, in greater part, to said community, and had been ordered to be sold to pay debts, as binding on the community and the individual succession of Treville Thebodeaux. On the trial, plaintiffs' injunction was successful, and was perpetuated to the extent of restraining the sale of their half of the community property. From that judgment an order of appeal was granted in favor of the defendant administrator, and in response to said order the bond above mentioned was furnished and filed. It is evident that the bond does not specify the defendant administrator as appellant, but Valéry Thebodeaux personally and individually. It is not signed by the administrator or his counsel, but by Valéry Thebodeaux individually. In the recitals of the bond no mention is made of the suit in which the judgment was rendered, either by number or title or amount or character or court. In the caption neither is designated, not even in substance. Were an adverse judgment to be rendered by this court, there would be nothing, that is discoverable in this bond, which could in any way connect

such decree with the one that is appealed from, or which would fix the liability of the securities of the appellant. There would be nothing in the bond to fix any liability upon the succession of Treville Thebodeaux, or the administrator; and it could not serve as a legal basis for proceedings or execution against the administrator or the succession. In *Succession of Walker*, 32 La. Ann. 525, it was held that an appeal bond "which contains no mention of the title to the suit, or matter in which the judgment appealed from was rendered, nor of the nature and scope of such judgment, nor of the date of the rendering and signing of the judgment, nor of the name of the party in whose favor it was rendered, nor of the party cast in the suit," is radically defective, and cannot support an appeal. *Percy v. Millaudon*, 6 La. 586; *Dunlap v. Price*, 10 La. Ann. 155; *Swearingen v. McDaniel*, 12 Rob. (La.) 205. It goes without saying that such a bond does not fulfill, not even substantially, the requisite formalities of the law. Appeal dismissed.

(45 La. Ann. 1100)

**WOLF v. YOUBERT et al.** (No. 1,443.)  
(Supreme Court of Louisiana. July Term, 1893.)

**USING FICTITIOUS NAME IN PARTNERSHIP — CONSTRUCTION OF STATUTE — JUDICIAL MORTGAGES — TIME OF TAKING EFFECT — RIGHTS OF THIRD POSSESSORS — COLLATERAL ATTACK ON JUDGMENT.**

1. Section 2668 of the Revised Statutes of 1870 was borrowed from the New York legislation on the subject, and the courts of that state have interpreted its intent to be to prevent the use of the name of a person not interested in the name of a firm, thus inducing a false credit to which it was not entitled, and this on the strength of a name which had been withdrawn, or which there was no authority to use.

2. The object of the law was to prevent the obtaining of credit secured by fraudulent representations, but not to prevent the giving of credit, and after it was given, and the day of settlement had come, prevent the party infringing the statute from demanding payment of his debtor.

3. A third possessor, holding title to property judicially mortgaged for his vendor's debt, may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it, and show that same is null for any cause inherent in the judgment; yet his rights in this respect are just the same as those of his vendor, as judgment debtor,—no greater, and nothing less.

4. Between the vendor and vendee there is a privity of contract which entitles the latter to exercise any rights of the former, for his protection, notwithstanding he may have renounced or abandoned them.

5. The judicial mortgage takes effect from the day on which the judgment is recorded, with this modification by the statute of 1888: that a judgment rendered at any term of the court outside of the parish of Orleans shall have no effect to create a judicial mortgage, as between judgment creditors, until from the day of the adjournment of the term at which same was rendered, although recorded prior to the adjournment of said term; the effect of that statute being to make the registry of several judgments rendered at the same term concur-

rent, and not to deprive them of any effect against the debtor until after the adjournment of the term.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; A. C. Allen, Judge.

Hypothecary action by Joel B. Wolf against Ulysse Youbert and Homer Youbert. William Evans and Philip Thompson were made parties defendant. From a judgment for plaintiff, defendant Evans appeals. Affirmed. Rehearing refused.

Thos. H. Lewis, Sr., E. D. Dubulsson, and Estlette & Dupre, for appellant. Kenneth Baillo, for appellee.

**WATKINS, J.** This is an hypothecary action brought against the two defendants Ulysse and Homer Youbert, as third possessors of property derived from the plaintiff's judgment debtor, Philip Thompson, subject to his duly-recorded judicial mortgage, and the prayer of his petition is that same be ordered sold to pay that judgment in due course of proceedings. Plaintiff's averments are to the effect that on the 15th of December, 1890, he obtained a judgment against Thompson in the United States circuit court at New Orleans, in this state, for the sum of \$3,768.90, with interest, and caused same to be duly inscribed in the proper book of mortgages for the parish of St. Landry on the 20th of said month; that such registry and inscription operated in his favor, from and after that date, as a judicial mortgage upon all real property then owned or since acquired by his judgment debtor in that parish; that, at the date and time of said registry and inscription, Thompson owned certain described property in that parish, against which he proceeds, and which is in the possession of the two defendants, in the proportions stated. For the evident purpose of identification, the plaintiff avers "that on the 9th of December, 1890, said Philip Thompson sold said property to William Evans, \* \* \* but said sale was only recorded in the conveyance book of the parish on the 22d of December, 1890." He also avers "that, since the purchase by said William Evans as aforesaid, he has disposed of said property, one-half to Henry Youbert, and the remaining one-half to Ulysse Youbert, though he avers that said sales to the Youberts were only recorded in the conveyance office of St. Landry parish on the 22d day of December, 1890, and said properties were and are affected by his said mortgage," etc. After excepting, the defendants filed an answer, and called their vendor, William Evans, in warranty, demanding such judgment in their favor against said warrantor as may be rendered against them, and Evans in turn excepted, and called in warranty his vendor, Thompson; and thereupon Thompson filed an answer, pleading the general issue, and specially disowning the existence of any recorded judgment operating a judicial mort-

rage on the property he conveyed to Evans at date of sale, December 9, 1890; also, that the failure of Evans to have his act of sale recorded in time relieves him from all responsibility. On the issues thus made up the case went to judgment, and was decided in favor of the plaintiff, and against the defendants; and they had like judgment against their warrantor, Evans, and he in turn had judgment against his warrantor and plaintiff's judgment debtor, Thompson. From this judgment, Evans, warrantor, is the only appellant, the other parties having acquiesced therein. The defendants tendered an exception of no cause of action, coupled with a general denial and a special defense as to their warrantor, Evans, and he tendered the two following exceptions, viz.: (1) That the judgment the plaintiff obtained in the United States circuit court against Philip Thompson is an absolute nullity on its face, in that it alleges that the plaintiff, Joel B. Wolf, was doing business, and obtained said judgment, under the firm name and style of Adolphe Wolf, Son & Co., in violation of a prohibitory law of the state of Louisiana, and of the state of New York, where he resides. (2) That since the institution of this suit plaintiff has proceeded by *fi. fa.* to execute his judgment, by the seizure of his debtor's property, situated in the parish of Acadia, and for which cause this suit should be dismissed. These three exceptions were all overruled, and this ruling of the judge *quo constitutus* the chief ground of appellant's complaint.

No particular stress is laid on the defendant's exception of no cause of action, and it is manifestly without any merit, as will be seen from the averments of the petition we have quoted. But counsel earnestly insists upon the first exception of the warrantor, Evans, which is to the effect that the plaintiff's judgment against Thompson is an absolute nullity on its face, in that it discloses that he did business in the social name of Adolphe Wolf, Son & Co., in violation of a prohibitory statute of the state of Louisiana, and a like statute of New York. It appears that on the trial of this exception the warrantor, Evans, offered in evidence the certified copy of the judgment, which had been recorded, so as to operate a mortgage, for the purpose of showing the nullity of that judgment on its face, as alleged in his exception. Plaintiff, in turn, offered the entire circuit court record, pleadings and evidence, which was objected to by warrantor's counsel, and the objection was sustained, and plaintiff reserved a bill of exceptions. In so doing the district judge ruled correctly. The exception urged was to the effect that the plaintiff's judgment was absolutely null, and that such nullity was apparent on its face; and of course the sole proof of such exception must be found in the judgment itself. Looking at the judgment, we find its recitals to be as follows, viz.: "It is ordered, adjudged, and decreed that the plaintiff, Joel

B. Wolf, residing in the city and state of New York, and there doing business under the firm name and style of Adolphe Wolf, Son & Co., and a citizen of the state of New York, do have and recover of and from the defendant, Philip Thompson, the sum of \$3,768.90," etc. And, looking into the statute which is relied upon, we find it to be as follows, viz.: "Hereafter, no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and company,' or '& Co.' is used, it shall represent an actual partner, or partners." Rev. St. § 2668. The succeeding section declares that a person offending the foregoing prohibition shall be deemed guilty of a misdemeanor, and fined. It will be observed that this statute does not formally, and in terms, pronounce the nullity of transactions in violation thereof; but counsel's contention is that we must connect this statute with that provision of the Code which declares that "whatever is done in contravention of a prohibitory law is void, although the nullity be not formally pronounced." Rev. Civil Code, art. 12. Accepting warrantor's theory as correct, for the purpose of argument, and yet we find the proof impertinent and inapplicable, in that it does not show that plaintiff ever did any business in the state of Louisiana. On the contrary, the judgment invoked affirmatively discloses that plaintiff resided in, and was a citizen of, the city and state of New York, and was there engaged in business, at the time the defendant contracted the indebtedness on which same is predicated. Hence, the Louisiana statute was not violated by virtue of the fact that the plaintiff conducted business in the city and state of New York "under the firm name and style of Adolphe Wolf, Son & Co." It is therefore clear that the decision of the question must be controlled by the statute of New York.

Of what is the statute law of the state of New York on this question, there is no proof in the record; but we are cited to the case of *Kent v. Majoulier*, 38 La. Ann. 259, in which we said that the provision of the statute, Rev. St. §§ 2668, 2669, is borrowed from the New York legislation on the same subject, (chapter 281, Sess. Laws 1833.) This declaration is controlling in this respect, and imports full proof of the existence and purport of the New York statute. Consequently, it is our duty to examine and apply the jurisprudence of the New York courts to the statute, and thus ascertain whether plaintiff is amenable thereto, and his judgment absolutely void on that account, and for that purpose we make the subjoined extract from the opinion in that case, viz.: "The highest court of that state [New York] has had, twice, at least, occasion to consider and expound the purpose and scope of the statute, and has emphatically announced that its intent was to prevent the use of the name of a person not interested in a firm, and thus in-

ducing a false credit; to which it was not entitled; and this, on the strength of a name which had been withdrawn, or which there was no authority to use. It was against fraud and imposition which might be practiced upon innocent parties who dealt with the person who transacted business in the name of a party whose interest had ceased, or who never had any in the same, that the statute was directed. Beyond this the statute cannot be extended by implication, or even by a liberal construction. *Zimmerman v. Erhard*, 83 N. Y. 74; *Wood v. Railroad Co.*, 72 N. Y. 198; *Cheese Co. v. Murtaugh*, 50 N. Y. 314; *Houston v. Moore*, 5 Wheat. 56; *U. S. v. Kirby*, 7 Wall. 486; *Harris v. Runnels*, 12 How. 83." Having made the foregoing analysis of the New York jurisprudence on the subject, and cited the foregoing decisions of the courts of that state, we made the following application of the principle announced to the case under consideration, namely: "We fully concur with that able court, and hold that the object of the law was to prevent the obtaining and enforcing of credit secured by fraudulent representations, and that it was not designed to prevent the innocent infringer of its prohibition from giving credit, and after it was given, and the day of settlement had come, from demanding reimbursement or satisfaction, to the full extent of his rights, from the benefited obligor. It would be in the highest degree inequitable and unjust to permit a debtor to repudiate a contract, the fruit of which he retains. The penalty attached to an infraction of the law could be inflicted, in a criminal prosecution, only at the instance of one wronged by the obtaining of an unfair or undue advantage, procured by false and fraudulent representations by one clearly in contravention of law. Whatever the statute and the penalty affixed to its violation may be, we are clear that the penalty cannot be extended to a civil case, where the action is to recover money from one to whom it was lent, or to whom credit was given, who was not deceived, and who lost nothing by his dealings with his creditor. \* \* \*

*Dwar. St. 248; Sedg. St. & Const. Law, 78; Oppenheim v. Loois, 9 La. Ann. 261; Simms v. Bean, 10 La. Ann. 346.*" See, also, to same effect, *Halliday v. Bridewell*, 36 La. Ann. 238, and *Succession of Bofenschen*, 29 La. Ann. 711. Taking the opinion in *Kent's Case* as our guide, it is clear that, under either the New York or Louisiana statute, it is the transaction of a business that is aimed at, and that it is the partner violating its terms, and not his customer, who incurs its penalty.

But counsel's contention goes further, and is to the effect that, notwithstanding the debtor of such a partnership cannot be heard to plead the nullity of his engagements on account of the creditor's violation of the statute, yet that that rule of exclusion has no application to a third person, such as a

third possessor. While it is true that a third possessor, holding title to property judicially mortgaged for his vendor's debt, may collaterally attack the validity of the judgment which is the foundation of the judicial mortgage which is sought to be enforced against it, (*Bernard v. Vignaud*, 10 Mart. [La.] 482,) and show that same is null for any cause inherent to the judgment itself, (*Peets v. Wilson*, 19 La. 478,) yet his rights in this respect are just the same as those of his vendor, as judgment debtor,—no greater, and nothing less. Between the vendor and vendee there is a privity of contract which entitles the latter to exercise any rights of the former, for his protection, notwithstanding he may have renounced or abandoned them. But it cannot be argued from that premise that the third possessor could exercise the rights of the state, and invoke the penalty of the statute against his vendor's creditor in a manner different, or more effectively, than his vendor could have done. To assent to such a proposition would be to say that the debtor might do indirectly what he would not be permitted to do directly. We are clearly of opinion that this exception of the warrantor was correctly overruled.

His second exception is tantamount to a plea of disseisin; and, subsequent to same being filed, plaintiff filed a supplemental petition admitting the seizure and sale under fi. fa. of certain property of Thompson, in the parish of Acadia, and requested the court to permit him to credit his judgment with the net proceeds of the sale. The necessary leave was granted, the judgment accordingly credited, and the exception overruled, and it passed out of the case. That was the proper solution of the exception, and the ruling was undoubtedly correct.

A further objection is urged in argument, as one arising on the face of the plaintiff's petition and judicial mortgage, to the effect that the registry of the judgment was effected on the day following that on which it was signed; and, further, to the effect that plaintiff admits that at the time of registry the warrantor, Evans, was the owner by purchase from his debtor, Thompson, though his title was not registered until the day after his judicial mortgage was recorded, and consequently his property was not affected by it. Citing this state of facts, counsel makes reference to the provisions of Rev. St. § 2501, requiring notaries to deposit all acts passed by them in country parishes in the recorder's offices "within fifteen days at furthest after same shall have been passed," and also to those of Act No. 143 of 1888, declaring that judicial mortgages shall only take effect from the day of the adjournment of the court rendering the judgment, and insists that, in the first place, the law imposed no duty on the warrantor to file his deed of sale, and have it recorded, until after the lapse of 15 days from the 8th of December, 1890, the date of its passage before the

notary, and, in the second place, that the registry of plaintiff's judgment on the day after it was signed had no effect until after the adjournment of the court rendering the judgment.

The answer to the first proposition is plain; and it is that the section of the statutes quoted gives to notaries no limit within which to file acts passed by them, but requires them, absolutely, to file them "within fifteen days at furthest after the same shall have been passed." It makes it permissible for same to be filed at any time after their passage. The Code declares, in most emphatic terms, that the judicial mortgage takes effect from the "day on which the judgment is recorded," etc. Rev. Civil Code, arts. 3322, 3329. And this without regard to the date on which the court rendering the judgment adjourned. This question was carefully examined and decided in *Chaffe v. Walker*, 39 La. Ann. 35, 1 South. Rep. 290, and we are of opinion that the opinion therein announced is correct, and will bear the test of the closest scrutiny, and it is consequently affirmed. It is true that Act No. 143 of 1888 has been since enacted, but that statute does not militate against the force and effect of that decision, as an examination of it will attest that it is restricted to the rank of conflicting judicial mortgages, and has no application to the parish of Orleans. Its provisions are as follows, viz.: "The judicial mortgage takes effect from the day on which the judgment is recorded in the manner hereinafter directed; provided, that judgments, the parish of Orleans excepted, rendered at any term of court, shall have no effect to create a judicial mortgage as between judgment creditors, until from the day of adjournment of the term at which the same was rendered, although recorded prior to the adjournment of said term." Act No. 143 of 1888. They are clear to the effect that they do not apply to the parish of Orleans, and are limited in their effect to the rank of conflicting judicial mortgages in other parishes of the state. On the evidence it is clear that plaintiff's judgment was rendered and signed in the parish of Orleans, and that plaintiff's mortgage is the only one on the defendant's property. Under the statute of 1888, as well as under the Code, the registry of plaintiff's judgment operated as a mortgage on Thompson's property from the date it went to record in the parish of St. Landry. That statute conformed article 555 of the Code of Practice to Rev. Civil Code, arts. 3322 and 3329, as interpreted in the *Walker Case*, only altering the rank of competing mortgages so as to prevent any inequality in the payment of several judgments rendered at the same term of court, though registered in the book of mortgages at different dates.

We have given this case most careful consideration, and arise from the study of it with the clear conviction that the judgment

appealed from is correct. Judgment affirmed.

#### On Rehearing.

This application is made for the exclusive purpose of obtaining an alteration of the judgment appealed from, which is absolute, and orders the hypothecated property unconditionally sold to pay the hypothecary indebtedness of his judgment debtor, Thompson, the appellant's contention being that plaintiff is only entitled to a judgment in the alternative, commanding defendants and third possessors "either to give up the property, or pay the amount for which it stands hypothecated." Code Pr. arts. 68, 74. We are of opinion that he is entitled to this amendment. *Vide Desohr v. Carmena*, 9 La. Ann. 180. Taking that case as our guide, we will so alter our decree as to make it conform thereto, but for that purpose a rehearing is unnecessary. It is therefore ordered, adjudged, and decreed that the judgment and decree appealed from be so altered in phraseology and amended as to read as follows, viz.: "It is ordered, adjudged, and decreed that the defendants deliver up the hypothecated property which is described in the plaintiff's petition to be sold in satisfaction of the plaintiff's and appellee's hypothecary claim, as set forth in his petition, viz.: The sum of thirty-seven hundred and sixty-eight and 90/100 dollars, (\$3,768.90), with five per cent. per annum interest from March 21, 1890, until paid, and costs, subject to a credit of eleven hundred and forty-eight and 92/100 dollars, (\$1,148.92,) with like interest. And it is further ordered and decreed that, in default of defendants' surrendering said property for sale as aforesaid within ten days from demand, said defendants pay to the plaintiff the aforesaid sum, with interest and costs of suit, not including costs of seizure and sale of the mortgaged property, which must be paid from the proceeds of sale when made; the costs of appeal to be taxed against the plaintiff and appellee." It is further and finally ordered and decreed that, as thus amended, our former judgment remain undisturbed. Rehearing refused.

(69 Miss. 907)

#### BARKWELL v. SWAN et al.

(Supreme Court of Mississippi. April, 1892.)

PAYMENT—ACCEPTANCE OF ASSIGNMENT OF MORTGAGE—RELEASE OF SURETY—TRUST DEEDS—VALIDITY—RIGHTS OF UNSOLICITED CREDITORS.

1. The surety on a note transferred as collateral security to the payee thereof a mortgage given him by the maker as indemnity against loss as such surety. *Held*, that the acceptance of this transfer did not operate as a payment of the note.

2. Though the payee of a note was so negligent in the care of certain property transferred to her by the surety thereon as collateral security for the payment of the note that the value of the property was impaired, such fact will not release the surety's liability for any deficiency arising from the sale of the property,

but will diminish the payee's right of recovery for such deficiency to the extent of the impairment.

3. Though a writing creating a trust in certain land for the benefit of the grantor's creditors was not placed of record as required by Code 1880, § 1296, such fact will not invalidate the trust where it appears that the writing was executed contemporaneously with a conveyance to the trustee by deed absolute on its face of the land in question, which deed was duly recorded.

4. A deed of trust for the benefit of certain creditors of an insolvent grantor is not void, as being in fraud of unsecured creditors, where the property covered by the deed of trust consists of nothing consumable in use, and the absolute possession of it is given to the trustee, even though more time is granted to secure the pre-existing debts of the favored creditors than the usual period required in collections made by law.

5. Where a creditor seeks to subject certain lands of his debtor to the payment of his demand against the debtor, and, as an incident thereto, asks for the cancellation of a conveyance of the land made by the debtor to a codefendant as being in his fraud as a creditor, and it appears that the conveyance is not in fact fraudulent, the creditor is entitled to a decree, under the prayer for general relief, subjecting the debtor's equity of redemption on the land to the payment of the demand.

Appeal from chancery court, Yazoo county; H. O. Conn, Chancellor.

Bill in equity by M. C. Barkwell against W. F. Swan and Andrew Gilchrist. From a decree dismissing the bill, plaintiff appeals. Reversed.

In 1884 Mrs. M. C. Barkwell purchased a herd of cattle in Wyoming from W. F. Swan, paying him therefor \$13,300. In 1887 she sold this herd of cattle to one Jay Pettibone. Defendant Swan became surety on the notes given by Pettibone for the purchase money to the amount of \$12,000, and took a mortgage on the herd of cattle to indemnify him against loss as surety. Swan, who owned large tracts of land in various counties in Mississippi,—102,000 acres in all,—conveyed it all to one Andrew Gilchrist, his codefendant in this suit, reciting in the deeds a consideration of one dollar. Appellant, by nonresident attachments in chancery, sought to subject these lands to the payment of these notes, on the ground that Swan, being insolvent, had made a voluntary deed to these lands to Gilchrist with intent to defraud creditors. The defense of Swan and Gilchrist was that the consideration of the deed was a trust agreement made by Swan to Gilchrist as a trustee for the benefit of certain creditors, and that this absolute deed was made in pursuance and as part of the trust agreement; that Pettibone had given Swan a mortgage to certain stock, which was at large on the range in Wyoming, and that Swan had assigned this mortgage to Mrs. Barkwell, and that this was payment of the notes. The trust agreement was never acknowledged or recorded. There is considerable evidence in the record on the question as to whether Mrs. Barkwell, who took the assignment of the mortgage as collateral security from Swan, had collected all the cat-

tle embraced in the mortgage then existing, and to what extent credit should be made for these cattle. It was shown by the evidence that the cattle were in Swan's possession when the mortgage was assigned. The chancellor held the trust valid, and dismissed the bill, and Mrs. Barkwell appealed.

Calhoun & Green, for appellant. Nugent & McWillie, for appellees.

WOODS, J. 1. The transfer of the mortgage made by Pettibone to Swan, and its acceptance by Mrs. Barkwell, did not operate to pay the debt thereby secured. We think it clear that this mortgage security was available to Mrs. Barkwell for the payment of the debt due her. We do not agree that, by the course of dealing with the property mortgaged, Mrs. Barkwell is to be held to have relinquished all demand for any deficiency in the sum realized by sale of the property. The improper or negligent conduct of Mrs. Barkwell in dealing with the property after the transfer of the mortgage security to her, if such there was, whereby the property was lost or its value impaired, will diminish her right to a recovery on the original obligation to the extent of the loss or impairment in value sustained, and the surety, Swan, discharged to that extent. She must bear any loss resulting from any illegal or negligent conduct on her part after taking charge of the mortgaged property, whereby the same was either wholly lost or its value impaired. The question is thus one of accounting, and the rights of the parties in this particular will be made manifest upon a proper accounting. *Clopton v. Spratt*, 52 Miss. 251.

2. The contention of counsel for appellant that the conveyance in trust from Swan to Gilchrist is void, under section 1296, Code 1880,<sup>1</sup> is not sound. The conveyance of the lands to Gilchrist from Swan was properly acknowledged and recorded, and it is through this conveyance—absolute on its face, but shown, not by parol, but by another instrument executed contemporaneously therewith, to be really a mortgage—that title is conveyed to Gilchrist. The agreement entered into contemporaneously with the conveyance was the evidence of the fact that the conveyance, though absolute on its face, was, in effect, a mortgage. The conveyance was acknowledged and recorded. The mere evidence of the real character of the conveyance was not recorded. It is sufficient, we think, to say that the only change made in our law since the many adjudications holding that a deed absolute on its face may be shown to be a mortgage is that provision of our Code of 1880, (section 1299,) which declares that a

<sup>1</sup>Code 1880, § 1296, provides that every writing declaring or creating a trust in land shall be lodged with the clerk of the chancery court of the proper county, to be recorded, and shall only take effect from the time it is so lodged for record.

conveyance or other writing, absolute on its face, when the maker parts with the possession of the property conveyed by it, shall not be proved, at the instance of any of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried. This change in our law, designed to cut off the temptation to perjury by oral evidence trumped up for the occasion, does not touch the evidence offered in this case to show the conveyance is a mortgage. The proof is by a writing executed contemporaneously with the conveyance.

3. The conveyance is not void because, as interpreted in the light of the writing executed contemporaneously, it hinders, delays, and defrauds creditors. While the remarks of the court in the cases cited and relied upon by appellant's counsel (*Bank v. Douglas*, 11 Smedes & M. 469, and *Henderson v. Downing*, 24 Miss. 106) support the position that no further time should have been granted in a mortgage to secure pre-existing debts than the usual period required in collections made by law, yet this remark is not potential in determining the case in hand. Here two years is the period of extension given in the mortgage. The property consists of nothing consumable in use, and the absolute possession is taken from the grantor and given to the grantee. In the two cases named, the facts are far different. Besides, at the time when the opinions referred to were delivered, the unfavored creditors were powerless to take any step looking to the subjection to their demands of any interest of the grantors in the property conveyed. Under our statutes as existing at present, the unsecured creditor may move and secure sale of the grantor's equity of redemption. This, itself, must be regarded as modifying the doctrine announced in those cases as to extensions of time, and upon which appellant relies.

4. The equity of redemption of Swan should have been subjected to complainant's demands, as the same may appear upon an accounting. The complainant's bill sought to subject to the payment of her demand against a nonresident debtor lands of that debtor lying in this state, and, as an incident thereto, prayed the cancellation of the conveyance to Gilchrist by Swan, as fraudulent upon its face. She sought to subject the whole of the lands as being Swan's, after cancellation of a deed apparently fraudulent. But she is met by respondents, who satisfactorily show the deed is really a mortgage, and therefore not fraudulent and void. The respondents make it clear that the absolute ownership in the lands is not in Swan, but that he has only the equity of redemption in them. The complainant cannot have all that she sought, but she should not be denied that which she is entitled to, if the same can be fairly said to be embraced in the frame of the bill and in the scope of the

relief prayed. If, under the prayer for general relief, the complainant may have other relief than that specifically prayed, not inconsistent with the purpose of the bill, it appears to us that she should be allowed to subject to any just demand of hers Swan's equity of redemption. We adopt this course in the present case with no hesitation, because it is impossible to say that it can surprise the respondents, or injuriously affect them or others. Let the decree below be reversed, and the cause remanded, to be further proceeded with in accordance with this opinion.

#### TAYLOR et al. v. WATKINS et al.

(Supreme Court of Mississippi. May 1, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — CONSTRUCTION — VALIDITY — PREFERENCES — DEEDS OF TRUST — RIGHTS OF CREDITORS.

1. An assignment for the benefit of creditors embracing only part of the property of the assigning firm will not be construed to be a general assignment of all the property of the firm from the fact that the petition, in an action to set it aside as being in fraud of creditors, averred it to be a general one, and the answer did not deny such averment.

2. Nor will such assignment be construed as a general one from the fact that one of the assignors, in the action to set it aside, testified that it was intended as a general assignment.

3. Nor will such assignment be construed as a general one from the fact that the assignors put the assignee into possession of all the partnership property.

4. An assignment for the benefit of creditors will not be rendered invalid from the fact that the assignee was a preferred creditor, it appearing that he was familiar with the assigning firm's business, in that he had been their bookkeeper, and was thus fitted for the trust.

5. Nor will the fact that the assignee was addicted to gambling invalidate the assignment, in the absence of a showing that the assignors knew of his indulgence in this vice.

6. Nor will the assignment be rendered invalid from the fact that, a few days before it was made, one of the assignors delivered to his wife certain notes payable to himself, where it appears that the notes were held by the assignor as collateral security for a debt due her from him.

7. A deed of trust to secure a debt due the beneficiaries, executed in conjunction with an assignment for the benefit of creditors, is not rendered invalid by the fact that the trustee permitted the grantor to remain in possession and management of the property, where it appears that the grantor was the father of the beneficiaries, was familiar with the management, and was subject to the control of the trustee.

8. Nor will the trust deed be rendered invalid by the fact that the property conveyed was in excess of the debt designed to be secured, as the grantor's creditors have a remedy by proceedings for the sale of his equity of redemption.

9. Nor can the validity of the trust deed be questioned from the fact that the grantor executed it without consulting the beneficiaries.

10. The fact that the trust deed conferred on the beneficiaries, who were minors, power to appoint a substitute trustee in case of vacancy, will not affect its validity, as a

court of equity will not permit a trust to fail for want of a trustee.

11. The genuineness of a debt sought to be secured by a conveyance, executed in conjunction with an assignment for the benefit of creditors, is not affected by testimony of the grantor that he burned the notes evidencing the debt upon the acceptance of the conveyance by the grantee.

Appeal from chancery court, De Soto county; B. T. Kimbrough, Chancellor.

Bill in equity by Minnie Belle Taylor and others against A. S. Watkins and others. From a decree for defendants, plaintiffs appeal. Affirmed.

A. S. Buchanan, Calvin Perkins, and R. E. T. Morgan, for appellants. Ira D. Oglesby and Powell & Farley, for appellees.

WOODS, J. The appellants assail the deed of assignment made by Payne & Bell, and the several deeds of trust and absolute conveyances made at the same time by the members of that firm of partnership and of their individual estates. The ground of assault is that the assignment is a general one; that, if not so on its face, it is averred to be of that character in the original bill, and this averment is not denied in any of the numerous answers; and that Bell, one of the assignors, testified that it was a general assignment. But, if mistaken in this, then the ground is taken that the assignment, with the several trust deeds and the one absolute conveyance made at the time of the execution of the deed of assignment, must be held and treated as parts of one entire transaction, which, it is contended, amounts to a general assignment, and that the purpose of the general assignment was to hinder, delay, and defraud creditors of the firm of Payne & Bell, and those of the partners individually. Whether the assignment is general or not must be determined by the deed itself. No admission in pleadings, no after-taken evidence of the assignors, and no declarations of the assignee to the effect that he was put in possession of the entire property of the assigning partnership, are at all potential in determining the character of the assignment. We can look only to the instrument itself for that purpose. Looking, then, at the deed of assignment, we find no words indicative of intent to convey the entire estate of the firm. No general terms embodying any such thought are employed. On the contrary, the property assigned is specifically named and described. Not only this, but it is manifest, standing at the end of a completed controversy, that some of the partnership property was not embraced in the enumeration of the specific articles conveyed in the deed of assignment. The deed did not purport to, and in fact did not, convey the entire estate of the firm. It is not a deed of general assignment regarded by itself alone. Collocating with it the several trust deeds and the one absolute conveyance, can they be treated as one whole? Are

they parts of one entire scheme to hinder, delay, and defraud creditors? The inquiry can be best answered by a brief examination, in detail, of the more prominent facts disclosed in the record, which are urged by counsel for appellants as conclusive badges of fraud in the grantors.

1. The selection of Bowdre as assignee is consistent with perfect good faith in the assignors, and was not an improper act. He was familiar with the business of the assigning firm, having been its bookkeeper for three or four years, and was peculiarly fitted for the trust conferred. The assignors regarded him as a competent and reliable person, and there is wanting all evidence of any knowledge on their part, of his habits or character, which might have made his appointment unsuitable. If, in fact, he gambled when in the service of the firm, there is no evidence that either member of the firm had any knowledge of the fact. There is, in truth, much reason for saying they did not know that he indulged in this vice at all. He was a preferred creditor, it is true; but that fact may be, and was here, in our opinion, of insignificant worth.

2. The dealings of Payne with the securities held by him as collateral for the debt due from him to his wife, and controlled and managed by him as he thought best for her interest, appears to us to be not even evidence of fraud on his part. He owed his wife. He kept the note evidencing the debt in his possession. He put with the note, in its envelope, notes payable to himself, and by him indorsed in blank as collateral security for the debt. He had the management and control of this business for his wife, as husbands naturally and generally have in harmonious families. He collected, from time to time, money on the collaterals, used it in his business, and substituted other paper in lieu of that thus collected and used. This he did for four years before, and up to a few days before, the assignment was made. Who was wronged? What fraud was perpetrated? That the very notes held as collateral security for the payment of his own note to his wife were delivered up to her when the fall came, and that she used them in becoming a member of the firm of Banks & Co., is the simple and natural outcome of a fair, honest, and provident transaction. He had a right to secure his debt to his wife, and she had the right to permit him to manage her collaterals according to his own will and best judgment. We wholly fail to see any fraud in this particular.

3. The trust deed made by Bell to secure the amounts due his wards—his minor daughters—is assailed with great vigor and skill, on three grounds chiefly: (a) The grantor was permitted by the trustee to remain in possession and management of the property conveyed. The answer to this is that Bell was perfectly familiar with the



stock farm, and doing business, and was a person competent to its conduct. The beneficiaries in the trust deed were his own minor children, as well as wards, and parental affection, as well as self-interest, would move him to exercise faithful care and supervision of the business. He had large control, certainly, but he did not have unbridled discretion. The will of the trustee was never violated, and his conduct was subject always to the trustee's approval. Indeed, he and the trustee testify that, while the details of the management were confined largely to Bell, the general outlines were adopted on conference with, and after approval by, the trustee. There is no hint of any bad faith or mismanagement on the part of Bell in his control and direction of the stock farm, dairy, or cattle. We see no reason why he should not have been employed just as he was. (b) But it is asserted that the property conveyed in trust for his wards—the minor daughters—was largely in excess of the debt designed to be secured, and that the time of payment of the debt was postponed 12 months. Reliance is placed for the maintenance of this position upon the case of *Henderson v. Downing*, 24 Miss. 106, and *Bank v. Douglass*, 11 Smedes & M. 469. In the case of *Barkwell v. Swan*, 69 Miss. 107,<sup>1</sup> the doctrine contended for by the learned counsel for the appellant, and found in the cases referred to in 24 Miss. 106, and 11 Smedes & M. 469, was declared to be modified by subsequent statutes which now permit a sale of the grantor's equity of redemption in the mortgaged property. If Bell, in this case, sought to protect his estate from attacks of creditors by conveying it prodigally and excessively to secure preferred creditors, and by giving himself undue extension of time for payment of the secured debt, there was and is nothing which precludes his general creditors from proceeding to sell his equity of redemption to satisfy their demands. (c) The objection taken to this trust deed made by Bell to secure his minor wards in their debt due from him because made with minors in their absence, and with power conferred on them to appoint a substituted trustee, in case of vacancy in that office, are all without merit. Bell may secure any creditor, adult or minor, without consulting the creditor; and, if the minors were incapable of exercising the powers conferred, (as to which we express no opinion,) a court of equity could and would see to it that the trust did not fall for want of a trustee. And this remark is applicable to the attack made upon the conveyance in trust made by Payne for the benefit of his insane ward, Oliver.

4. The only debt sought to be secured or paid by either Payne or Bell whose genuineness is called in question at all is that said to have been due from Bell to his wife. The only circumstance in all the volumi-

nous record which lends countenance to this contention (if it may be said to do so, which is doubtful at the least) is the fact that Bell testifies that he burned the two notes which his wife held against him when she accepted the conveyance from him in payment thereof. We differ wholly with counsel as to the value of this circumstance. Indeed, we attach no importance to it whatever.

5. The contention of appellants as to the fraudulent character of the conduct of Payne & Bell in charging Meriwether with \$115, and debiting the sheriff Rollins with the same amount, of charging to themselves the several debts contracted with the firm by their farms, their employes, their families, and for which they had agreed to become responsible, and of drawing on Porter & Macrol for an amount sufficient to pay their taxes, individually and as a firm, may be disposed of without discussion, as palpably not well taken. It is not to be forgotten that while the firm, assigning, left unconveyed an inconsiderable property, Bell, one of the members, left unconveyed, indisputably, his interest in a plantation worth \$2,500, and stock in a dairy company worth \$500. We decline to pursue the matter further, as it is clear to us, on every ground, that the correct result was reached in the decree of the court below. Affirmed.

(69 Miss. 274)

#### HAWKINS v. JAMES.

(Supreme Court of Mississippi. Oct., 1891.)

LANDLORD AND TENANT—ACTION FOR POSSESSION—EVIDENCE—RELEVANCY.

Where, in an action to recover possession of real estate, plaintiff claims that defendant is holding over after the expiration of her tenancy, and defendant denies the lease on which plaintiff relies, evidence of an executory contract of purchase by defendant from plaintiff's grantor, and of defendant's possession thereunder for many years prior to plaintiff's purchase, is irrelevant.

Appeal from circuit court, Adams county; W. P. Cassidy, Judge.

Action by William James against Zelia Hawkins to recover possession of certain real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff claimed under a written lease, signed by defendant with her mark. Defendant denied the execution of the lease, and offered evidence to show that she was the owner of the demised premises, and had been in possession for many years prior to plaintiff's purchase, under a written executory contract of purchase from plaintiff's grantor, and that she would be entitled to a deed on payment of a small balance of the contract price. This evidence was excluded, and this action by the court is assigned as error.

James G. Leach, for appellant. Ernest E. Brown, for appellee.

<sup>1</sup> 13 South. Rep. 809.

COOPER, J. The evidence offered by the defendant and excluded by the court was irrelevant, and its exclusion proper. The question at issue was whether the defendant had become tenant to the plaintiff by executing a written contract to pay rent for the year 1890. She denied that she had done so, while the plaintiff asserted that she had. The fact that at and before the date of the supposed contract she was in possession of the land under an executory contract of purchase did not tend to prove or disprove the issue joined. Its only effect, if proved, would have been to corroborate the testimony of the defendant by showing its probability; but this alone does not make it relevant. 1 Greenl. Ev. 59; 1 Phill. Ev. c. 10, § 3, and notes by Cowan & Hill and Edwards. In *Hale v. Hills*, 8 Conn. 38, the issue was whether one Israel Hills had, on August 27, 1827, delivered to the defendant a deed, dated June 27, 1826. It was held incompetent to show that, a few days before the date of the supposed delivery, the defendant had broken open the trunk of Israel Hills, and taken therefrom the deed and sundry other papers; and that, upon defendant's presenting these papers to the grantor, he ordered the defendant "to put them back into the trunk, and not to meddle with them again." There are some cases to be found in which evidence but slightly tending to prove the issue joined has been admitted, but it will be found that in these the testimony has been relevant, and the objection has rather been to its probative force than to its competency. The general rule undoubtedly is that a collateral and inconclusive fact may not be given in evidence. Judgment affirmed.

(69 Miss. 266)

#### RIGGS v. COKER.

(Supreme Court of Mississippi. Oct., 1891.)

REPLEVIN—WHEN LIEN—PERISHABLE GOODS SOLD BY SHERIFF.

Laws 1884, p. 84, provide that, on the seizure of personal property in a proceeding to establish a vendor's lien thereon, the sheriff shall hold and dispose of the property as in replevin. Code 1880, § 2618, provides that if replevied chattels are expensive to keep, or are perishable, they may be sold by the sheriff, as in cases of attachment. *Held*, that if the sheriff sell chattels held by him under the former act as being perishable or expensive to keep, the defendant in the proceeding cannot bring replevin against the purchaser on the ground that they should not have been sold.

Appeal from circuit court, Tunica county; R. W. Williamson, Judge.

Replevin by J. J. Riggs against N. Coker for certain logs. From a judgment for defendant, plaintiff appeals. Affirmed.

The logs in question were purchased by defendant at sheriff's sale, under the follow-

ing proceedings: Kirkland, Rich & Co. and Bagswell & Nelson instituted suits in the circuit court of Tate county, under Acts 1884, (Laws 1884, p. 84,) against J. J. Riggs, to recover of him the purchase money of the logs in controversy. The logs were seized by the sheriff, and Riggs was served personally to answer these suits. The Acts of 1884 provide that the sheriff shall deal with the property seized as in replevin, and the Code of 1880 (section 2618) provides, in cases of replevin, that if the chattels "are expensive to keep, or are perishable articles," they may be sold, as provided in cases of attachment, \* \* \* and the proceeds of sale shall be in lieu of the things sold." The sheriff, in the exercise of this discretion, deemed the property seized both perishable and expensive to keep, and acting upon his judgment, and under the authority of the statute, sold the property to defendant, Coker, who was not a party to the suit, and bought the same, and paid \$3,300 for it to the sheriff. The proceeds of the sale were paid into court. Judgment was had against Riggs, and the property seized condemned for the payment of the purchase money, and the court in the judgment directed the proceeds to be applied to the payment of Riggs' indebtedness to the plaintiffs. Riggs did not in that action contest these demands, nor raise any objection to the sale, the condemnation of the property, or the application of the proceeds. He now seeks to recover of Coker, the purchaser at the sheriff's sale, the said property by replevin, instituted while the proceeds of the sale of the property was in the hands of the sheriff, and while the said original suit was pending. On the trial of the replevin suit he proved his purchase of the logs, and possession under that purchase, and rested. Defendant offered in evidence the transcript of the records in the two suits against Riggs to recover the purchase money of the property. These records showed the purchase of Coker at the sheriff's sale. Plaintiff objected to the introduction of this evidence. Plaintiff then offered to show that sheriff's sale was invalid. This evidence the court ruled was not competent. There was a peremptory instruction by the court to find for the defendant.

W. A. Percy, for appellant. Ira D. Oglesby, for appellee.

CAMPBELL, C. J. The purchaser at the sale made by the sheriff acquired title to the logs as against the defendant in the suit in the progress of which the sale was made, and that person cannot maintain an action against such purchaser, whether the logs should have been sold or not, upon the facts shown by this record. Affirmed.

(99 Miss. 126)

## MEGGETT v. WESTERN UNION TEL. CO.

(Supreme Court of Mississippi. Oct., 1891.)

TELEGRAPH COMPANIES—NONDELIVERY OF MESSAGE.

An action cannot be maintained against a telegraph company for failure to deliver a telegram by which plaintiff requested a third person to ship to him produce at a certain price, when it does not appear that the addressee could and would have made the shipment if he had received the message.

Appeal from circuit court, Washington county; R. W. Williamson, Judge.

Action by W. McD. Meggett, for the use of H. Wilczinski, against the Western Union Telegraph Company for failure to transmit a message. From a judgment for defendant, plaintiff appeals. Affirmed.

The telegram in question was filed at the Greenville, Miss., office of the telegraph company after business hours in the evening of 25th of July, 1890, as a night message, addressed to H. Hunter, of Clinton, Mo., as follows: "Ship immediately, Herman Wilczinski, Greenville, hundred each, corn and oats, fifty-two, forty-one. Red hot. Business quiet. Appledown arrived yet? [Signed] W. McD. Meggett." This message was mislaid, and never forwarded. The message was not paid for, and was sent "collect." Wilczinski was compelled to buy oats and corn later, and at an advanced price. The damage claimed is the difference between the price of corn and oats at the time of the delivery of the telegram and the price paid by Wilczinski after giving the order. There was no evidence as to any contract relation between Meggett and Hunter, or that Hunter would have shipped the oats and corn if he had received the telegram promptly. The court below gave a peremptory instruction for the defendant.

G. P. Neilson, for appellant. Jayne & Watson and Mayes & Harris, for appellee.

WOODS, J. The action of the trial court was altogether correct. The whole evidence in the case fails to show that any loss sustained by the usee was attributable to the failure of the appellee to transmit the message. There is an absence of all proof even tending to show that Hunter had the ability or the will to supply Wilczinski with the produce named in the telegram upon the terms and conditions contained therein. No effort was made by appellant to show that Hunter could and would have shipped at the price and on the terms stated in the telegram. If, in fact, Hunter either could not or would not have made the sale and shipment, it is impossible to conceive of any loss resulting to the usee by reason of the failure of the telegraph company to transmit the message. It seems unnecessary to cite authority or to indulge in any reasoning to support this view, which prevailed on the trial below.

As this disposes of the case, we find it inappropriate to pass upon any other controverted question raised by counsel. Affirmed.

(99 Miss. 126)

## SEARLES v. ALABAMA &amp; V. RY. CO.

(Supreme Court of Mississippi. Oct., 1891.)

CARRIERS—INJURY TO FREIGHT—PRESUMPTION.

Where grain shipped on defendant's cars is found on delivery to be damaged by water, the presumption that the cars were in good order, raised by evidence that the cars of defendant were universally inspected, as provided by the rules of the company, and would have been condemned if in bad order, is not conclusive, but the question of their condition is for the jury.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by C. J. Searles against the Alabama & Vicksburg Railway Company for injury to freight. From a judgment for defendant, plaintiff appeals. Reversed.

Plaintiff shipped three car loads of oats over defendant's road to Meridian, thence over connecting lines to Atlanta, Ga., under a through bill of lading, freight being paid in advance. The oats were carried through in the same cars, not being unloaded in transit at all. When the oats reached Atlanta the original seals of the cars had not been broken, but they were found to be wet and considerably damaged. Searles had sold the oats by sample through a broker, but the purchasers refused to take the oats at the contract price, and Searles was forced to resell them at a greatly reduced price, on account of their damaged condition. Searles brought this action against the Alabama & Vicksburg Railway Company to recover \$522.50 damages; this being the difference between the price for which the oats had been sold before shipment and the price received for same. On the trial it was shown that three bills of lading were given to plaintiff, one for each car shipped; the first on February 3, 1890, the other two February 4, 1890. The first and second cars left Vicksburg on the 5th of February, and the third on February 6th. They were received in Meridian, and, after a short delay, forwarded. Plaintiff's evidence was to the effect that the oats were in good condition when they were delivered to defendant at Vicksburg, and were damaged when they reached Atlanta. Plaintiff showed by its car inspector that it was the universal habit, under a rule of the company, to carefully inspect all cars before they were allowed to be loaded with freight. He had no recollection as to these particular cars, but was sure they were in good repair, or they would have been condemned. There was a peremptory instruction given to find for the defendant. There was a verdict and judgment for defendant. Plaintiff appealed.

Dabney & McCabe, for appellant. Birchett & Shelton and W. L. Nugent, for appellee.

WOODS, J. On all the evidence submitted in the trial court it cannot be safely affirmed that there was no disputed question of fact for a jury. The inquiry as to the railway company's alleged negligence in shipping the grain in unsafe and unsuitable cars was met by the evidence of the car inspector of appellee as to his universal habit, and the rules of the company touching the examination and sending out of all cars. This evidence, we agree with the court below, raised a presumption of the sufficiency of the cars used in making this particular shipment, and, if no other evidence were to be found in the record, the peremptory instruction might be maintained. But the presumption of the sufficiency of the cars employed was met by another presumption, arising out of the evidence, showing the condition of the cars and their loads upon reaching the point of destination. The three cars, so far as the record shows, were then in the condition in which they were when started from Vicksburg, each one sealed, and untouched and undisturbed, and the entire load of each was seriously damaged by water. In the absence of any countervailing evidence, the reasonable presumption must be indulged that the damage was occasioned by rainfall penetrating and striking through inadequate and unsuitable cars; and so, on all the evidence, the question of fact as to the railway's negligence in furnishing insufficient and insecure cars originally was one for the jury's determination. The presumption created by the car inspector's evidence in favor of the sufficiency of the cars was a reasonable, but not a conclusive, one. The presumption of insufficiency, growing out of damage to the grain, on the facts proven, was reasonable also, but not conclusive, and the jury should have been permitted to pass upon the question of fact raised by this conflicting evidence. Reversed, and remanded for a new trial.

(69 Miss. 625)

**BAGGETT v. STATE.**

(Supreme Court of Mississippi. April, 1892.)  
RECEIVING STOLEN MONEY—INDICTMENT—SUFFICIENCY OF DESCRIPTION.

An indictment which charges merely that defendant received stolen money consisting of \$200 in United States bank notes, of the value of \$200; \$200 United States currency, of the value of \$200; and \$200 of United States treasury notes, of the value of \$200,—is bad for not more particularly describing the stolen property, or averring that such description cannot be given because unknown to the grand jury.

Appeal from circuit court, Lincoln county;  
J. B. Chrisman, Judge.

Bill Baggett was convicted of receiving stolen money, and appeals. Reversed.

The indictment charged defendant, in one count, with stealing \$200 in United States bank notes, of the value of \$200; \$200 United States currency, of the value of \$200; and

\$200 of United States treasury notes, of the value of \$200. In the second count he is charged with having received, knowing it to be stolen, money, described as in the first count. A motion by defendant to quash this indictment was overruled by the court below. Among other causes set out in the motion to quash was the following: Because the indictment failed to charge the kind and denomination of the bank notes, etc., charged to have been stolen. The only evidence on this point was that the money stolen was one \$100 bill, one \$20 gold piece, and some \$20 bills, making in all \$200.

H. Cassidy and A. C. McNair, for appellant. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, C. J. According to the text-books treating of the subject, and numerous adjudications by the courts of England and America, this indictment is bad for not stating the denomination of the bills stolen or received, or in some way more particularly describing them, or some of them, or averring that it could not be done because it was unknown to the grand jurors. We confess our inability to perceive the reason or wisdom of the requirement of such particularity in indictments, but so the law appears to be; and, as we have no statute changing the common law on this subject, we do not feel at liberty to disregard the rule so generally announced in the books. This indictment would probably be held good in Massachusetts, but in that state alone, in the absence of a statute affecting the question. If the indictment was held good according to the ruling in *McKane v. State*, 11 Ind. 195, where the "dollars" were assumed to import one-dollar pieces, the verdict here would be bad as unsupported by the evidence, which fails to show a single one-dollar bill among those stolen. The motion to quash the indictment should have been sustained. Reversed, indictment quashed, and cause remanded for a new indictment, to await which the prisoner will be held for answer.

(69 Miss. 879)

**YOUNG v. BARR.**

(Supreme Court of Mississippi. April, 1892.)

UNLAWFUL ENTRY AND DETAINER—ACTION BY ASSIGNEE.

Where the owner of a lot of land conveys it, but is unable to put the grantee in possession of a strip on one side thereof because an adjoining owner has moved her fence so as to inclose it with her own, such grantee is an assign of the person deprived of possession, within the meaning of Code, § 2645, authorizing such assigns to bring an action of unlawful entry and detainer.

Appeal from circuit court, Hancock county;  
S. H. Terral, Judge.

Action of unlawful entry and detainer by Eppie E. Barr against Rosa Young. From a judgment for plaintiff, defendant appeals. Affirmed.

The strip of land in dispute was part of a

lot in Waveland, Miss., which Mrs. Barr had a short time before bought from Mrs. Shropshire, who conveyed to her the whole of the lot, and put her in possession of all of it but the strip in question. She could not put her in possession of this because a few days before, in the absence of Mrs. Shropshire, defendant entered upon and moved her division fence upon Mrs. Shropshire's inclosure about 10 feet, so as to embrace in her inclosure the strip in controversy. Mrs. Barr brought this action to recover possession of the land. The fence, as it stood at the time Mrs. Young moved it, was where it had been put over eight years before by the husband of Mrs. Shropshire after a survey in order to locate it on the true eastern boundary of the lot. There was some evidence to show that this fence was built by Mrs. Shropshire and the then owner of the Young lot jointly, each party paying half the expenses. Defendant never made any claim to the strip in dispute, or objected to the occupation of the land, until Mrs. Shropshire sold her lot. Defendant's contention was that the action accrued before the conveyance to Mrs. Barr, and therefore she had no right to maintain this action under Code 1880, § 2645; and in support of this view it was urged that the word "assigns," as used in the statute, does not mean the vendee or grantee of the person ousted, but one who holds a distinct and separate assignment in writing to sue for the possession. There was a peremptory instruction by the court below, on the trial, to find for plaintiff.

Ford & Ford and Robert Lowry, for appellant. E. J. Bowers and Nugent & McWillie, for appellee.

OOOPER, J. There can be no question that Mrs. Shropshire intended to convey to the appellee, and did convey, if she herself had title, a lot of land 206 feet wide, nor that the land in controversy is a part of this lot. Mrs. Barr is therefore the "assign" of Mrs. Shropshire, whose possession was unlawfully invaded, and may maintain the present action just as Mrs. Shropshire might have done if she had continued owner. The facts in reference to the entry by Mrs. Young are undisputed, and disclose that invasion of the right of the occupant, which, as was stated in *Parker v. Eason*, 68 Miss. 290, 8 South. Rep. 844, the action of unlawful entry and detainer was given to remedy. The judgment is affirmed.

(45 La. Ann. 1049)

HEWES et al. v. BAXTER. (No. 1,435.)  
(Supreme Court of Louisiana. July Term, 1893.)

APPOINTMENT OF TUTOR—VALIDITY—FAILURE TO FILE INVENTORY—PARTITION—RIGHTS OF PARTIES—APPEAL—WHO MAY TAKE.

On Motion to Dismiss.

Defendant is not affected by a declaration in the judgment that it is in his favor v.1890.no.20—52

when in reality it is against him. He has the right to appeal from it to correct any errors. *Police Jury v. Succession of McDonogh*, 8 La. Ann. 362; *Second Municipality v. Duncan*, 2 La. Ann. 182.

On Merits.

1. Where defendants in a partition suit except that one of the coplaintiffs, who alleges himself to be the natural tutor of his minor child, is not such, and on the trial of their exception show that although, under an order of court authorizing the father to qualify as tutor, he had taken an oath as such, he had never caused (as the law requires) the abstract of inventory of the minor's property to be recorded, which protects the minor through a mortgage, and that no "letters of tutorship" had ever been issued, the exception should be sustained as to this coplaintiff, who should be dismissed from the suit, and it should be remanded, to be proceeded with according to law.

2. The facts that on the application of a father so claiming to be tutor a family meeting had been called by the court to consider whether the father, as tutor, should institute a partition suit; that it had recommended that he should do so; that its deliberations had been homologated, and the suit authorized to be brought by the judge,—will not cut the defendants, who are third parties, off from their right of protection against possible sacrifice of the property and future litigation arising from proceedings of questionable validity.

3. Defendants in partition having direct substantive rights of their own, and interested not only in the price to be obtained, but in the title to be conveyed, by reason of their continuing obligation as covendores of the property to be sold, have the right to insist that proceedings of doubtful legality, which have not yet reached consummation, but are in process of formation, shall be placed securely beyond the danger point, and not permitted to pass on to finality.

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; Felix Voorhies, Judge.

Action by Harry B. Hewes and others against John P. Baxter, tutor and executor, for partition. From a judgment ordering a partition, defendant appeals. Reversed.

P. H. Mentz and W. J. Burke, for appellant. Foster & Broussard and L. T. Dulany, for appellees.

NICHOLLS, C. J. This action is one for the partition of certain property, movable, immovable, and credits, in the parish of Iberia, between joint owners. The plaintiffs are Harry Hewes, Miss Rose Mary Leitch, and J. W. Stokoe, personally, and in his capacity as natural tutor of his minor son, Nell W. Stokoe, issue of his marriage with his deceased wife, Mattie J. Stokoe. The defendant is J. P. Baxter, as tutor of the minors Baxter Milmo, Walter Milmo, Gerlie Milmo, and Bernard Milmo, and also as executor of the estate of Bernard B. Milmo, the father of these last-mentioned minors. Plaintiffs alleged that the property, of which an itemized list and description was annexed to the petition, was owned, held, and possessed by petitioners and the before-named minor children of Bernard B. Milmo in indivision, and that they desired and demanded a partition thereof; that the firm of Milmo, Stokoe & Co., to which the said property once be-

longed, had been dissolved by the death of Bernard B. Milmo and Mrs. Mattie J. Stokoe, partners therein, and a final and full settlement of said partnership had never been made; that Harry Hewes owned the undivided three-eighths of said property; that Rosa Mary Leitch, who is a daughter of Mattie J. Stokoe by a first marriage, and a minor duly relieved from the disabilities of minority by a judgment of court, owned the undivided one-fourth of five-eighths; that the minor Neil W. Stokoe owned the undivided one-fourth of five-eighths; that J. W. Stokoe personally owned the undivided one-half of five-eighths, and that the four minors, represented by their tutor, J. P. Baxter, owned the undivided ten-eighths which they, the only forced heirs, inherited from their father; that Miss Rosa Mary Leitch and Neil W. Stokoe acquired their interest by inheritance from their mother, Mattie J. Stokoe, which they were seised and in possession of as sole and forced heirs; that there were no debts, and Rosa Mary Leitch had accepted unconditionally the succession; that J. W. Stokoe, as tutor of the minor Neil W. Stokoe, had caused a family meeting to be convened on behalf of said minor, and that said family meeting, whose proceedings had been homologated, recommended that, on behalf of said minor, his tutor institute proceedings for a partition; that all of said property was of such a nature and kind that it was detrimental to the owners to hold the same in indivision, and that a partition thereof was necessary, and that it should be made by licitation. Petitioners prayed for citation upon Baxter, as tutor and testamentary executor; that there be judgment in their favor, recognizing them as co-owners of said property, and ordering and decreeing the sale thereof for the purpose of effecting a partition among all the co-owners; that on the part of the majors said property be sold for cash, and, so far as the interest of each and all of the minors, that it be sold upon such terms and conditions as might be recommended by a family meeting convened in their behalf; that experts be appointed to examine into the nature and kind of said property, and to report to the court whether or not it was susceptible of division in kind; that an estimative inventory be made of said property; that the judgment ordering the sale also order and decree that the final partition be referred to a notary in order that a partition be made between all the co-owners, and according to law; that Stokoe, as tutor of his minor child, be authorized to stand in judgment as recommended by the family meeting. On the 30th May, 1892, the district judge signed an order by which he authorized J. W. Stokoe, as tutor, to prosecute the proceedings, and to stand in judgment as the representative of the minor, in accordance with the recommendation of the family meeting held in that behalf; appointed

experts to examine and report under oath the nature and condition of the property sought to be partitioned, and directed the taking of an estimative inventory of the same. The defendant, Baxter, as tutor, filed an exception to the effect that J. W. Stokoe was not, and never had been, tutor of the minor Neil W. Stokoe; that the abstract of inventory showing the amount and value of the property of said minor had never been recorded; that no appointment of said J. W. Stokoe, as tutor, had been made, or, if made, that the appointment was absolutely null, void, and without effect; that no "letters of tutorship" had ever issued to the said Stokoe from the court, and that he was without appointment or authority of any kind to represent the minor; that at the time he applied for the convocation of a family meeting to authorize him to bring the suit in behalf of the minor he had not taken the oath required by law, and that he was without authority to petition for the said meeting, and that the holding of the same was without effect of any kind, and that all the proceedings relative thereto were null and void, and that all the parties alleged by the plaintiffs to be co-owners of the property sought to be partitioned were not represented. For these reasons he prayed that the suit be dismissed. This exception having been overruled, defendant filed an answer, in which, after pleading the general issue, it was admitted that the minor children of Bernard B. Milmo were owners of ten-eighths of the property described in plaintiffs' petition, but specially denied that J. W. Stokoe had any right or title to any part of the property, or that Rosa Leitch or Neil Stokoe had ever acquired title to any part of the same. The answer declared "that the property belonged solely to the estate of Mrs. Stokoe, deceased; that J. W. Stokoe was the executor of the last will and testament of said deceased, and that the said estate was in his possession solely and exclusively as such executor; that legatees were named in the will; that J. W. Stokoe had never filed any account of his gestion, that he had never distributed the property as required by the last will, and that neither the legatees under said will, nor the heirs of the said deceased, had acquired title to or possession of said property, and that none of them were owners of any part of the property of said estate; that no orders had ever been obtained by said executor, nor had any petitions asking for such orders ever been presented to any court, asking for the distribution of the property or assets of said estate, or for the payment or delivery of the legacies named in the last will and testament of said deceased; that the entire property of said estate still remained as it was at the moment of the probate of the said last will and testament; that title to the property was solely in the said executor

in his said capacity, in which capacity he had not the right to sue for a partition." Defendants prayed that the demand be dismissed, and for trial by jury.

The case having gone to trial, the jury returned a verdict as follows: "Verdict for defendant. Inasmuch as the property cannot be divided in kind, it is our opinion that the sale of said property at public sale, in parts, would work to better advantage to all parties concerned in this suit. [Signed] John Broussard, Foreman." The court, on the verdict so found, rendered the following judgment: "The above numbered and entitled cause having been duly fixed for trial by jury, and a jury having been duly impaneled, and the said cause having been duly taken up and tried before said jury, and the evidence and the law being in favor of the defendant and against the plaintiffs, and the verdict of the jury being in the following words, to wit: 'Verdict for defendant. Inasmuch as the property cannot be divided in kind, it is our opinion that the sale of said property at public sale, in parts, would work to better advantage to all parties concerned in this suit. John Broussard, Foreman,'—it is therefore ordered, adjudged, and decreed that the property described in plaintiffs' petition be sold at public auction by the sheriff of this parish, to effect a partition between them, and that the same be sold in parts, to wit: The land between Main St., in Jeanarette, La., and the Bayou Teche, and the buildings, improvements, and machinery thereon, be sold together, and that the steamboat *Rosa M. Stokoe*, the pull boat, logs, lumber, and open accounts, and the lot of land in said town next to the railroad, be sold separately. It is further ordered, adjudged, and decreed that the plaintiffs pay the costs of this suit. It is further ordered, adjudged, and decreed that a family meeting composed of the nearest relatives of the minors co-owners of this property and parties to this suit be convened before Leonce B. Delahoussaye, notary public in and for the parish of Iberia, for the purpose of fixing the terms of said sale in so far as said minors are concerned, and to safeguard their interests." From this judgment the defendant appealed. Plaintiffs filed a motion in the supreme court to dismiss the appeal on the grounds: (1) "That the judgment being in favor of appellant in toto, and ordering just what he asked and wished, so far as the testimony and judgment shows, he has no right to an appeal." (2) "The testimony, evidence, and judgment of the lower court, and verdict of the jury, having granted him what he asked, wished, and requested, he, in case of partition under such circumstances, is not entitled to an appeal, and an appeal from a judgment in his favor will be dismissed." (3) "Where there is a judgment in favor of the appellant granting him the mode and manner of doing

what he asks, the appeal taken by him will be dismissed."

The record fails to bear the appellees out in their statements in the motion to dismiss. Defendants have constantly resisted plaintiffs' demand, and sought to have it dismissed. At no time have they abandoned their opposition. The fact that the judge in rendering judgment declared that the decree was rendered by reason of the law and the evidence, and the verdict of the jury being in favor of defendants and against the plaintiffs, amounts to nothing, in view of the decree itself, which was adverse to the defendants on issues raised and presented by them. In the case of *Police Jury v. Succession of McDonogh*, 8 La. Ann. 362, this court said: "A party may appeal from a judgment rendered in his favor, and at his own instance, to correct any errors in it." As a matter of course, a mere declaration by either judge or jury, or by both, that a judgment is one in favor of a defendant, when in reality it is one against him, can have no effect as against the facts disclosed by the record. There is no merit in the motion to dismiss. The appeal is sustained. *Second Municipality v. Duncan*, 2 La. Ann. 182; *Police Jury v. Succession of McDonogh*, 8 La. Ann. 362.

The defendants and appellants contend most earnestly that the district court should have sustained the first exception filed by them, which was to the effect "that J. W. Stokoe was not authorized to represent his minor child, for the reason that the abstract of inventory showing the amount and value of the property of the minor had never been recorded, and that, if any appointment of said Stokoe, as tutor of said minor, had been made, (which was expressly denied,) said appointment was absolutely null, void, and without effect of any kind; and that, no "letters of tutorship having issued from the district court, he should be held to be without appointment or authority of any kind to represent the minor." The record shows that on the 29th of April, 1892, J. W. Stokoe filed in the district court for Iberia a petition, in which he alleged that his wife, Mattie J. Stokoe, had died in that parish; that her succession had been opened, and an estimative inventory of her estate had been made and duly filed and recorded in Iberia parish; that his said wife had died leaving one minor, the issue of her marriage with him, and that said child had inherited the ——— part of her estate, and was the owner thereof; that said minor was named Neil Stokoe; that he (petitioner) was the tutor by nature, and desired to qualify as such, as no tutor had been appointed to represent the minor, and he therefore prayed to be allowed to qualify as natural tutor. We find on the same day an order of the district clerk that "considering the petition, it is ordered that J. W. Stokoe be allowed to

qualify as natural tutor to his minor child, Nell Stokoe, issue of his marriage with Mattie J. Stokoe, and that an extract of the inventory of the property of said minor, as shown by the estimative inventory made on the — day of —, 18—, of the estate of J. W. Stokoe, [Mattie J. Stokoe?] be duly recorded upon the mortgage books of Iberia parish." We find that on the 30th April, 1892, J. W. Stokoe took the oath of office as natural tutor to the minor child, but we find no further order relative to his appointment or confirmation, and no evidence was adduced to show that letters of tutorship had ever been issued to him, although that fact was expressly put at issue. The record further shows that on the 25th of April, 1891, an inventory with appraisal was made of the property of the succession of Mattie J. Stokoe, and filed in the office of the district clerk on the same day, but that, up to the date of the rendition of the judgment in this case in the district court, neither this inventory nor any abstract thereof had been recorded in the mortgage books of the office of the recorder of the parish of Iberia. Defendants call our attention to articles 321 and 335 of the Civil Code, the first of which declares that "in the several cases in which the tutor is not required to give bond it shall be the duty of the clerk of the district court of the parish in which the appointment is to be made, to furnish a certificate of the amount of the minor's property according to the inventory on file in his office. This certificate must be recorded in the mortgage book of the parish in which the tutor resides, and a certificate to that effect signed by the recorder of mortgages must be presented to the judge before he can make the appointment or authorize 'letters of tutorship' to be issued;" and the second that "the letters of tutorship shall not be delivered to the tutor until he shall have complied with the law as herein required. Until they shall have been delivered to him he shall not interfere with the administration of the property of the minor except for the purpose of preserving it in cases which admit of no delay. The tutor is not recognized, confirmed, or appointed, nor is he permitted to act as tutor until the judge renders and signs a decree authorizing letters of tutorship to be issued." The provisions of these two cited articles are combined in article 3351 of the Civil Code. Defendants insist that these articles are mandatory as conditions precedent to an appointment or to action as a tutor, and that, as resulting from that fact, they operate a prohibition against such action, which, if taken, is null, void, and of no effect. They cite several decisions in support of their contention, particularly the Succession of Arland, 42 La. Ann. 548, 8 South. Rep. 389. Plaintiffs, on the other hand, rely upon that of Stackhouse v. Zuntz, 36 La. Ann. 530, and the conclusion reached

in that case by the court construing the articles just copied in connection with article 304 of the Code, which provides, among other causes for the "removal" of a natural tutor, that of his neglect to have had this inventory made and recorded at the time, and within the period, prescribed by law, which time, as the court then construed it, was that required by the two articles first quoted. After mature deliberation upon the questions submitted to us for adjudication in this case, we have reached the conclusion that, under the circumstances and conditions in which they were raised, the district judge, on the exception filed by the defendants as to the right of J. W. Stokoe to represent the minor Nell Stokoe as his tutor, or to stand in judgment for him therein, should have sustained the same to the extent of dismissing the said J. W. Stokoe (as representing Nell Stokoe as tutor) as a coplaintiff from these proceedings.

Defendants, as joint owners of the property sought to be partitioned, have direct substantive rights of their own, entitling them to insist, by reason of the same, upon having the proceedings so conducted as to cast no cloud upon them which would affect the price to be obtained, or throw a doubt upon the title to be conveyed under them. Their continuing obligations, as covendores of the property to be sold, authorize them reasonably to demand, at the hands of the court, that proceedings of doubtful validity which have not yet reached their consummation, but are in process of formation, should not be permitted to pass on to finality, but should be forced to be placed securely beyond the danger point.

Without expressing any opinion as to whether defendants' contention that an appointment by a court, of a person as tutor, prior to the recording required by law of the abstract of the inventory of the minor's property, is an absolute nullity, be well founded or not, or what would be the effect, under differing circumstances, of acts done by a person acting as tutor under such a state of facts, it is sufficient for us to say that defendants have brought to our notice a condition of things such as to certainly entitle them to protection. Doubtful questions should be resolved in their favor. Plaintiffs in partition have no right to jeopardize the interests of their co-owners by taking out uncertain proceedings. The failure of the father to have had the abstract of inventory recorded, and, after such recording, to have had "letters of tutorship" issued to him, while such important interests of his child and others were at stake, was inexcusable, and is too likely to be attended by dangerous results not to be checked.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and de-



creed that this cause be remanded to the court below, and be therein reinstated, without prejudice to the rights of any one, either plaintiffs or defendants, and with leave granted to all parties to so reform their pleadings and proceedings as to conform to the law and the views herein expressed; the costs of appeal to be taxed against the appellees, and those of the lower court to await final action therein.

BREAUX, J., takes no part.

(45 La. Ann. 1059)

HEWES et al. v. BAXTER. (No. 1,434.)  
(Supreme Court of Louisiana. July Term, 1893.)

APPOINTMENT OF TUTOR—VALIDITY—FAILURE TO FILE INVENTORY—PARTITION—RIGHTS OF PARTIES—APPEAL—WHO MAY TAKE.

Same as that on suit of same title, No. 1,435, (13 South. Rep. 817.)  
(Syllabus by the Court.)

Appeal from district court, parish of St. Martin; Felix Voorhies, Judge.

Action by Harry B. Hewes and others against John P. Baxter, tutor and executor, for partition. There was judgment ordering partition, and defendant appealed. Plaintiffs moved to dismiss the appeal. Motion denied, and judgment reversed.

Foster & Broussard and L. T. Dulaney, for appellant. P. H. Mentz and W. J. Burke, for appellees.

#### On Motion to Dismiss Appeal.

WATKINS, J. The grounds assigned for the dismissal of the appeal are that there is no legal bond of appeal furnished, in compliance with the order of the judge granting the appeal; further, because the order of court granting the said appeal fixed the amount of the appeal bond at \$4,000; that subsequently a rule was taken on behalf of the defendant and appellant, commanding plaintiffs and appellees to show cause at the judge's chambers why said bond should not be reduced in amount, but same was dismissed, and thereafter the judge made an ex parte order reducing the amount of said bond to \$500, and without notice to the plaintiffs and appellees, and that such order was illegal and void. The additional ground is taken that no appeal lies in a partition suit unless the ownership of some of the joint heirs or co-owners is matter of dispute; and the averment is made that although the defendant, in his answer, denied that some of the plaintiffs are owners in common, yet in his testimony he admitted the joint ownership of all. The order of appeal is in the alternative, granting the defendant a devolutive appeal, fixing the bond for same at \$250, and a suspension appeal, fixing the bond therefor at \$5,000. After the granting of the order, the defendant applied to the district judge in chambers, and

procured an order reducing the amount of the suspension appeal bond to \$500, not, however, disturbing the amount of the devolutive bond. In pursuance of said order, the defendant executed a bond for \$500, and instead of furnishing security, under an order of court, he substituted that sum of money, and deposited same with the clerk of court. Consequently, if it be conceded that the order reducing the amounts of the suspension appeal bond from \$5,000 to \$500 was irregular, yet the bond for \$500 is quite sufficient to respond as a devolutive appeal bond. *Glover v. Taylor*, 38 La. Ann. 634. On the other branch of the case, it is only necessary for us to observe that it is elementary; that we cannot go into an investigation of a question as to the evidence that was adduced on the trial, in order to determine the dismissibility of an appeal. Motion to dismiss denied.

#### On the Merits.

This is a suit for the partition of a large quantity of land situated in the parish of St. Martin, which was formerly the property of a firm or copartnership styled Milmo, Stokoe & Co., now dissolved by the death of two of its members,—Mrs. M. J. Stokoe and Bernard Milmo. It is instituted by Harry B. Hewes, the only surviving member of that partnership, joined by John W. Stokoe, surviving husband and partner in community of said Mrs. Mattie J. Stokoe, who appears in his own right, and as the natural tutor of N. W. Stokoe, issue of their marriage; and also by M. Rose Leith, an emancipated minor, issue of same marriage,—the latter being a forced heir and unusual legatee of Mrs. Stokoe, deceased. The action is directed against John B. Baxter, as dative tutor of the minor children and forced heirs of Bernard B. Milmo, deceased partner of said copartnership, as co-owner of said plaintiff of said common or partnership property. The proportional shares of each of said partners or co-owners is as follows, viz.: Bernard B. Milmo, tutor, ten-eighths; Mattie J. Stokoe, represented by her husband and by her two children, five-eighths; Harry Hewes, three-eighths. The allegation is made by the plaintiffs, and not seriously controverted by the defendant, that the lands in question cannot be conveniently divided in kind, and that the partition should be made by lictation. In limine the defendant tendered the following peremptory exception founded on law, namely: That John W. Stokoe, who is alleged to be natural tutor of the minor Neal W. Stokoe, is not, and never has been, the tutor of said minor; that an abstract of the inventory of said minor's property, showing the amount and value thereof, has never been inscribed in the book of mortgages as the law requires; that, if any appointment of said Stokoe as tutor of said minor has been made, same is absolutely

null and void and without effect of any kind; that no letters of tutorship have issued to him as tutor; and that he is without appointment as such, or authority of any kind to represent the minor as such, and more particularly without authority to represent said minor on this suit, or to stand in judgment therein; hence the said minor is without a representative in this suit, and consequently this suit should be dismissed.

The issues raised herein are precisely similar to those presented, and this day decided, in suit of same title, and hearing docket number 1,435, (13 South. Rep. 817,) appealed from the parish of Iberia, and wherein the aforesaid exception was made and sustained for reasons assigned therein, and which are reiterated and adopted as our reasons for judgment herein. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that this case be remanded to the court below, and therein reinstated, without prejudice to the rights of any one of the parties, either plaintiff or defendant, and with leave granted to all parties to so reform and perfect their pleadings and proceedings as to conform to the law and the views herein expressed, and in the case No. 1,435, herein specified; the costs of appeal to be taxed against the appellees, and those of the lower court to await final action thereon.

BREAUX, J., takes no part.

(98 Ala. 293.)

CHIPMAN et al. v. GLENNON et al.  
(Supreme Court of Alabama. June 8, 1893.)  
FRAUDULENT CONVEYANCE—STOCK IN TRADE—  
EVIDENCE—CONSIDERATION—BURDEN OF PROOF—  
NOTICE OF INSOLVENCY.

1. A recital in a bill of sale of the value of the goods sold is not evidence against a creditor of the seller, who attacks the validity of the sale.

2. Where one buys a merchant's entire stock of goods under circumstances which are sufficient to put the buyer on inquiry, and which, if followed up, would inform him that the merchant was insolvent, the buyer must show both a valuable and an adequate consideration for the sale.

3. Where a creditor of a merchant is unable to collect his debt in money, and in satisfaction of his debt, and the assumption of those of certain other creditors, he takes the merchant's entire stock, with the exception of the property which the merchant may hold under the exemption laws, the facts are sufficient to put the purchasing creditor on inquiry as to the existence of other debts, which he has not assumed.

Appeal from circuit court, Mobile county; William E. Clarke, Judge.

Action by Chipman, Calley & Co. against J. K. Glennon and others, as sureties on the official bond of Dick Roper, sheriff of Mobile, to recover damages for an alleged wrongful levy of an attachment. The attachment was sued out against A. Curtis, and was levied on property which had been

conveyed by Curtis to plaintiffs. Judgment for defendants, and plaintiffs appeal. Affirmed.

M. D. Wickersham and R. P. Deshon, for appellants. Gregory L. & H. T. Smith and W. E. Richardson, for appellees.

COLEMAN, J. The action was for damages for the wrongful levy by the sheriff of an attachment upon the goods of appellants, (plaintiffs.) There is no material conflict in the evidence; at least, none that can exert any influence upon the question to be considered. The proof shows that on the 30th of November, 1887, Adam Curtis, who for many years had been engaged in the mercantile business in Mobile, of selling boots and shoes, by bill of sale, sold and conveyed his entire stock of goods, accounts, fixtures, and lease to Chipman, Calley & Co. The consideration for the sale was the payment of a past-due indebtedness to plaintiffs for \$2,405.83, and the assumption by the purchaser of other past-due indebtedness to other creditors of Curtis, amounting to \$3,289.20, making a total past-due indebtedness of \$5,695.03 as the consideration. The debt due plaintiffs, and those assumed by them, were shown to be genuine bona fide debts. The bill of sale of the goods, etc., was introduced in evidence, which contains a complete inventory of everything sold, and the valuation of the goods at invoice prices. At invoice prices, the goods foot up \$8,769.63. The bill of sale places the total value at \$5,995.43. There was no proof offered of the actual value of the goods sold, except the mere recitation in the bill of sale, as stated above. It was admitted that the claim upon which the attachment was sued out, and levied by the sheriff, was a just debt against Adam Curtis, and existed prior to, and at the time of, the execution of the bill of sale to plaintiffs. There is no other proof in the record that Adam Curtis was in failing circumstances at the time of the sale, or that plaintiffs had any knowledge of his condition, except that to be inferred from the facts, as stated in this opinion. The court gave the general charge for the defendants. The giving of this charge is assigned as error, and is the question presented for review.

The recital in the bill of sale that the goods were valued at \$5,995.43 was not evidence of their value, against the defendants. The rule is thus declared: "When, between the grantee and an existing creditor, a controversy arises as to the validity of the conveyance, the recital of a consideration is the mere declaration or admission of the grantor, and is not evidence against the creditor." *Hubbard v. Allen*, 59 Ala. 296. The same rule applies as to any mere recital of the value of goods or property sold. As against the defendants in this case, there is no competent evidence to

show that an adequate consideration—a fair equivalent—was paid for the goods. The real value of the goods may have been largely in excess of the price paid, or less. There is proof that plaintiffs paid a valuable consideration, consisting of the debt due plaintiffs, and the debts due other creditors, assumed and paid by them. There are many decisions which declare, as a general proposition of law, in a contest between a creditor of the grantor and his grantee, attacking the validity of the grant, if it be shown that the debt of the attacking creditor existed prior to the grant, the burden is upon the grantee to show that he paid both a valuable and adequate consideration. *Page v. Francis*, (Ala.) 11 South. Rep. 737; *Moore v. Penn*, (Ala.) 10 South. Rep. 343; *Skipper v. Reeves*, 93 Ala. 334, 8 South. Rep. 804; *Robinson v. Moseley*, 93 Ala. 70, 9 South. Rep. 372; *Caldwell v. Polak*, 91 Ala. 358, 8 South. Rep. 548; *Bank v. McDonnell*, 89 Ala. 445, 8 South. Rep. 137. The proposition is undoubtedly the law in this state, and applies in all cases where a sale is made in payment of a pre-existing indebtedness by a creditor in failing circumstances, which are known to the grantee, or under circumstances, known to the grantee, calculated to put him on inquiry, which, if followed up, would lead to a knowledge that the grantor was insolvent, or owed other debts, the collection of which would be hindered or delayed by the grant. We hold, however, that a creditor who takes goods from his debtor in payment of a pre-existing debt, unless the price paid is so grossly disproportionate to their value as to raise a presumption of fraud, without notice that there are other existing creditors, or notice of facts sufficient to put him on inquiry, and which, if followed up, would lead to a knowledge of his debtor's condition, and that the effect of his purchase upon other creditors would be to hinder and delay them in the collection of their debts, cannot be charged with actual or constructive fraud. The mere proof, without more, that the debt antedated the grant, does not devolve upon the grantee the burden to prove both a valuable and adequate consideration. If the grant is made upon a mere voluntary consideration, it is void, as against existing creditors. If made upon a valuable consideration, the attacking creditor must go further, and show notice to the grantee of the existence of other debts, or circumstances sufficient to elicit inquiry, and which, if followed up, would lead to a knowledge of their existence. When this is shown, then the burden is on the grantee to show an adequate consideration,—one reasonably equivalent to the value of the goods taken in payment of the debt, as distinguished from a mere valuable consideration,—sufficient to support the sale. This is the rule declared in *Smith v. Collins*, 94 Ala. 403, 10 South. Rep. 334, and is fairly deducible from

*Smith v. Kaufman*, 94 Ala. 364, 10 South. Rep. 229. Unless this was the law, an insolvent bona fide purchaser of property, for which he paid a valuable consideration, would be chargeable with fraud, and lose the benefit of an honest transaction, merely upon proof that at the time of his purchase of the property there were outstanding debts against his vendor, although the purchaser had no notice of their existence, or that his vendor was insolvent, or intended by the sale to defraud his creditors, or notice of facts sufficient to put him on inquiry.

The question, then, is whether the statements of facts, as disclosed in the record, are of such a character as to charge the plaintiffs, as a conclusion of law, with notice that there were other debts outstanding against their grantor, Curtis, or notice of such facts as to put them on reasonable inquiry. What are the facts?

It appears that L. J. Calley, a member of the firm, who did business in Boston, went to Mobile to collect the debt due his firm, amounting to \$2,405.83. Not being able to collect in money, he was willing to, and did, take in payment therefor merchandise. To effect the agreement, it became necessary to assume and pay other large debts of Adam Curtis, past due, to other creditors, amounting in the aggregate to \$3,289.20,—a much larger amount than his own debt. The debtor selected from the stock, and set apart for himself, the amount allowed to him by law as exempt from legal process, and, with the exception of the property exempt, the entire store, with its fixtures, books, accounts, and stock, were sold to plaintiffs. Considering the business that Adam Curtis was engaged in, the fact that plaintiffs could not collect in money for the debt due them, though past due, their knowledge that he owed other unpaid debts, which were set out in the bill of sale, and their assumption of these large debts in order to secure the payment of their own, and the fact that Curtis reserved from the same the amount exempt to him by law, all of which are admitted to be true, and without explanation, we hold the plaintiffs were put upon inquiry. A merchant able to pay his debts would hardly go out of business in this manner. A merchant creditor, who feels reasonably secure in the collection of his debt in money, would not, under ordinary circumstances, receive payment in goods, and, to obtain payment in this way, assume and pay other debts, much larger than his own. We think these circumstances, as a matter of law, were sufficient to put plaintiffs upon inquiry as to whether there were other unpaid creditors of their debtor, and if they failed to make inquiry they are chargeable with a knowledge of such facts as a proper inquiry would have disclosed; and, if there were other existing creditors at the time of their purchase, plaintiffs must be held to have purchased with a knowledge of such outstand-

ing demands. Being chargeable in law, under the facts, that there were other creditors, not provided for, at the time of their purchase from Curtis, and it being admitted that the demand of the attaching creditor, under which the sheriff levied, was just, and antedated the sale, the burden was on the plaintiffs to prove that the goods were received at a fair valuation, and were an equivalent for the price paid. Plaintiffs offered no evidence on this point, and the recitals in the bill of sale are not competent against the creditors of the grantor. It follows that the court did not err in giving the affirmative charge for the defendants. Affirmed.

(69 Miss. 352)

ILLINOIS CENT. R. CO. v. KING.

(Supreme Court of Mississipp. April, 1892.)

RAILROAD COMPANIES — FALSE ARREST BY DEPOT AGENT — CONSTITUTIONALITY OF ACT — ESTOPPEL — APPEAL.

1. A railroad company is liable for a false arrest and imprisonment by its depot agent of a man who used a water closet at its depot set apart for ladies only, irrespective of Act Feb. 22, 1890, (Laws 1890, p. 106,) which provides that station agents shall preserve order in the waiting rooms, and may arrest and deliver to some officer all persons guilty of disorderly conduct, and hence the constitutionality of such act is not involved in an action against it by the person arrested.

2. Where defendant recognized a statute as valid and obligatory, and acted under it, in the matter out of which the action arose, he cannot assail its constitutionality on finding that it imposes a liability on him for an improper exercise of authority thereunder.

3. The fact that such station agent was at the time acting for another railroad company as well as defendant does not affect the liability of the latter, but merely shows that such other company is also liable.

4. The facts that a party consents that a verdict in his favor may be set aside, and that the opposing party refuses to consent to it, do not affect the rights of the latter as a litigant, and it may appeal on special exceptions.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by F. B. King against the Illinois Central Railroad Company for false arrest and imprisonment by its depot agent. There was a verdict for plaintiff, and defendant appeals on special bills of exception. Affirmed.

While waiting in defendant's depot at Jackson, Miss., for a train, plaintiff used a water closet set apart for ladies only, and was thereupon seized by the depot agent, dragged across the room, and delivered to a policeman, who, at the agent's request, took him to jail, where he remained until the afternoon of the next day, when he was released, without any charge being made against him. On the first trial, defendant claimed that under Act Feb. 22, 1890, (Laws 1890, p. 106,) which provides that station agents shall be conservators of the peace, with authority to preserve order in the waiting rooms, and may arrest and deliver to some officer all persons guilty of disorderly conduct, etc.,

the station agent, in making the arrest, was acting as the agent of the state. The court, on such trial, taking the view claimed by defendant, gave a peremptory instruction in its favor. This judgment, on appeal by plaintiff, was reversed. *King v. Railroad Co.*, 10 South. Rep. 42. On the second trial, defendant offered evidence that at the time of the arrest the depot agent was acting for the Alabama & Vicksburg Railway Company, but the evidence was excluded. It also asked instructions in accordance with the theory of its exemption if the agent was acting for such other company, which were refused. Defendant further offered in evidence the charters of the New Orleans, Jackson & Great Northern Railroad company, and certain other companies, and the leases by which defendant acquired the franchises of these several companies, and under which it operates its road, for the purpose of showing that the act of 1890, as construed by the supreme court on the former appeal, is unconstitutional, in that it impairs the obligations of contracts, as contained in the instruments offered, inasmuch as under such charters defendant has the right to select its own agents, and prescribe their duties. To the exclusion of such evidence, defendant excepted.

Mayes & Harris, for appellant. Calhoun & Green, for appellee.

CAMPBELL, C. J. The proposal of the plaintiff to consent to set aside the verdict he had obtained, and the refusal by the defendant to accept this proposition, did not in any manner affect the right of the defendant as a litigant.

The fact that the station agent was acting for another railroad company as well as the defendant did not prevent a recovery by the plaintiff of the defendant. It merely showed that two might have been sued instead of one.

The unconstitutionality of the act of 1890, as being an invasion of the chartered rights of the defendant, is not involved in the decision of this case, since Montgomery, the station agent or depot master, was engaged about his master's business in arresting the plaintiff. He thought he was doing his duty as required by law, and was endeavoring to carry out the act of 1890. If the act of 1890 had not been passed, the company he served would have been liable for an unlawful arrest and imprisonment made by him in the discharge of his duty as depot master, even though he may never have been instructed by the company to arrest and imprison any person. The truth is that the act of 1890 was recognized by the railroad company as valid and obligatory. Notice was given as it requires, and the officials of the company and Mr. Montgomery, depot master at Jackson, considered themselves bound by it, and undertook to claim the

rights and perform the duties it declares; and, now that it has been found to impose liability on the company for an improper exercise of authority under it, the company will not be allowed to successfully assail the constitutionality of the act it has recognized and acted under in the very matter out of which this action arose. The way to raise the question of the validity of the act of 1890 is open, and is well known to the learned counsel of the railroad company, and, when presented in a shape to call for a decision, one will be made. We have been much interested by the spirited criticism of counsel for the appellant of the act of 1890, and our decision to respond to it arises solely from the view that the case does not call for or admit of it. Affirmed.

(69 Miss. 145)

MOBILE & O. R. CO. v. WATLY.

(Supreme Court of Mississippi. Oct., 1891.)

ACCIDENTS TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—DAMAGES.

1. Where a child is killed on a railroad track through the negligence of its father, the jury should be instructed to find for defendant unless its servants, after seeing its perilous condition, failed to exert themselves as they should have done to avert the injury, and a charge that defendant is liable unless its servants did everything in their power to prevent the accident prescribes too stringent a rule.

2. A father is entitled to recover for a child killed by the negligence of defendant, to the value of his pecuniary interest in the child, but not for the loss of his society, nor the comfort he might have taken in bringing him up.

Appeal from circuit court, Noxubee county; S. H. Terral, Judge.

Suit by Jack Watly against the Mobile & Ohio Railroad Company for damages for the negligent, wanton, and reckless killing of his infant son, four years old. Judgment for plaintiff. Defendant appeals. Reversed.

The evidence shows that on or about October 4, 1889, the boy, with his sister, 8 or 9 years old, between 11 and 12 o'clock, was on a trestle on defendant's railroad about a mile south of Shuqualak station; that they were instructed by their father to go to the field with the dinner for the hands that day; that said plaintiff knew that they would pass over the line of defendant's railroad, and the trestle upon which the accident occurred, about the time defendant's local freight train was due, going north; that the children had long been in the habit of passing over this road, with the permission and consent of their father; and that the defendant was familiar with the construction of the road where the accident occurred. The trestle was on a sharp curve, and there was a cut about a quarter of a mile south of the trestle and the trestle could not be seen by any one approaching from the south until he emerged from the cut, and there was a considerable down grade from the cut to the trestle. The local freight train going north, running at the

rate of 30 miles an hour, with a long train, —460 yards long,—emerged from the cut while the children were on the trestle, and the boy was run over and killed. The engineer testified that he saw the children 200 or 300 yards from the train; that as soon as he realized their dangerous condition he sounded the cattle alarm, and before he turned loose the whistle the child was struck and killed. There was some evidence for the plaintiff to the effect that the children had nearly crossed the trestle before they were overtaken, and that, with reasonable effort to stop the train, it would have given time for both the children to escape, as the girl did get off, and was unhurt. On the first trial there was a peremptory instruction for the defendant, from which an appeal was taken to this court, and was reversed at the April, 1891, term of the court. 9 South. Rep. 445. The case was again tried, and resulted in a verdict and judgment for the plaintiff for \$2,000. Motion by defendant for a new trial was overruled. The instructions condemned in the opinion of the court are as follows: "(1) When it is said that a railroad company is entitled to a clear track, it is not meant that they may run their trains recklessly and blindly, regardless of any and all consequences to others. The law requires that they should keep a reasonable and frequent lookout to see that no one is unnecessarily injured thereby, and, should they see any one upon their tracks, then they must use every effort in their power to prevent harm to such persons, and this duty is most imperative in the case of children of tender age, and in places of danger; and if the jury believe, from the evidence in this case, that the engineer, or any of the employees of the defendant in charge of the train that ran against plaintiff's son, saw the child upon the trestle, or might have seen him there by the exercise of a reasonable watch, and failed to do everything in their power to prevent injury to him, the jury should find for the plaintiff." "(3) The court instructs the jury that if they should find for the plaintiff they should state in their verdict what amount of damages the plaintiff has sustained; and in their determining that question they shall take into consideration all of the circumstances of the case,—the age of the child, the kind of child that it was, the assistance that it might be to its father in future years; also, the loss of its society, and the comfort the father might take in rearing him and bringing him up to manhood, and the reliance he might place upon him in future years for his support and maintenance, having in view compensation to the parent for the loss he has sustained."

A. J. Russell, for appellant. A. C. Bogle, for appellee.

CAMPBELL, C. J. The evidence presents such a clear case of contributory negligence

on the part of the plaintiff as to preclude recovery by him for any mere negligence of the defendant, and consideration of that should have been entirely excluded by the court, which should have instructed the jury to find for the defendant unless it appeared that its servants in charge of the train, after seeing the children in a perilous situation, failed to exert themselves as they should have done under the circumstances to avert injury to them. That is the only debatable question in the case, and it was to try that by a jury that the case was remanded on the former appeal. The first instruction for the plaintiff is erroneous, in embracing the question of negligence by the servants of the defendant, and blending it with the real and only question to be tried, as stated above, and in prescribing too stringent a rule, by saying that failure of the servants of the defendant to "do everything in their power to prevent injury" to the child made the defendant liable. Undoubtedly, when the danger to the child was discovered, all reasonable effort should have been made to avert it. It is for the jury to say whether all was done that might and should have been done under the circumstances then existing, as presenting themselves to the men in charge of the train. It is not a question of law, but of fact. The law has no rule on the subject, except that all should be done under such circumstances which the case requires, and it is committed to the jury to determine as to that, from a consideration of all the circumstances in evidence.

The third instruction is wrong, in so far as it authorizes the jury to consider the loss by the father of the "society" of his child, and "the comfort the father might take in rearing him and bringing him up to manhood," as elements of damages he may recover. Compensation for the injury is to be measured by the value of the pecuniary interest of the father in his child. He is to be compensated for the pecuniary loss sustained, and not otherwise. It is a question of dollars enough to pay for the loss the father has sustained by the death of his child, on the theory of his right to his services during his minority. Reversed and remanded for a new trial.

(60 Miss. 848)

**SHORT v. NEW ORLEANS & N. E. R. CO.**  
(Supreme Court of Mississippi. April, 1892.)

**INJURIES TO RAILROAD EMPLOYEE—NEGLIGENCE OF VICE PRINCIPAL OR FELLOW SERVANTS—PRESUMPTION.**

Const. 1890, § 193, provides that employees of any railroad corporation shall have the same rights and remedies as are allowed to persons not employees, for injuries caused by the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, or of a fellow servant engaged in another department of labor, etc. *Held*, that negligence will not be inferred from the fact of injury to an employee,

but it must be shown, since the rule applicable in case of injury to passengers does not apply to an employee.

Appeal from circuit court, Clarke county; S. H. Terral, Judge.

Action by J. L. Short against the New Orleans & Northeastern Railroad Company, to recover for the death of plaintiff's minor son, caused by defendant's negligence while deceased was in its employ as a brakeman. From a judgment entered on the verdict of a jury directed by the court in favor of defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

The conductor of the train on which deceased was employed testified that just before the accident he ordered deceased to go forward from the caboose to his place on the train, in front of some flat cars loaded with lumber, to hold the train while going down a grade some distance ahead; that deceased left the caboose, and that was the last witness saw of him alive; that he felt the caboose run over something, which proved to be deceased's body; that he did not know how he was killed; that he had about 20 cars, 6 or 8 of which were loaded with lumber; that the accident occurred in a dip near a tressel, between two high grades, near a curve; and that at this low place there is always a slacking up of the train, causing a severe jerk. The engineer testified that on this occasion he did not hold the train going down the grade to the place where the accident occurred, as he usually did. On the cars loaded with lumber there were cross-ties nailed to the side stakes, consisting of plank set up edgewise.

J. A. Orr, for appellant. Fewell & Branhan, for appellee.

CAMPBELL, C. J. Under the law as settled before the constitution of 1890, the plaintiff had no case. He failed to make out a case under section 193<sup>1</sup> of that constitution, because he did not produce any evidence that the injury complained of resulted from the negligence of a superior agent or officer, or person having the right to control or direct the services of the party injured, or a fellow servant engaged in another department of labor, etc. Indeed, there is an utter want of evidence of any negligence by anybody. The deceased was killed, and no one knows how. That is not enough to sub-

<sup>1</sup> Const. 1890, § 193, provides as follows: "Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed by law to other persons not employees, whereby the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. \* \* \*

ject the railroad company to liability. Negligence must be shown. The rule applicable in case of injury to passengers does not apply to an employee. The statute existing prior to the constitution, whereby it was devolved on railroad companies to exculpate, in case of injury from running of the locomotive or cars, (section 1059, Code 1880,) does not embrace employees, who were not within its contemplation. *Railroad Co. v. Hughes*, 49 Miss. 258; *Dowell v. Railroad Co.*, 61 Miss. 519. Whether the father, as such, may maintain an action for the death of his son, in cases where a right of recovery is declared by section 193 of the constitution, has not been argued in this case, and we pre-empt any intimation as to this, which is mentioned for the purpose of excluding the conclusion that this question was either overlooked or impliedly decided. Its consideration and decision was unnecessary, in view of the conclusion that the plaintiff did not make out his case, if entitled to sue. Affirmed.

(60 Miss. 739)

WARD et al. v. COOPER et al.

(Supreme Court of Mississippi. April, 1892.)

WILLS—DESCRIPTION OF DEVISEES.

A devise "to all the children of my sister B. equally and jointly, and to their heirs and assigns, forever, including any and all her said children who may be living at" her death, is a devise to the children of B., who survived her, as a class, and does not include her grandchildren.

Appeal from chancery court, Tunica county; W. R. Trigg, Chancellor.

Action by Bettie Ward and others against L. P. Cooper and Charles N. Guinn for the construction of the will of Jonathan Bostick, deceased, and to establish an interest in certain real estate devised by such will. From a judgment sustaining a demurrer to, and dismissing, the bill, plaintiffs appeal. Affirmed.

Jonathan Bostick died November 10, 1868, leaving a will, item third of which is as follows: "Item 3. I give and devise to my sisters, Barthenia Guinn, wife of A. B. Guinn, Elizabeth Guinn, wife of W. H. Guinn, and Nancy Bostick, jointly and equally, for and during the term of their natural lives, my tract of land known as the 'Beaver Dam Place,' situated in Tunica county, state of Miss.; \* \* \* and, at the death of my three sisters, I direct that my executor hereinafter named for the state of Mississippi shall make sale of Beaver Dam place, at public auction, to the highest bidder, upon such time, or for cash, as to him, under all the circumstances, may seem best. If upon time, he will see that the purchase money is secured by proper lien retained in the premises, as well as sufficient personal security. And the proceeds of said sale I give and devise to all the children of my sister Barthenia Guinn, equally and jointly, and

to their heirs and assigns, forever, including any and all her said children who may be living at the death of my said sister Barthenia." Barthenia Guinn, the testator's sister, died March 17, 1873. She had five children in all. Of these, three died during the lifetime of their mother, and two, (Charles and Archibald,) only, survived her. The will was made in November, 1867, and the testator died in November, 1868. Two of the children of Barthenia died before the will was made, leaving children. The other died after the death of the testator, but before the death of Barthenia Guinn, leaving children. The last survivor of these sisters, life tenants, died October 4, 1888, which terminated the life estate. The Mississippi executor having died before, in the lifetime of Nancy Bostick, the last survivor of the life tenants, the Beaver Dam place was not sold. Archibald Guinn sold his interest in the land to the defendant L. P. Cooper, and he and Charles N. Guinn are now in possession of the land, and have been since the death of Nancy Bostick, claiming to be entitled to the benefit of the devise. This is a bill filed by the grandchildren and great-grandchildren of Barthenia Guinn, whose parents died before Barthenia Guinn, against one of the two children who were living at the time of her death, and the grantee of such other child. Complainants claim to share in the proceeds of the property as their mothers and grandmothers would, had they survived her and her father. Defendants claim that only Charles and Archibald Guinn, who were living at Barthenia Guinn's death, are entitled to take under the will.

John T. Lowe, W. S. Chapman, and L. C. Standifer, for appellants. Henry Craft, Calvin Perkins, and W. P. Harris, for appellees.

CAMPBELL, C. J. Only the immediate offspring of Barthenia Guinn were entitled to take under the will, since the gift is to "children," and a broader than the primary signification of the word is not given to it by the will. Her children living at her death were the class designated by the will as those who were to take, "equally and jointly," at the termination of the life estate. Affirmed.

(60 Miss. 642)

HATTER v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi. April, 1892.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

Where a brakeman is injured in coupling an engine, the coupler of which was not defective, but more dangerous than another kind, he cannot recover where he knew of its character, and had informed himself as to the best method of coupling with it.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Jean Andre Hatter, a minor, about 19 years old, and a servant, sued the Illinois Central

Railroad Company for damages for personal injuries inflicted by alleged defective coupling appliances. Judgment for defendant. Plaintiff appeals. Affirmed.

The declaration alleges that, in the performance of his duties as a brakeman, his arm was caught between the deadwood of the freight car and the chafing iron on the tender of the engine, and mashed and mutilated. It avers that said engine was not safe in coupling appliance for use upon freight cars having drawheads like this, and that said chafing iron on said tender made such coupling with the freight car which had said drawhead commonly used by said defendant on its freight cars very dangerous when used with ordinary care, in that said chafing iron projected over the drawhead of the freight car. The plea was the general issue, with notice that the injury was caused by the plaintiff's fault and negligence. The theory of the plaintiff was that the use of chafing irons on freight engines was extrahazardous; that this coupling was more dangerous than the ordinary freight-engine coupling; and that the defendant had been negligent as to the plaintiff in using it on its freight engine, as the plaintiff was inexperienced, was young, and had not been informed of the extra care required to couple engines of this character. Plaintiff testified that without negligence on his part, in making a coupling between the engine, on which was a chafing iron, and a box car, his arm was caught between the deadwood of the box car and the chafing iron. That this chafing iron was an unsafe and unsuitable appliance to be used on an engine to couple freight cars with the ordinary drawhead, in this: that it was a piece of iron five inches wide and one-half inch thick, which was attached to the back of the tender of a passenger locomotive to bump against the buffer, and take the slack out of the train. That upon a freight car it would pass a few inches over the drawhead, and extended back until it touched the deadwood on the box car. That it was dangerous, because of liability to catch the hand between the chafing iron and the deadwood. That the usual method of coupling a car is to leave the link in the moving tender, and set the pin in the hole of the drawhead of the stationary car, and guide the link with one hand into the mouth of the stationary drawhead, and, when the bump comes, the pin drops down, and the coupling is made. That with the chafing iron it was impossible to make the coupling that way, but the method was exactly the reverse. That, if it had been an ordinary drawhead, there would have been no danger. This defect was obvious. Plaintiff was a minor, and had been in the service but a short time; had never used this coupling appliance before that trip, when, as they were at McComb City, the engine was brought for that train, and plaintiff coupled it successfully there. It was not

a regular freight engine, but one that was used at times for freight trains and sometimes for passenger trains. It carried this train to Canton, and was again assigned to plaintiff's train on the return trip, and it was in coupling at Canton that plaintiff was hurt. There was no evidence of contributory negligence. The court gave a peremptory instruction to find for the defendant.

Calhoun & Green, for appellant. Mayes & Harris, for appellee.

COOPER, J. The complaint of the appellant was not that the coupler used by the defendant company was defective as one of its kind, but that it was of a kind more dangerous in its use than those of another sort. But it was proved by the defendant, and not controverted by the plaintiff, that the use of this coupler (one with a chafing iron attached) was not unusual when the plaintiff entered into its service; that there were several of its freight engines so equipped, which were intended to be used upon passenger trains as occasion might require. The plaintiff himself seems to have recognized the fact that in his employment as brakeman he would be required to couple cars to engines having these chafing irons, for he informed himself touching the methods by which couplings with such engines could best be made. We find no room for doubt that the use of this appliance was one of the dangers incident to his employment, and voluntarily assumed by him. To hold the employer liable for the injury sustained would, as it appears to us, be to declare that railroads are responsible for injuries to their servants in all cases in which the safest appliances in use are not secured by them. We do not understand that counsel for appellant would push the rule contended for by them to this extent, and we know of no authority by which it could be done. The peremptory instruction for the defendant was correct, upon the uncontroverted facts of this case. Judgment affirmed.

(88 Miss. 759)

#### BILLINGSLEY v. POLLOCK.

(Supreme Court of Mississippi. April, 1892.)

##### BANK COLLECTIONS—FAILURE—TRUST.

Where a bank collects a note by taking a check on itself, of one having a sufficient deposit, and sends a draft therefor, which is not paid, by reason of its suspension, the bank will not be held to be a trustee as to the amount collected, but such creditor will stand on the same footing as other creditors of the bank.

Appeal from chancery court, Washington county; W. R. Trigg, Chancellor.

Petition by Lizzie A. Billingsley against W. A. Pollock, receiver, to have a trust declared. From a decree dismissing the petition, petitioner appeals. Affirmed.

The Bank of Greenville collected a note sent to it by Lizzie A. Billingsley, appellant,



for collection, of \$1,000, and forwarded to her its draft to cover the collection on the day the bank suspended and was placed in the hands of a receiver. The draft was not paid, on account of the suspension of the bank. The appellant filed the petition in the chancery court having jurisdiction of the receiver, in which she seeks to have the amount declared a trust, and to fasten a lien for its payment upon the general assets of the bank, in the hands of appellee as receiver. The appellee pleaded that the money collected by the Bank of Greenville for appellant was mingled with the general funds of the bank, so as to be indistinguishable therefrom, and could not be traced into his hands, as receiver, as part of the assets of said bank; that only \$368 in cash came into his hands, and that there were due \$11,000 of such collections made by said bank, for which no remittance was made, or remittance by drafts of said bank which were not paid; and that the relations between the appellant and the bank were only those of debtor and creditor. The plea was set down for hearing upon its sufficiency. It was held sufficient by the court. Appellant declined to take issue on it, and there was a final decree against her, dismissing her petition.

Joshua Skinner and A. Lewenthal, Jr., for appellant. Yerger & Percy, for appellee.

CAMPBELL, C. J. In *Ryan v. Paine*, 68 Miss. 678, 6 South. Rep. 320, we held that parties who sent a claim to a bank "for collection," which the bank collected by taking the check of the debtor on itself, the debtor having no money in the bank, but merely becoming the bank's debtor by this overdraft, after the insolvency of the bank was declared, had the right to treat their debt or as still such, and enforce their claim to what he owed the bank for account of this transaction. In *Kinney v. Paine*, 68 Miss. 258, 8 South. Rep. 747, we held that parties who had sent their claim to an insolvent bank for collection, and which it collected by a check on itself by the debtor, who had no funds in bank, could follow and reclaim their own in the hands of the receiver. We are well pleased with these decisions, and reaffirm the obvious principle supporting them, but are unwilling to establish the proposition that a correspondent of a bank, whose claim it has collected, and failed to pay over, has an equitable lien on all the assets of the bank, securing precedence over all other creditors of the bank. Some of the courts so hold, but we will not follow their lead to this absurd result. It is enough to allow the correspondent who sends his claim to a bank "for collection" to pursue and reclaim his own, without depriving others of their rights. There is no such magic in the word "trust" as to convert all the assets of a bank into a fund to secure one who deals with it for convenience of collecting claims, in pref-

erence to others who trust it and deal with it. The maker of the note collected in this case was discharged, for she paid it. True, she did not have the money counted out to her on Evans' check, as we may assume would have been done, if required, but that was not necessary. Evans had money there, and his check was received as money, and his deposit was lessened by that much. The transaction was a legitimate one, in the usual course of business, and there is no just principle on which the appellant can be declared entitled to priority over other creditors of the insolvent bank. We should not be beguiled by the use of words, and call one claim a "trust," in order to secure it a preference over "debts." Wherever there is a trust, it may be enforced as such, but calling one sort of claim a trust merely to place it on a better footing is not allowable. It has been done in some instances, where hard cases have made bad precedents, which we will not follow. Affirmed.

(69 Miss. 692)

SMITH et al. v. BOWDRE.

(Supreme Court of Mississippi. Oct., 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATION.

A provision in a deed of assignment for the benefit of creditors that, should the assignee decline to accept, "we reserve the right, by and with the consent of the majority of our creditors, to name some one else in his stead," is not such a reservation of power over the property as to invalidate the assignment.

Appeal from chancery court, De Soto county; B. T. Kimbrough, Chancellor.

Suit by W. B. Bowdre to restrain E. W. Smith and others from prosecuting certain attachment suits. A demurrer to the bill was overruled, and defendants appeal. Affirmed.

Payne & Bell, a mercantile firm, made a general assignment of all their property for the benefit of their creditors, with some preferences. The appellants having sued out five different attachments at law, and levied the same upon portions of the assigned property, the appellee, W. B. Bowdre, named as assignee in the assignment, filed his bill in chancery to restrain the prosecution of the attachment suits being prosecuted by the appellants and others who had sued out attachments, the equity alleged being the avoidance of a multiplicity of suits. The assignment was made an exhibit to the bill of complaint. Some of the defendants to the chancery suit answered the bill, but the appellants demurred, alleging as a cause of demurrer that the assignment showed upon its face that it was made with the intent upon the part of Payne & Bell to defraud their creditors. The assignment contains the following provision, which is relied upon as invalidating it: Should the assignee decline to accept, "we reserve the right, by and with the consent of the majority of our creditors, to name some one else in his stead." The

chancellor overruled the demurrer, and granted an appeal to this court.

Calvin Perkins, for appellants. Ira D. Oglesby, for appellee.

COOPER, J. We cannot see that the right of any creditor, or any security afforded by the deed of assignment, was impaired by the reservation by the assignor of the power to appoint another assignee, (with the assent of a majority of the creditors for whose benefit the assignment was made,) if the one nominated by the deed should decline to accept the trust created thereby. The power reserved was not over the property or its disposition. There is no reservation of a right to change the destination of the proceeds of the estate, or to hamper its management. The evident purpose of the provision was to prevent the delay incident to an application in chancery for the appointment of a trustee if the assignee named should decline to act. Ordinarily, if not universally, such power, honestly exercised, would be beneficial, rather than injurious, to creditors. Decree affirmed.

(69 Miss. 674)

**KIMBROUGH v. RAGSDALE et al.**

(Supreme Court of Mississippi. April, 1892.)

**DISMISSAL—VARIANCE—SALE—INSTRUCTIONS.**

1. Where a petition to enforce a mechanic's lien alleges a sale to defendants jointly, a motion to dismiss on the ground that the sale was to one defendant only, before evidence has been received, is properly denied.

2. An objection to variance between pleading and proof must be raised when the evidence is offered, and not for the first time on appeal.

3. Where an action is brought to charge two defendants for goods sold, and the books of plaintiff show a charge to one only, it is error to charge that the keeping of the books was simply a matter of convenience, and does not change defendants' obligation to pay the debt; it being a question for the jury.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Petition by Ragsdale & Co. against Walter Fuller and A. McC. Kimbrough to enforce a mechanic's lien. Judgment for plaintiff. Kimbrough appeals. Reversed.

Walter Fuller, a contractor, built a house in Greenwood for A. McC. Kimbrough. Some of the material with which to build the house was purchased from Ragsdale & Co., who filed a petition in a justice of the peace court against said Fuller and Kimbrough to enforce a lien for the price of said material, which was \$191.60. The petition alleged a joint liability of Fuller and Kimbrough under a verbal contract. A bill of particulars of the account was filed with the petition, which showed that the goods were charged to "Walter Fuller, for A. McC. Kimbrough." On the trial in the justice of the peace court the case was dismissed as to Fuller, and a judgment was recovered against Kimbrough,

from which he appealed. On the trial in the circuit court, Kimbrough moved to dismiss the suit, because there was no joint liability of the defendants, as alleged in the petition. This motion was overruled. The evidence of the plaintiff was to the effect that the sale was made to Kimbrough alone, but no objection was made to the introduction of this evidence in the trial court. The evidence is conflicting as to whether the material was furnished to Fuller, the contractor, or to Kimbrough. Defendants' testimony showed that the contract between Fuller and Kimbrough was that Fuller was to furnish all the material, and that he had been paid in full for the contract by Kimbrough. The testimony was conflicting as to whether Ragsdale & Co. had notice of the contract between Fuller and Kimbrough. The books of Ragsdale & Co. were in court, but were not introduced in evidence. Defendants were permitted to show by oral testimony that the goods were charged on the books to Walter Fuller for Kimbrough. The second instruction given for the plaintiff, and referred to, is as follows: "The court instructs the jury for the plaintiffs that their books kept in the store were for their convenience, and that they had a right to keep them in any manner they saw proper to suit their convenience, and that the manner in which they were kept does not change defendant's obligation to pay the debt sued on, if he owes same."

Calhoon & Green, for appellant. A. H. Longino, for appellees.

COOPER, J. The petition in this cause is based upon a sale to Fuller and Kimbrough jointly. The court properly overruled the motion to dismiss the petition, for it could not know that the contract, as stated, would not be proved. No objection was made to the evidence offered by the petitioner to establish the sale to Kimbrough alone. The slightest reflection should have suggested that in that way only can advantage be taken of a variance between the cause of action as stated in the pleadings and that sought to be proved. Our Code (section 1134) provides that one or more of several joint contractors may be severally sued, but it was never intended to permit a plaintiff to declare upon a joint contract, and recover upon a several one.

The second instruction for the plaintiff was directly upon the weight of evidence. The defendants were certainly entitled to have the jury determine whether the goods were charged upon the plaintiff's books to Fuller alone, because he was the purchaser, or whether such entries were for the convenience only of plaintiff. This was a question of fact, and not of law, and the court should not have expressed any opinion concerning its solution.

Reversed, and remanded for a new trial.

(69 Miss. 670)

## NEWMAN et al. v. TAYLOR.

(Supreme Court of Mississippi. April, 1892.)

## JUDGMENT BY DEFAULT—EQUITABLE RELIEF.

Where a judgment is rendered by default without service of process, in order to obtain relief in equity, defendant must show not only want of service, but that he has a good defense to the action.

Appeal from chancery court, Issaquena county; W. R. Trigg, Chancellor.

Bill by W. W. Taylor against H. & C. Newman to vacate a judgment by default. Decree for complainant. Defendants appeal. Reversed.

Plaintiff exhibited his bill in the chancery court, alleging that in the year 1882 he was indebted to appellants in the sum of \$2,026.85, and that this account was paid in full, and that he held a receipt in full, signed: "H. & C. Newman, Per A. J. Wilkinson, Agent and Attorney." That in April, 1884, said H. & C. Newman brought suit against him on said account in the circuit court, and obtained a judgment by default against him for said sum and accrued interest. That, although he had his domicile in said county, he was not served with summons, and was ignorant of the pendency of said suit; and prayed for an injunction against said judgment. The defendants demurred to the bill on several grounds, among others that there was allegation that the defendants threatened to enforce the judgment, and that complainant had a full, adequate, and complete remedy at law. The demurrer was overruled. The defendants answered, denying that the indebtedness had ever been paid, and that the plaintiff had any receipt for said indebtedness signed by defendants or anybody authorized by them, and expressly denied that Wilkinson was so authorized, and denied that complainant was not served with process, and averred that he was duly served. Complainant's deposition was taken, and was to the following effect: In 1882 he was indebted to defendants. That he paid the amount to A. J. Wilkinson, their attorney, by giving him a check on H. & C. Newman for \$150, and by turning over to Wilkinson a lot of notes and accounts, which Wilkinson selected, in full payment of the account; and that Wilkinson gave him a receipt in full. He says he was not served with summons. Three letters were filed with his deposition. The first was signed "S. E. Worms, representing H. & C. Newman," and in substance stated that the writer, having been disappointed in promises of Taylor, has placed the same in A. J. Wilkinson's hands, with instructions to force payment. The second letter was addressed to Wilkinson, and contained the following: "Get Max Sumers to select the best accounts on the best terms possible. He ought to be willing to surrender all of the accounts, especially as he wants a clear receipt. However, do the best you can for us. If you can't get all, take the amount he offers.

[Signed] H. & C. Newman. Worms." The third letter was to Wilkinson, and contained the following paragraph: "We would ask you to use your best efforts to get the Taylor accounts secured, that you may realize on them this fall, if it cannot be done at once. [Signed] H. & C. Newman. W." Worms states in his deposition that the letters were written by him, and that he was employed by H. & C. Newman in the capacity of traveling agent, to solicit cotton and make collections, but had no special authority from H. & C. Newman to write the letters. The depositions of the circuit and chancery clerk and the sheriff showed that the summons was lost from the files of the records, and that there was no record showing that the summons in the action against Taylor had been served on him.

Miller, Smith & Hirsh, for appellants. James R. Yerger, for appellee.

COOPER, J. The appellee, against whom a judgment at law had been rendered without notice, could have secured relief by motion in the law court, upon the trial of which it would only have devolved on him to show that no service of process had been made on him. *Meyer v. Whitehead*, 62 Miss. 387. Instead of resorting to the court of law, he has applied to chancery for relief, and, being in a court of equity, finds himself subjected to the operation of the equitable maxim that "he who seeks equity must do equity," by reason of which it was incumbent on him to show, not only that the judgment at law was void, but that he has a good defense to the suit. *Stewart v. Brooks*, Id. 492. Under the old practice in chancery, the rule was to award a new trial at law, but since the extension of the power of relief in courts of law this jurisdiction has become practically obsolete. 3 Pom. Eq. Jur. 1365. Courts of equity yet relieve against judgments obtained by fraud, accident, or mistake. This relief is not now by granting a new trial at law, but the court of equity will take full and final jurisdiction, so as to do complete justice between the parties. *Hale v. Bozeman*, 60 Miss. 965. The complainant was entitled to relief only upon condition of showing that he had a valid defense against the claim on which the judgment was rendered. This he failed to do, for it is not shown to have been within the apparent scope of the agency of Wilkinson, by whom the settlement of the debt was negotiated, or of that of Worms, by whom Wilkinson was directed to act, to bind the defendants, H. & C. Newman, by such settlement; nor is it shown that they subsequently were informed of and ratified the same. The complainant stopped a little short of proving his case; but, since injustice may be done by rendering a final decree here, we will remand the cause, with leave to all parties to take further proof. The decree is reversed, and cause remanded.

(69 Miss. 667)

**MASSEY v. RIMMER.**

(Supreme Court of Mississippi. April, 1892.)

**ADVERSE POSSESSION BY WIFE.**

Where a grantee in a deed erases his name, and inserts that of his wife, with intent to vest title in her, and she holds the land as owner thereof, the statute of limitations begins to run in her favor during the life of her husband, and continues uninterrupted by his death.

Appeal from circuit court, Attala county; C. H. Campbell, Judge.

Ejectment by S. P. Rimmer against W. P. Massey. Judgment for plaintiff, and defendant appeals. Affirmed.

Certain land in Attala county, Miss., was conveyed to D. B. Massey by one Riddle in 1869. Massey and his family occupied this land continuously until his death, in 1871. Some time before his death, D. B. Massey erased his initials in the deed as grantee, and inserted his wife's initials instead, and erased the words "his heirs," and inserted "her heirs," intending thus to vest title in his wife. In 1891, S. P. Rimmer, appellee, brought ejectment against the heirs of D. B. Massey, who were then in possession, and had been since the death of their father. On the trial, Rimmer introduced in evidence the deed from Riddle to M. A. Massey, (the same deed which was shown to have been altered by D. B. Massey,) and several successive trust deeds given by Mrs. Massey, now Mrs. Pope, and her husband, to appellee, Rimmer, to secure a debt due by them to Rimmer; a foreclosure sale under said trust deeds; a trustee's deed to M. J. Rimmer; and then a deed from M. J. Rimmer to appellee. All the heirs except W. P. Massey disclaimed interest in the land, they having conveyed their interest to said W. P. Massey. The evidence of defendant tended to show that, after the death of their father, all the heirs claimed the land as tenants in common. The case was tried by the court, without a jury. The court found as facts that the original deed to the land was made to D. B. Massey, and that he changed the deed, intending to vest title in M. A. Massey, his wife; that M. A. Massey and her children have been in possession since and before the death of D. B. Massey; that M. A. Massey claimed title, and claimed to own the land; and, holding under this changed deed for more than 10 years, acquired title.

Dodd & Armistead, for appellant. Allen & McCool, for appellee.

CAMPBELL, C. J. D. B. Massey, in his lifetime, having erased his name from the deed which vested title in him, and inserted his wife's name in the deed instead of his own, for the purpose of vesting the title in her, and she having held the land as owner by virtue of this arrangement, the statute of limitations commenced to run in her favor in the lifetime of her husband, and continued uninterrupted by his death, and,

after the lapse of 10 years, perfected her title, as against the heirs of her deceased husband. *Hartman v. Nettles*, 64 Miss. 495, 8 South. Rep. 234.

Affirmed.

(69 Miss. 663)

**HUNTLEY, Marshal, v. BANK OF WINONA.**

(Supreme Court of Mississippi. April, 1892.)

**TAXATION OF BANKS — LEVY BY TOWN IN EXCESS OF LIMITATION.**

A tax levied by a municipal corporation on the solvent credits of a bank in excess of the limitation prescribed by Act 1890, (Laws 1890, p. 9,) which provides that "cities and towns are prohibited from levying or collecting any other tax on banks, or on solvent credits, owned by individuals or corporations, greater than 75 per cent. of the state tax," is illegal, regardless of the purpose for which it is levied.

Appeal from circuit court, Montgomery county; C. H. Campbell, Judge.

Action by the Bank of Winona against W. L. Huntley, marshal and tax collector of the town of Winona, to recover certain taxes paid by plaintiff under protest. The action was commenced before a justice of the peace, and taken by plaintiff on appeal to the circuit court. From a judgment for plaintiff, defendant appeals. Affirmed.

In the circuit court the case was tried without a jury on the following agreed statement of facts: Huntley, by virtue of his office as tax collector of the city of Winona, (which was a separate school district,) in the year 1891 collected from C. H. Campbell, cashier of the Bank of Winona, under protest, a three-mill tax for school purposes on the solvent credits of said bank, said tax amounting to \$132, the same having been levied by the board of mayor and aldermen of said city of Winona, and being in excess of 75 per cent. of the state tax, already levied by said board for the year 1891 on the solvent credits of said bank for town purposes, and collected from said bank by said Huntley, tax collector. Said bank does business in the incorporated town of Winona.

W. S. Hill, for appellant. Sweatman, Trotter & Knox, for appellee.

COOPER, J. The tax in controversy in this case is confessedly in excess of the limitation prescribed by the act of 1890, (Laws, p. 9.)<sup>1</sup> It is certainly a tax levied by the municipal authorities of the town of Winona, and, being such, it is forbidden by law, regardless of the purposes for which it was levied. Judgment affirmed.

<sup>1</sup>Act 1890 (Laws 1890, p. 9) provides "that all real estate of any bank or banking association shall be liable to pay taxes—state, county and municipal—according to its value, as other real estate is taxed. Cities and towns are prohibited from levying or collecting any other tax on banks, or on solvent credits, owned by individuals or corporations, greater than seventy-five per cent. of the state tax."

(32 Fla. 312)

STOCKTON et al. v. HARMON et al.

(Supreme Court of Florida. Aug. 15, 1893.)

VACATING SUPERSEDEAS — APPOINTMENT OF RECEIVERS — RESTRAINING ORDER — CORPORATIONS — AMENDMENT OF BY-LAWS.

1. Where an appeal is taken from those provisions of a decree which vacate expressly a former order granting an injunction and appointing a receiver, and no appeal is taken from the provision of the same decree which dismisses the bill, an order directing that such appeal operate as a supersedeas will be set aside, and the supersedeas vacated as unauthorized.

2. An entry of appeal cannot be amended in the appellate court.

3. The doctrine in *State v. Jacksonville, P. & M. R. Co.*, 15 Fla., on page 286, as to appointing receivers of railroads without notice, approved.

4. The practice of granting a restraining order for several days, until the motion for an injunction can be heard, without requiring an indemnity bond, is contrary to the provisions and policy of our statute. Section 1465, Rev. St.

5. An amendment of a by-law which merely changes the number necessary to constitute a quorum of a board of directors does not alter another by-law which requires a vote of two-thirds of the directors to suspend or remove an officer of the company.

6. The case made by the bill held to be palpably insufficient to justify the appointment of a receiver, and clearly deficient as authorizing an injunction, except as to action alleged to have been taken by three of the directors on the theory that they constituted a quorum or had power to remove officers of the company.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; R. M. Call, Judge.

Bill by John N. C. Stockton and others against Archer Harmon and others for the appointment of a receiver. Interlocutory injunction granted. Injunction vacated, and bill dismissed. From the order vacating the injunction, complainants appeal. Motion to vacate supersedeas. Granted.

H. H. Buckman and H. Bisbee, for the motion. Cooper & Cooper, opposed.

RANEY, C. J. There is in this cause a final decree, bearing date August 3, 1893, dismissing the bill, and in the former part of the same entry there are provisions which expressly vacate the interlocutory orders for injunction and a receiver, which had, on a prior day, been granted without notice. There is an appeal from so much of the decree of August 3d as vacates such prior orders, but none from the dismissal of the bill. There is also an order of the circuit judge directing that the appeal shall operate as a supersedeas, and bond has been given as required by this order. In the absence of an appeal from the action of the lower court in dismissing the bill, appellants cannot be heard to question the vacation of the orders doing away with the injunction and receivership, and for this reason the order of supersedeas must be vacated as unauthorized.

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ized and illegal; but, as there may be another entry of appeal in the lower court, the existing entry not being the subject of amendment here, and the same matters urged before us now as to the frivolity of the case made by the bill, and consequently of the appeal, may be presented again, we deem it proper to say: (1) That there is palpably no case made by the bill for a receiver, and that the appointment of a receiver was entirely without justification; and in this connection we wish to say that we approve entirely of the remarks to be found in the case of *State v. Jacksonville, P. & M. R. Co.*, 15 Fla., on page 286, as to appointing receivers of railroads without notice. (2) The bill is also entirely deficient as to an injunction, in so far as the protection of any property rights of the complainants Stockton and Denham, or either of them, are concerned. There is exhibited no such jeopardy of any property rights of Stockton or Denham, individually or as stockholders or directors, or of any one else, as justified an injunction or a receiver. The practice of granting, without requiring an indemnity bond, a restraining order or injunction for the period that the order was allowed in this case, is contrary to the provisions and policy of our statute. Section 1465, Rev. St. (3) It, however, cannot be said that it is clear that no case is made by the bill as to the illegality of the action of Harmon, Scott, and Buckman, in acting as a quorum of the board of directors. It is not clear that a quorum was duly changed from four to three, and, even admitting that such change was made, there is no pretense that any alteration was ever made of the by-law (section 7) which requires a vote of two-thirds of the directors to suspend or remove an officer filling an office created by the stockholders of the company. We, of course, do not regard the general manager as such an officer, but the secretary and treasurer are clearly such. Were there a proper appeal, we should at least continue the supersedeas as to any and all action taken, or to be taken, upon the theory that three constituted a quorum, or that less than two-thirds of the directory can suspend or remove a person from an office created by the stockholders. (4) Otherwise than as above stated, there is no such condition of affairs shown by the record as justifies a court of equity in interfering with the management of the properties of either company by its officers, according to its by-laws, and the principles of law governing in such matters. *American Loan & Trust Co. v. Toledo C. & S. R. Co.*, 29 Fed. Rep. 416. (5) It may also be observed that no bond has been required of the receiver.

An order will be entered vacating the order of supersedeas made by the circuit judge on August 3, 1893.

(31 Fla. 315)

**WILLIAMS v. STATE.**

(Supreme Court of Florida. Aug. 7, 1893.)

**HOMICIDE—WITNESS—CROSS-EXAMINATION.**

1. The rule is well settled that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and if he wishes to examine him as to other matters he must make the witness his own. But this rule permits an inquiry on cross-examination into all the facts and circumstances connected with the matters of the direct examination.

2. For the state a witness testified that he was standing at the east side of a house called a "commissary," where the deceased was killed, and saw the accused there a short time before the killing; that, while at the building called the "commissary," witness heard the accused use language indicating a purpose to kill the deceased, such as, "If you don't pay me, I am going to kill you." On cross-examination the witness was asked what kind of a building was that commissary, and the question was excluded by the court, on the ground that it was not a proper cross-examination. *Held* to be error. The question was not only a legitimate cross-examination, but it cannot be said to be immaterial, as the witness' answer may have been the means of establishing the fact that he was not at the house, and did not hear and see what he related.

(Syllabus by the Court.)

Error to circuit court, Marion county; Jesse J. Finley, Judge.

Johnnie Williams, alias Ben. Latimore, was convicted of murder, and brings error. Reversed.

Geo. H. Badger, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

**MABRY, J.** The plaintiff in error was indicted, tried, and convicted of murder in the first degree in the Marion circuit court, and the sentence of death was passed upon him. He has sued out a writ of error to this court, and various assignments of error are made here.

We are confronted with an error in the record before us which, according to well-established rules of law, will necessitate a reversal of the judgment. A witness—Enoch Butler—was introduced by the state, and testified that he was at the place called the "commissary" on the afternoon of the day the deceased was killed, and saw the accused there. He also stated that he was standing at the east side of the house between sundown and dusk, and the deceased was paying off hands. Heard him say something about not paying off the hands that night, and defendant said: "I am going to have my money, you d—d old son of a b—h. If you don't pay me, I am going to kill you." He was also asked how he happened "to be at that commissary that evening," and stated that he went there to collect for some pork, potatoes, and things he had sold to the hands getting cross-ties. On cross-examination the witness was asked, "What kind of a building was that commissary?" The state objected to the question,

as not a proper cross-examination, and the court excluded it. Proper exception was taken to the ruling, and it is assigned as error here. The rule is well settled that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and if he wishes to examine him as to other matters he must make the witness his own. This rule, however, permits an inquiry on cross-examination into all the facts and circumstances connected with the matters of the direct examination. *Savage v. State*, 18 Fla. 909; *Adams v. State*, 28 Fla. 511, 10 South. Rep. 106; *Tischler v. Apple*, 30 Fla. 132, 11 South. Rep. 273. The deceased was shot and killed in the house called the "commissary," near 9 o'clock at night, and if the defendant did the killing there was no question of his guilt. It does not appear that the witness Butler saw the killing, or was present when it was done, but he states that he was at the commissary between sundown and dusk, saw the defendant there, and heard him use language indicating a purpose to kill the deceased. It is apparent that it was a matter of great importance to the accused whether or not the witness mentioned was in fact present and heard the language related by him. He states that he was standing at the east side of the building referred to, and heard the defendant use the language imputed to him. It was a proper cross-examination to ask him what kind of a building that was, and we cannot say that the question was immaterial, as the witness' answer to it may have furnished convincing proof that he was not there, and did not in fact see it. The fact that other witnesses for the state described the commissary house will not relieve the ruling from the objection made, as the question excluded tended to test the correctness of the witness' statement in a material point against the accused. The defendant had a clear legal right to inquire into the matter excluded, and we cannot say that no harm was done him. We cannot avoid the result here, without a violation of a well-recognized rule of law, and that too, in a case involving life.

We do not deem it necessary to refer to the other assignments of error made.

The judgment is reversed, and a new trial awarded.

(39 Miss. 232)

**STEVENSON v. MORRIS MACH. WORKS.**

(Supreme Court of Mississippi. Oct., 1891.)

**ACTION BY SALES AGENT—BREACH OF CONTRACT BY PRINCIPAL—DELAY IN DELIVERING GOODS.**

Where one enters into a contract with certain manufacturers by which the latter are to fill orders procured by him, and he is to receive a commission on such orders, he has a right of action against such manufacturers in case they so unreasonably delay to fill orders that the purchasers refuse to accept the goods, and he loses his commissions on the sales.

Appeal from circuit court, Lauderdale county; S. H. Terral, Judge.

Action by T. F. Stevenson against the Morris Machine Works to recover commissions on sales of goods. From a judgment for defendant, plaintiff appeals. Reversed.

Appellant was employed by appellee to represent him in selling various machinery, consisting of engines, boilers, etc., upon the following terms: Appellant was at his own expense to travel over the country, and obtain orders from persons for machinery, and to forward said orders, signed by the purchasers, to appellee, to be filled by him, for which services appellant was to get 30 per cent. discount from the catalogue prices of said machinery. When sales were made on a credit, appellant was required to take notes payable to Morris Machine Works, written upon blanks furnished by them. Stevenson was to be paid his commissions when the machinery sold was delivered and accepted by the purchasers, and the purchase money paid. This course of dealing was carried on for some time with entire harmony, appellant sending orders, and appellee filling them, generally not later than 30 days. Some time in the year 1890, appellant forwarded some orders to appellee for machinery to be shipped to various parties. These orders were duly acknowledged by appellee, but shipment of the machinery was delayed so long that the various purchasers declined to take it all, and so notified appellant. Stevenson then demanded his commissions on account of his sales. Appellee declined to pay them, and appellant brought this suit to recover same. After all the testimony on both sides had been submitted, the court gave a peremptory instruction to find for the defendant. There was a verdict and judgment accordingly. A motion for a new trial, by appellant, was overruled, and he appealed.

Miller & Baskin, for appellant. McIntosh & Williams, for appellee.

CAMPBELL, C. J. This is an action to recover damages sustained by the plaintiff from an alleged breach of a contract made by the defendant with the plaintiff to fill orders he might obtain for the manufactured goods of the defendant; and it should have been left to the jury to find whether there was such a contract, and whether it was broken or not, and, if so, to award the damages shown to have resulted. It seems clear that there was an implied contract to ship goods in a reasonable time, and that this was not done in some instances, and that the plaintiff has a right to recover damages upon the case made by the record before us. He may not be entitled to commissions *eo nomine*, but he is entitled to damages measured by them, if he was unjustly prevented, by act of the defendant, from getting his com-

missions, as they would have accrued if the defendant had performed his contract. Reversed, and remanded for a new trial.

(69 Miss. 217)

### BECK v. STATE.

(Supreme Court of Mississippi. Oct., 1891.)

#### INTOXICATING LIQUORS—ILLEGAL SALE—WHAT CONSTITUTES—EVIDENCE.

One who, at the request of a proprietor of a bar, though not connected therewith, goes thereto, and procures liquor for a customer, handing the proceeds to the proprietor, is guilty of selling intoxicating liquors to the same extent as the proprietor of the bar.

Appeal from circuit court, Yazoo county; J. B. Chrisman, Judge.

Ike Beck was convicted of selling intoxicating liquor in violation of law, and appeals. Affirmed.

One Fullwood owned and operated a steamboat plying the Yazoo river. There was a bar on the boat, where intoxicating liquors were sold. While the boat was in Yazoo county, a man came on board the boat, and asked Ike Beck, appellant, who was the steward of the boat, but had no interest in the boat or the bar, for a bottle of whisky. Beck referred him to Fullwood. Beck, at Fullwood's request, went with the man to the bar, got the whisky for him, received the money for it, and gave it to Fullwood. Yazoo county had voted against the sale of intoxicating liquors under the local option law. The court gave the following instruction for the state: "If the jury believe from the evidence, beyond any reasonable doubt, that Dyer went to the defendant, and to buy whisky, and Fullwood asked defendant to let him have it,—that is, to let Dyer have it,—and, at Fullwood's request, defendant gave Dyer the whisky, and Dyer gave him the money, which he in turn gave to Fullwood, and that this occurred in Yazoo county at any time during the year 1889, before this indictment was found, then he is guilty as charged, and the jury ought to convict." Beck was convicted, and the court sentenced him to pay a fine and to imprisonment. Beck appealed.

Robert Bowman, for appellant. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, C. J. In *Monaghan v. State*, 66 Miss. 513, 6 South. Rep. 241, it appeared that a minor was a go-between of a licensed dealer and an adult, and therefore the dealer was not guilty of selling to the minor. The sale was to the adult. In the case before us, the appellant was a party to an illegal act,—an unlawful sale of liquor. He aided and abetted Fullwood, the owner of the liquor, to violate the law, and thereby became guilty. All who aid in the commission of a misdemeanor are principals. Affirmed.

(69 Miss. 391)

WISE et al. v. BROOKS et al.

(Supreme Court of Mississippi. April, 1892.)

EQUITY—REFORMATION OF DEED—INTENTION OF PARTIES.

Equity will not reform instruments which express the intention of the parties at the time they are made, based on the knowledge then possessed by them, though their intentions would have been different if they had been better informed.

Appeal from chancery court, Yazoo county; H. C. Conn, Chancellor.

Bill in equity by Louis Wise and Herman Wise, partners as Wise Bros., against Eliza E. Brooks and others, for the reformation of certain deeds and the record of partition proceedings. From a decree dismissing their bill, plaintiffs appeal. Affirmed.

This is a suit to correct a misdescription of land, or rather a mistake as to the construction and meaning of words of exception used in a conveyance of land. All the parties claim the land in controversy from John Everett as the common source of title. In 1855, John Everett acquired title to a large tract of land, including the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of section 1. In November, 1866, John Everett conveyed to J. E. D. Rowe, in trust for the benefit of Rowe's wife, a certain part of the above-described lands, which part is described by metes and bounds alleged in the deed to contain 100 acres, more or less. In 1867, John Everett conveyed to his son James E. Everett all of his land, including the land in controversy here, except the part which he had previously conveyed to Rowe, and referred to the book and page of the records where his deed to Rowe could be found. In September, 1877, J. E. Everett conveyed to G. W. and Henry C. Everett an undivided two-thirds interest in all the land which John Everett had sold to him, and this deed refers to the book and page where Rowe's deed could be found. In March, 1880, G. W. and H. C. Everett conveyed to Joseph Gallinger their two-thirds interest in the land which James Everett had conveyed to them by trust deed, and Gallinger afterwards purchased the land at a foreclosure sale, but in this conveyance no mention is made of the tract conveyed to Rowe. Gallinger afterwards conveyed the same undivided two-thirds interest to J. E. and G. W. Everett. In this deed there was no mention or exception made of the land conveyed to Rowe. H. C. Everett died intestate and without children. Gallinger at the time retained a trust deed on the land for the purchase money. This trust deed was foreclosed, and a deed made again to Joseph Gallinger. In these last two deeds there was nothing said of the tract conveyed to Rowe. Afterwards James E. Everett's individual one-third interest on the tract was levied on by the sheriff under execution, and conveyed by sheriff's deed to Mary E. Bedwell. The sheriff, in his deed conveying to her said interest, conveys the E.  $\frac{1}{2}$  of the N.

E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of section 1, "less 100 acres north of Piney." It is out of vagueness and want of definiteness of this exception in the sheriff's deed this litigation arises, the complainants contending that the exception refers to only that tract which John Everett conveyed to Rowe, while defendants contend that it has no reference to the Rowe land. Thus far the title to an undivided two-thirds interest is in Joseph Gallinger, and an undivided one-third interest in Mrs. Bedwell. In 1882, Joseph Gallinger died, leaving a will, which authorized his wife to sell any of his property at her discretion. Afterwards M. E. Bedwell filed a bill in the chancery court against Mrs. Gallinger and her children, in which she prayed for a partition of said lands "known as the John Everett Place." The bill alleges that the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of section 1, "less 100 acres north of Piney," are a part of the tract to be divided. Mrs. Bedwell and Mrs. Gallinger, some time after the partition was made, conveyed the land to Henry E. Miller, Mrs. Gallinger reciting in her deed that it was her intention to convey to Miller all her interest in what is known as the "John Everett Place." Miller conveyed the lands to Wise Bros., complainants herein, using the same exception contained in the sheriff's deed. The bill charges that the words, "except 100 acres lying north of Piney," as used in the several conveyances of said land and in the partition proceedings, refer to and are intended to refer only to the land conveyed to Rowe, the deed to which recites that the tract contained "100 acres, more or less," and the deed of J. Everett to J. E. Everett, conveying the balance of his land, and the deed of J. E. Everett to G. W. and H. C. Everett, conveying a two-thirds interest in the same land, both make clear and explicit exception of the Rowe tract by referring to the book and page where that deed was recorded, and that this exception so fully and specifically made in the earlier deeds should control the vague and indefinite words in the later deeds to the same land, and to show that the intention of the parties was to convey and describe the same tract originally conveyed to Rowe, or that the lands excepted, instead of being 100 acres lying north of Piney creek, were intended to be only what was included in the metes and bounds, which Mr. Rowe testified contained only about 60 acres, instead of 100 acres. The answer of all the defendants except Miller, Bedwell, and Gallinger deny that there is any uncertainty in the words of exception contained in the deeds, or in the partition proceedings. They contend that the words, "100 acres, more or less, lying north of Piney," were intended to except that number of acres of the John Everett land from sale or partition, and that it, not being sold nor allotted by partition, remains a part of the John Everett estate, and as such descends to his heirs.



They also claim it by adverse possession, and that the land in controversy is a part of said land. The answers of Mrs. Bedwell and Mrs. Gallinger deny all the material allegations of the bill. Miller says in his answer that he understood at the time of his purchase from Mrs. Gallinger that he was to get all of the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of section 1 except the Rowe tract.

W. S. Epperson, for appellants. T. H. Campbell and Henry & Richardson, for appellees.

**CAMPBELL, C. J.** The bill makes a very proper case for the remedial power of a court of chancery, which may, in proper cases, rectify mistakes either in sheriffs' deeds or court proceedings; but, unfortunately for the complainants, they have failed to maintain their bill by sufficient evidence. It is doubtless true that, but for misapprehension as to the extent of the operation of the deed to Rowe, the parties would have proceeded differently; but that is not the question for equity to consider in a proceeding to reform contracts. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were. Affirmed.

(69 Miss. 915)

**MILLSAPS v. MERCHANTS' & PLANTERS' BANK OF GREENVILLE.**

(Supreme Court of Mississippi. April, 1892.)

**PROMISSORY NOTE—ACTION BY INDORSEE—DEFENSE—BREACH OF WARRANTY.**

In an action on a note by an indorsee before maturity, against the maker, it appeared that it was given for the payee's one-third interest in the capital stock of certain railroad companies, and that the amount of the note was exactly one-third of the margin between the amount of the total capital stock of such companies and their total indebtedness as guaranteed by the payee to induce defendant to make the note. *Held*, that it was error not to permit defendant to show that the debts of such companies were much larger at the time the note was given than they were guaranteed to be, since, if they were, the payee's warranty was broken as soon as made, and defendant eo instanti acquired the right to recoup against his liability on the note.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by the Merchants' & Planters' Bank of Greenville against R. W. Millsaps on a promissory note executed by defendant to H. K. Johnson, and by the latter transferred to plaintiff before maturity. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendant appeals. Reversed.

Defendant filed several pleas to the declaration, the fifth of which, referred to in the opinion, is as follows: "(5) And for further plea in this behalf, defendant, Millsaps, says that the promissory note was given for the purchase price of certain stock

of sundry street-railway companies of the city of Greenville in defendant's first plea mentioned, and at the time said note was executed, and to induce the execution thereof, Harry K. Johnson represented and stated to said defendant that the books of said railway companies showed then existing an indebtedness, and guaranteed that the amount of said outstanding indebtedness did not and would not exceed the sum of \$36,500; and defendant, relying upon and trusting to the said representations, executed and delivered the said note with the understanding and upon the agreement that if, upon the examination of said books, the said representations and guaranty was found to be true, he would pay said note, and the stock purchased would be transferred, assigned, and delivered to him contemporaneously therewith, and but for such representation and guaranty the said promissory note never would have been executed and delivered. And defendant avers that said representations and guaranty were untrue in part, in this: that the books of said company do not now, and did not then at that time, show their status or the extent of their indebtedness, and that said indebtedness largely exceeded the said sum so stipulated, reaching a much larger sum, to wit, the sum of forty or fifty thousand dollars. Without this, that the said stock has never been paid or tendered for delivery to defendant." Issue was joined on defendant's pleas.

W. L. Nugent, for appellant. M. Green, for appellee.

**MAYES, Special Judge.** This is an action on a promissory note for \$2,916.67, executed by the appellant to the order of Harry K. Johnson, and by said Johnson indorsed in blank and transferred to the appellee before maturity. On the trial in the court below, after the testimony was closed, the court, by a peremptory instruction, directed a verdict for the appellee, and this action is the matter complained of here.

The note sued on was given as a part of a contract between the parties thereto, which is embodied in the following writing: "In consideration of twenty-nine hundred and sixteen and 67-100 dollars, paid to me by R. W. Millsaps, I, Harry K. Johnson, grant, assign, set over, and deliver to said R. W. Millsaps, one undivided one-third interest in twenty-two thousand six hundred dollars of the capital stock of the Greenville Street Railway Company, the total stock being twenty-five thousand dollars, and one-third of the capital stock of the Greenville Electric Street Railway Co., and of the Star Street Railway Co., of Greenville, Mississippi, and of the Suburban Railway Co. The price above paid represents a total price

of \$15,150, less one-third of the consolidated indebtedness of all of said roads, which is guarantied by said Johnson not to exceed thirty-six thousand seven hundred dollars at this date. The stock of the Greenville Street Railway Co., an interest in which, is above conveyed, is at present pledged to John Gunn as security for its purchase price, it having been bought by said Johnson from said Gunn. This sale is made in accordance with a contract of sale entered into between the parties the 22d day of July, 1890, which contract is in the hands of Campbell & Starling, attorneys, and reference is hereby made to it. Witness my signature, this 20th day of September, 1890. Harry K. Johnson." The writing of July 22d, referred to, has been lost, but Mr. Starling testified to its contents; and it appears to have been only a preliminary memorandum to the same effect as this, the final contract. The appellant presented several defenses. It will suffice to say, as to all of them except one, that we think the testimony of the appellant himself shows that they are unavailing, and that the action of the learned judge below was correct. But one of those defenses, arising under the fifth plea, is in a different attitude, and, in respect to it, we hold that error was committed. By the contract above set forth, and the preliminary memorandum referred to therein, it is made manifest that what Johnson sold and Millsaps bought was really one-third in a margin of value between the worth of all the property of all the street railways, placed at \$45,450, and the guarantied sum of all their debts so guarantied to be at the time not in excess of \$36,700. This left the margin \$8,750, one-third of which is \$2,916.67, the exact amount of this note. Looking through the mere verbiage of the transaction, that was its real substance. Millsaps was not to pay one-third of the gross value of the railroad property, or \$15,150 for one-third of the stock, but the plan was that he was to pay the par for one-third of that margin, and the \$36,700 of debts were to be floated by placing a consolidated mortgage on the entire property, and taking up those debts with the proceeds of the mortgage. It is plain that, whatever the amount of nominal stock in the roads might be, it was actually worth only so much as the assets exceeded the liabilities; and it was on this basis that they contracted. If, therefore, there was no such margin of value, the thing bought and sold did not exist. It is not merely a question of the ability of Johnson to deliver stock certificates, which are but the evidences of a right, but of the existence of the very substance, the title to which was to be evidenced by the certificates, in whose hands soever they might be.

Now, the appellant claims that the debts

guarantied against really amounted at the time to \$44,825, and perhaps more. If this be correct, then the margin of value, of which one-third was sold Millsaps, instead of being \$8,750, was \$175 or less. The question then arises whether, in this action, that matter could be investigated, and whether the appellant was injured in its withdrawal from the jury by the court's peremptory instruction; and this question, in both aspects, we answer in the affirmative. Although the writing of September 20th uses the expression that the amount of the existent liabilities is "guarantied" to be not in excess of \$36,700, and although it is contended that by that expression was meant that, if they did exceed that amount, Johnson was to take care personally of the excess, we do not so construe the contract. Parol evidence is clearly incompetent for the purpose of interpreting the terms used, and what was offered for that purpose we must disregard. The writing is intelligible in itself. The words used in the writing are in effect a warranty, and a warranty of an existing material fact. That warranty, if it be true, as claimed, that the then existing indebtedness did exceed the sum named, was broken so soon as it was made, and Millsaps acquired, eo instanti, the right to recoup, against the liability on the purchase note, his demand based on that breach. Tied. Sales, §§ 180, 186; 2 Suth. Dam. 121, 128; 1 Suth. Dam. 279. Judgment reversed, and cause remanded.

CAMPBELL, C. J., being disqualified by reason of interest, did not participate in this decision. EDWARD MAYES, a member of the bar, was, by consent, elected to sit in his stead.

(88 Miss. 271)

#### LOCHTE et al. v. AUSTIN.

(Supreme Court of Mississippi. Oct., 1891.)

TAX DEED—PRESUMPTIONS—DESCRIPTION—PAROL EVIDENCE TO EXPLAIN.

1. Where defendant in ejectment claims under a tax collector's deed which describes the lot as bounded by certain streets in a named township and range, but fails to name the town in which the streets lie, parol evidence is admissible to show that there are no streets answering that description outside of the town.

2. A tax collector's deed is prima facie evidence that the assessment and sale were valid.

3. Where a deed correctly describes a lot as to its boundaries on three sides, the misnomer of a street on the fourth side is immaterial.

Appeal from circuit court, Harrison county; S. H. Terral, Judge.

Ejectment by H. Lochte & Co. against Alice E. Austin for a lot in the town of Biloxi having a front of 50 feet on Washington street, bounded south by Washington street, east by lot of N. Pitre and Henry Pitre, north by Biloxi Firemen's Hall, and west by lot

of Zuberbier & Behan. Plaintiff introduced a number of deeds, and offered testimony to show adverse possession under them. There was no common source of title shown either by bill of particulars or by the evidence. Defendant introduced a deed from the tax collector of Harrison county to his ancestor, J. J. Hurty, describing the lot as bounded east by N. Pitre, north by Firemen's Hall, south by Washington street, west by Lamense street, in township 7, range 9, (except lot sold to Zuberbier & Behan.) Defendants then showed by F. Seal, tax collector, that the only Washington and Lamense streets in township 7, range 9, in Harrison county, are the streets of those names in the town of Biloxi. Defendants then showed that a lot 40 feet east and west and 80 feet north and south on Lamense street had been sold to Zuberbier & Behan. It was agreed that a part of the tax for which the lot was sold to J. J. Hurty was legally assessed, and that a part was not legally assessed. There was a peremptory instruction given for the defendant, and, verdict and judgment having been given accordingly, plaintiffs appeal. Affirmed.

H. Bloomfield, for appellants. A. M. Dahlgreen and W. A. White, for appellee.

CAMPBELL, C. J. The uncertainty as to the land described by the tax collector's deed, by reason of its failure to state that the lot is in Biloxi, was removed by the evidence, which also shows the application of the expression in it, "less lot sold to Zuberbier & Behan," and renders certain what land was sold. The deed is prima facie evidence that the assessment and sale of the land were legal and valid, and, in the absence of any evidence to the contrary, must be held to have conveyed title. The defendant is one of the heirs of Hurty, the grantee in the tax collector's deed, and had the right to defend under it for herself and cotenants, if they had not conveyed to her. But they had, and, as the lot was correctly described in their deed to her as to its boundaries on three sides, the misnomer of a street on the remaining side did not make any difference. The court rightly instructed the jury to find for the defendant. Affirmed.

(69 Miss. 462)

BARTON v. MAGRUDER et al.

(Supreme Court of Mississippi. Oct., 1891.)

RESULTING TRUST—WHEN ARISES—FURNISHING MONEY FOR PURCHASE.

Where the owner of land about to be sold under a mortgage procures a third person to furnish part of the money necessary to buy it, the owner herself furnishing part, a resulting trust arises in favor of the latter to the extent of the money furnished by her.

Appeal from chancery court, Wilkinson county; Claude Pintard, Chancellor.

Bill by Mary B. Barton against L. W. Magruder and others. From a decree sustaining a demurrer to the bill, complainant appeals. Reversed.

The bill alleges that in 1868 complainant owned a plantation containing 825 acres, worth about \$10,000, with a yearly rental of 50 bales of cotton; that she had, before that time, been the guardian of her children, M. J. Walker, now Magruder, J. N., D. N., and E. H. Walker, heirs of James Walker, deceased, and was at the date aforesaid indebted to the three last mentioned in the sum of \$4,470, which she secured to them by deed of trust on said plantation, and that she owed her daughter, Mrs. Magruder, a balance of \$1,000; that to pay off this indebtedness she effected a loan of \$5,000, and placed a mortgage on said property to secure it, her sons having canceled their trust deed to enable her to do this, and that she paid her daughter, defendant, in full out of this borrowed money, and that from that time her daughter made no further claim against her, but frequently admitted to others the full satisfaction of her claim; that in 1878 she was called on to pay the loan, which she could not do, and the place was advertised for sale under the said deed of trust; that in this emergency she learned that one Woods would advance the necessary money if he could be secured against the claims of her children and wards, she having then settled fully with D. N. Walker, and secured the payment to the remaining two by deed of trust subsequent to the one given to M. Rodney, aforesaid; that she placed the matter in the hands of her children, to whom she was in the habit of trusting her business affairs entirely, she being of great age, and to her attorney, who called in the attorney of defendant, and together they concocted a scheme whereby her daughter, being the only child not involved, should propound a claim against complainant, and against her creditor, M. Rodney, in order to obtain an injunction of the sale, and that complainant was to submit to a decree of the chancery court and a sale of the property under it, so as to supersede the claims of her sons aforesaid, and for Woods to buy it in, discharge Rodney's claim, and hold the property three years, until reimbursed, upon which he was to convey to his daughter, who was to hold the same, and work out the debt, and reconvey to her mother, complainant. The original bill states that this scheme was submitted to and approved by complainant, but in the supplemental bill she explains that she was entirely ignorant of the details, trusting the matter entirely to her children. The bill further alleges that her daughter accepted this trust, and that her husband was knowing and consenting thereto. That an injunction was obtained, and, on hearing, a decree was rendered against complainant in favor of her

daughter and M. Rodney, for \$5,635.30. That the plantation was sold under the last decree, and bid in by said Woods for said sum of \$5,635.30, of which he advanced \$4,000, and complainant paid the balance. This sale was December 8, 1879. That afterwards, just before the expiration of the three years Woods was to hold the land, defendants borrowed from one Morgan \$400 to pay him off, which they secured by mortgage on complainant's plantation, Woods making title to Mrs. M. J. Magruder, pursuant to the family agreement, and setting up in the deed a total consideration of \$5,635.30. That the debt had not been reduced by Woods applying the rents to it, as he agreed, but that he paid them over to defendants. That on the day of the last-mentioned conveyance said M. J. Magruder conveyed the property to her husband and codefendant, and that at the time of the transaction neither of the defendants had the means to take up the debt due Woods. That defendants have used the rents for their own purpose to the date of this suit, and that they have not discharged the original debt, but that it has increased, and that they have borrowed money from D. C. Bramlett, by like mortgage on the plantation, to pay off Morgan, and that they have placed other incumbrances on it. That she has never yielded the possession of her home, but resided on it until the decayed condition of the house, which she could not repair, by reason of the action of the defendants in stripping her of all her means, forced her to remove therefrom. That when she urged defendants to restore to her her property she was put off with evasive answers and promises, and that they did not assert any ownership of said property until several years after the title thereto was made to them, and that she had made repeated efforts to assert her claim in the courts, and made efforts to employ counsel, but by reason of her poverty, caused by the acts of defendants, she could not do so. The bill is filed by Mrs. Mary B. Barton against L. W. and Mrs. Mary J. Magruder, and prayed for a discovery from the defendants, and an account of rents and of moneys paid them from the income of the plantation, and also asked for an injunction prohibiting the defendants from disposing of the property or incumbering it further, and a decree requiring the defendants to convey the plantation to complainant, and to pay her all such sums as may be found due from them on account of rents.

J. H. Jones, for appellant. A. G. Shannon, for appellees.

CAMPBELL, C. J. This case suggests, rather than presents, a state of facts like *Robinson v. Leflore*, 59 Miss. 148. The bill speaks of a loan by Woods, and of his reimbursement, but does not distinctly aver that

the advance of the money was as a loan to the complainant. It is evident that this was the real nature of the transaction, and that the desire to save the land to her was the object for which the money was furnished and applied to the purchase of the land, and, if the bill had been framed in this view, the demurrer would have been overruled; but we are not prepared to say that it was not properly sustained, in this aspect of the case. There is, however, a feature of the bill which entitles the appellant to a reversal of the decree. It is averred that the complainant paid part of the purchase money to vest the title of the land in Woods; and, to the extent that her money was paid for this, there was a resulting trust in her favor, and she may enforce it. The bill should be remodeled to meet the necessities of the case as we suppose it to be. Reversed, demurrer overruled, and cause remanded, with leave to defendants to answer in 30 days after mandate filed, and for the complainant to amend her bill as she may be advised.

(59 Miss. 606)

#### CHILES v. CHAMPENOIS.

(Supreme Court of Mississippi. Oct., 1891.)

##### QUIETING TITLE—EVIDENCE—RES JUDICATA.

1. In an action to quiet title, where complainant's title is put in issue, she must aver and prove that she is the owner of the property either by a good legal or equitable title. 7 South. Rep. 208, affirmed.

2. On a bill to remove a cloud where complainant's title is put in issue, a decree dismissing the bill for failure of proof by complainant is conclusive in another action against the same parties in relation to the title to the same land.

Appeal from chancery court, Lauderdale county; Sylvanus Evans, Chancellor.

Bill by Annie E. Chiles against J. F. Champenois and others. From the decree both parties appeal. Reversed.

In October, 1886, Annie E. Chiles, appellant, filed her bill in the chancery court of Lauderdale county, claiming to be the equitable owner of the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  section 13, township 6, range 15 E., in Lauderdale county, and sought as such to cancel a tax title acquired by C. W. Gallagher, January, 1876, and a deed executed by said Gallagher to a half interest in said land to B. F. Cameron in 1886, and a trust deed executed thereon by said Gallagher and Cameron and Mrs. Cameron, as clouds on her title. She also sought to have a resulting trust in said land declared in her favor, and the title divested out of the heirs of her grandfather, F. B. Higgins, and vested in herself. She was a minor at the time of acquisition by Gallagher of the said tax title, and her bill was filed a short time after attaining her majority. The principal infirmities of said tax title, as alleged in her bill, were ambiguity in assessment and the tax collector's deed.

The relation of said Gallagher to the land and to complainant and her mother was such as to render him legally incompetent to purchase at tax sale. Relief was sought as against the conveyance to Cameron and incumbrance to Champenois, for the reason, as therein assigned, that Gallagher could not convey something he did not own, and that they were chargeable with actual and constructive notice. On final hearing the chancery court dismissed the bill. On appeal the decree of the chancery court was affirmed in part and reversed in part, the court holding that complainant was entitled to a resulting trust as against the heirs of F. B. Higgins, and to a cancellation of Gallagher's tax title by reason of the trust relation existing between him and complainant, but declined to hold that she was entitled to relief against Cameron, the vendee of Gallagher, and Champenois, the mortgagee, for the reason that complainant had failed to show title against the world. The court declined to pass upon the validity of the Gallagher tax title, or of the said deed and mortgage, for the reason that complainant had not brought herself within the rule of the statute requiring proof of actual ownership, which was necessary to be shown in order to entitle her to relief, all of which will more fully appear by reference to the case of *Chiles v. Gallagher et al.*, 67 Miss. 413, 7 South. Rep. 208. In March, 1888, pending said litigation, B. F. Cameron conveyed to J. C. and L. A. Lloyd the half interest purchased by him from Gallagher. C. W. Gallagher and B. F. Cameron each borrowed from said Champenois the sum of \$1,500, and secured the amount by a single deed of trust, each intending to incorporate therein property enough to cover and secure his half; Gallagher inserting the land here in controversy, Cameron and wife inserting other lands. A few days after the Lloyds purchased the half interest of Cameron, an arrangement was entered into between Champenois, Cameron, Gallagher, and the Lloyds, whereby J. C. Lloyd executed his deed of trust in favor of Champenois on certain property belonging to him in Meridian, to secure the said indebtedness, less a payment of \$531.25 made thereon by Cameron; and thereupon Champenois, without the knowledge or consent of complainant, released and discharged Cameron from the \$3,000 indebtedness, and canceled the said deed of trust as to Cameron, thus entirely releasing the Cameron property from the operation of the said trust deed, and releasing him from all liability on said indebtedness; and the trust deed executed by Lloyd recites that the same is in substitution and satisfaction of the Cameron trust deed. Upon the return of the mandate in the case of *Chiles v. Gallagher*, George M. Hodges, substituted trustee in the said trust deed executed by C. W. Gallagher et al., advertised the lands in controversy for sale on the 31st day of March, 1890, reciting that the sale

would be made for satisfaction of the \$3,000 note and interest secured thereby. Thereupon complainant filed her bill in this cause against B. F. Cameron, J. F. Champenois, G. M. Hodges, J. C. and L. A. Lloyd, setting up the facts herein enumerated, and alleging in addition that she is the true and lawful owner of said land, tracing her title back to the United States government, filing as exhibits all the muniments of title from the entry by Ezekiel Stafford on the 31st day of May, 1836, down to herself.

Walker & Hall, for appellant. Hamm, Witherspoon & Witherspoon, for appellees.

COOPER, J. The decision in the case of *Chiles v. Gallagher*, 67 Miss. 413, 7 South. Rep. 208, referred to in the pleadings in this cause, was a conclusive adjudication against Mrs. Chiles' title as to the interest in the lands sold by Gallagher to Cameron. Her title was put in issue by the pleadings, and, as to the land owned by Cameron, was decided against her because of defect of proof. It is settled by an unbroken line of decisions in this state that one proceeding in equity to procure a cancellation of a cloud upon his title must aver in his bill that he is the owner of the property, either by a good legal or equitable title, and, if the issue is taken upon his title, must prove it as laid. There is nothing peculiar to the proceeding by bill to cancel clouds upon titles, by reason of which a greater or less force should be given to the decisions of the courts on such bills. Whether one proceed in equity to cancel as a cloud the adversary title, or bring an action at law to recover on the legal title, the judgment of the court upon the issues presented must be equally conclusive. In either case, a court of competent jurisdiction applies the law to the facts proved and involved in the material issue on which the right of the parties rests, and this is adjudication.

It is unnecessary to determine whether there has been a final decree as to the interest in the lands yet held by Gallagher. If complainant, as she might have done, had brought to the attention of the chancellor the facts occurring since the decision by this court of the appeal in the case of *Chiles v. Gallagher*, by supplemental bill in that cause, she could have secured all the relief asked in the present bill, and undoubtedly in such proceeding the decision would have been conclusive. We do not perceive why any different result flows from an independent proceeding between the same parties. But, however that may be, we are satisfied to reannounce the former conclusion as applied to the same facts now developed in this cause. On the principal points of controversy—those relating to the titles of the respective parties to the lands—the decree of the court is correct, and is affirmed. But there is manifest error in the account as stated, for

which the decree must be reversed. On the 9th of April, 1880, when Lloyd bought from Cameron the interest in the land which he had bought from Gallagher, and substituted his property in exoneration of the lands of Mrs. Cameron, an arrangement was made by all parties, the necessary effect of which was to limit the extent of the charge upon the interest of Gallagher in the lands. By that agreement Cameron assumed the payment of \$531.25, and Gallagher personally, and also all the land, was absolutely discharged as to that sum. The debt to Champenols, which remained chargeable on the land, was fixed at the sum of \$2,531.25, (principal and interest,) and of this sum Lloyd agreed to pay \$1,000. This left the remainder, \$1,531.25, as the sum then due by Gallagher. While Champenols had the right to go against all the property for all the debt, as between Gallagher and Lloyd, Gallagher's interest in the land was primarily chargeable with \$1,531.25, and Lloyd's with \$1,000. The antecedent payments made by Cameron (whether from his own funds or from the funds of the firm of Gallagher & Cameron does not clearly appear) were, by the act of the parties, applied to the equal exoneration of both parties, and the sum then remaining due was apportioned among them, Cameron assuming payment of \$531.25, Gallagher of \$1,531.25, and Lloyd of \$1,000. It was error, therefore, to charge, as against the lands of Gallagher, to the exoneration of the lands of Lloyd, any part of the antecedent payments made by Cameron. To this extent the decree of the court below is erroneous as against complainant. The decree is in another respect erroneous as against Lloyd. He has, since the 9th day of April, 1880, paid certain sums as the annual interest on the whole debt, and by a subsequent arrangement between himself and Gallagher the latter has secured to him the repayment of one-half of the sums so paid. The chancellor treated this as a discharge of all interest due by Gallagher during the time that the interest was so paid by Lloyd, which was erroneous. If Gallagher and Lloyd had each owed one-half of the debt due to Champenols, the decree in this respect would have been correct. But of the debt Gallagher owed \$1,531.25, and Lloyd only \$1,000. By the arrangement between himself and Lloyd, Gallagher has paid only the interest on one-half of the debt, (\$1,265.62,) while the decree credits him with payment of interest on the whole sum he owed, (\$1,531.25.)

We note that the pleadings and evidence disclose that complainant is not the sole heir of her deceased father. But, since no injury would result to Champenols by the failure to make the coheir a party, if he is permitted to cause sale of the land to be made by his trustee, (which the decree permits,) we would not, for that reason, reverse the decree. If sale had been directed to be made by a commissioner of the court, this co-

heir would have been a necessary party. For the errors noted, the decree will be reversed, and cause remanded, to be further proceeded with in accordance with this opinion.

(68 Miss. 596)

MARBLE et al. v. FIFE.

(Supreme Court of Mississippi. Oct., 1891.)

CONSTITUTIONAL LAW—SALE OF LANDS FOR TAXES.

Act Feb. 22, 1890, providing for the sale of all lands held by the state under tax sales and not redeemed, and that such sales should vest an indefeasible title against all but those under disability, is constitutional.

Appeal from chancery court, Warren county; Claude Pintard, Chancellor.

Suit by C. H. Fife against Belle Marble and others to confirm title to certain land. Judgment for complainant. Defendants appeal. Affirmed.

The appellants were at one time the owners in joint tenancy of the north half of lot 11, square 1, Springfield, in the city of Vicksburg, Miss. They claimed no other land in Vicksburg, and this claim was through Frank Walker, who died in 1877, intestate, leaving as his surviving heirs his widow and children, appellants in this case. At the time of Frank Walker's death he was living upon the land, and his widow and children have been living on it since, and are still living on it. On the land assessment of Warren county of 1879, Frank Walker was assessed with the west half of said lot 11. The taxes for 1880 were not paid, and in March, 1881, the sheriff, without the assessment roll ever having been changed or corrected, advertised and sold for such unpaid taxes the north half of said lot, and struck the same off to the state. The east half of said lot thus escaped assessment entirely. The south half of lot 11 was owned by the Shannon heirs, on which the taxes had been regularly paid. Afterwards, the heirs not redeeming, and no one purchasing the state's title of 1881, the act of 1890 becoming the law, the lot was certified by the auditor, under the provisions of that act, on his list of lands held by the state, to the president and clerk of the board of supervisors, and to the sheriff of Warren county, when the assessment as the north half of lot 11, square 1, was by them found to be correct. None of the heirs paying the delinquent taxes assessed against the land under the act of 1880, the land was advertised by the sheriff, and sold, complainant, Fife, becoming the purchaser, who filed this bill to confirm his title. The widow and heirs of Frank Walker were made parties defendant to the bill, who answered, denying that complainant had acquired any title to the land under said tax sale, and claiming title in themselves. The answer avers that the assessment roll of Warren county for 1879 was void, because not returned and approved by the board of supervisors at the proper time, and that there never was any valid assessment of the land. The cause was heard on

the bill and answer and an agreed statement of facts. There was a decree for complainant. The right of two of the defendants to redeem was provided for in the decree, they being minors. Defendants appealed. Injunction was granted. Respondents interposed a demurrer setting up, as the principal ground, that the matters sought to be litigated were involved in, and had been adjudicated in, the suit of Chiles vs. Gallagher et al. The demurrer was overruled, but leave was given to raise the same question by way of answer. The principal defense raised by the answer is *res adjudicata*. On the final hearing the court held the plea of *res adjudicata* to be good, and adjudged that complainant was entitled to redeem the half interest in said land not sold by Gallagher, on payment of one-half of the \$3,000 mortgage debt and interest, within 60 days. The costs were divided between complainant and Lloyd.

Anderson & Russell, for appellants. Gibson, Henry & Bien, for appellee.

CAMPBELL, C. J. There is no valid objection to "An act to facilitate the sale of lands held by the state," etc., approved February 22, 1890, (Laws, p. 16,) as applied to the facts of this case. The land was properly described (so as to identify it) and valued on the assessment roll of the county from 1884 on, and it was paid on for 1884, 1885, and 1886. On the roll of 1887 it was described as the property of the state, and, because of that, was not paid on, as it should have been. The act cited was intended as a means of investing the state, or any purchaser, with a title to such lands as are described in the act, if not redeemed before sale, as the result of dealing with them in pursuance of its provisions. It is not denied that the lot in dispute was embraced by the terms of the act, and it is admitted that it was dealt with as prescribed by the act, whence it results that the sale was valid, and the decree of the court sustaining it is affirmed.

#### On Suggestion of Error.

PER CURIAM. The argument of counsel was read in the consultation room, and fully understood and appreciated by the judges, who did not misunderstand the facts, or suppose that there was any sale to the state except that under the assessment of 1879. The fact that the land was on the assessment roll of 1883 by proper description, after the correction, and on the roll of 1887, was adverted to to show that it was assessed, which is a constitutional requirement; and it was competent for the state to proceed under the act of 1890, as was done, and by a sale to convey title. The case was well argued, and the arguments and the case received full consideration, and, in deciding it, we wrote all that we desired to say of it, and make this statement only to assure the

counsel who complain that their suggestion of error has had respectful consideration, and that there is no error in our decision, which is adhered to with the opinion as written. Denied.

(69 Miss. 283)

WITHERSPOON v. CITY OF MERIDIAN.  
(Supreme Court of Mississippi. Oct. Term, 1891.)

STREETS—BOUNDARIES—EVIDENCE OF ENGINEER—DEDICATION—ESTOPPEL.

1. The positive testimony, of one who had been city engineer for 15 years, that a fence extended into a street a certain distance, and that he learned this by making a survey as city engineer of the block around which was the fence, makes out a *prima facie* case as to the location of the street line, which is not impaired by evidence that there was a want of correspondence among various maps of the city.

2. Where property in a city is deeded as a "block" in a certain "survey," and is described as bounded by streets, and the recognized maps of the city show streets and avenues around the block, other evidence of a dedication of the streets is not necessary, in an action between property owners and the city, involving the boundary line of the street.

3. A city, by allowing a fence inclosing a surveyed block to extend into a street, and by constructing a sidewalk along such fence, is not estopped to claim to the true boundary of the street.

Appeal from chancery court, Lauderdale county; Sylvanus Evans, chancellor.

Suit by Sue E. Witherspoon against the city of Meridian. The bill was dismissed, and complainant appeals. Affirmed.

This is a suit to cancel and remove a cloud from certain real estate in Meridian, Miss. The bill also sought to enjoin the street commissioner from entering upon the land, and appropriating it for street purposes. The bill alleges that complainant is the real owner of the land, and shows as her title that Richard McLe More once owned the land, and that in 1859 he conveyed it to L. A. Ragsdale, and that, in 1874, Ragsdale sold it to John W. Fewell, who conveyed it, in 1880, to complainant. The answer of defendant admitted the conveyances set up in the bill of complaint, but avers that the deed to complainant was made and executed after the lands in dispute were dedicated to the defendant and the public for street purposes. The deed from Ragsdale to Fewell, in 1874, described the land as "all of blocks 1 and 2, according to Ragsdale's survey of the city of Meridian; that is to say, that land lying in said city, and bounded as follows: On the north by Taylor street; on the west by Ala. street; on the south by Barnes street; on the east by the street dividing the Ragsdale survey from the Lindsey survey." Fewell took possession of the property, and placed a fence on what he thought to be the true boundaries. Ragsdale, who was familiar with the land, went with Fewell to locate the land. Fewell went into possession of the 24 feet claimed on the eastern part of Sixteenth avenue, and the 21 feet claimed

on the eastern part of Fourteenth street. Ragsdale knew this, but never objected. The evidence shows that, prior to the sale to Fewell, that part of the city where the land in dispute is situated was a wild woodland, uninhabited, a large tract there being owned by said L. A. Ragsdale, who had had the land surveyed and platted into blocks, lots, and streets. The survey was known as "Ragsdale's Survey." Fewell conveyed the land to complainant, in 1880, by the same description, and she has been in continuous possession ever since. The street bounding the land on the west, called "Alabama Street" in the deeds, is now known as "Sixteenth Avenue," and "Taylor Street" is now called "Fourteenth Street." Sixteenth street, as opened and used on the western side of the land, was 60 feet in width, and 10 feet of this on the eastern side was laid off and worked as a sidewalk, and was so used at the time of complainant's purchase, in 1880. The street commissioner was, in 1890, about to take possession of a strip of this land on the west and north sides of the land inclosed by Fewell, and claimed by appellant, claiming it embraced a part of the public street, when this bill was filed, and an injunction was obtained by complainant. On the hearing the city introduced one J. M. T. Hamilton. John W. Fewell, also, was introduced, and testified that he knew that the land had been platted by Ragsdale, and that it was a matter of general notoriety. Complainant showed that she bought the land under the belief and understanding that the lines of the lot were as indicated by the fence made by Fewell, and that there was nothing to give her notice that the city would ever claim any more land than was then being used by it as a street and a sidewalk. On the hearing the chancellor dismissed the bill.

The testimony of Hamilton, referred to in the opinion, is as follows: "I am a civil engineer, and was city engineer of the city of Meridian for about 15 years. I made a survey, as city surveyor and engineer, of block 2, of Ragsdale's survey of the city of Meridian. I found, upon making this survey, that the fence extended on the west of block 2, into Sixteenth avenue, a distance of 24 5-10 feet all along the western boundary of block 2. On the north of said block, the line of inclosure extended into Fourteenth street a distance of about 21 feet. I suppose this property was surveyed into lots, blocks, and streets by Mr. L. A. Ragsdale. He told me he had the survey made. I know the inclosure takes in the parts of Fourteenth street and Sixteenth avenue by measurement and survey of block 2, as above set out. I have looked at Exhibit A to the answer. It is the survey made by myself, and it shows the relative location of the boundaries of block 2, Ragsdale survey, and the lines of inclosure. This survey was made by me as city engineer, about the first of the present

year. I found the original corner of the partially vacant block south of block 2, and, from this as a starting point, located block 2. The starting point herein mentioned had been found by me prior to this time, and the point had been found to conform to the other streets and avenues in said Ragsdale survey of the city of Meridian."

Miller & Baskin and Witherspoon & Witherspoon, for appellant. McIntosh & Williams, for appellee.

CAMPBELL, C. J. We cannot affirm that the chancellor erred in his conclusion that the complainant had failed to sustain her bill. He was justified in accepting as true the testimony of the civil engineer, Hamilton, who testified positively, and as of knowledge, that the avenue and street were as claimed by the defendant. His testimony certainly made out a *prima facie* case for the city. If it was not true, there was a way to assail it and overthrow it. This was not done. An effort was made to impair and destroy it, by showing the want of correspondence among various maps of Meridian, but, giving full credit to the testimony as to this, Hamilton's testimony that the lines are as stated by him may be accepted as a safe guide to the proper result. It is true that there is no specific evidence as to a dedication of the avenue and street by Ragsdale, but the deeds from him to Fewell, and from Fewell to the appellant, show that the "block" was in the "Ragsdale survey," and was bounded by streets, and the recognized maps show avenues and streets, and the only real dispute is as to their width; and as to this, it seems to us, upon all the evidence, the case is with the city. It is not claimed by counsel for the appellant that the city has lost its right to the openings by the statute of limitations, but the argument is that the city is estopped to claim by what has occurred. We are committed to the doctrine that a public street cannot be lost, and become private property, by mere occupancy for the time prescribed to bar actions for land held adversely. *Vicksburg v. Marshall*, 59 Miss. 563. We adhere to that, and we are not willing to declare against the doctrine of equitable estoppel as applied to protect individuals against municipal claims under some circumstances. There may be cases where we would not hesitate to use the beneficent doctrine of estoppel in pais against a municipality. We can imagine such a case, but this is not one. Affirmed.

(59 Miss. 255)

ALABAMA & V. RY. CO. v. BOLDING.  
(Supreme Court of Mississippi. Oct., 1891.)  
JUDGMENT—VACATION—WRITS—SERVICE ON CORPORATION—MISNOMER—WAIVER—DE FACTO OFFICER.

1. The court cannot, at a term subsequent to that at which a judgment was rendered, vacate the same for errors of law in the pro-



ceedings, but can only do so where the judgment is void.

2. The sufficiency of the return of the summons on its face, and of the declaration on demurrer, and the action of the court in allowing a judgment by default taken on the first return of summons to be set aside, the return amended, and judgment by default to be again taken, and writ of inquiry of damages to be immediately executed and followed by final judgment, are all matters pertaining to the practice of the court, with a party properly before it, involving a question of error, and not of jurisdiction, and are no ground for vacating the judgment at a subsequent term.

3. One acting as deputy under appointment by the sheriff, though he has not qualified as required by law, is a de facto officer; and, as between third persons, his acts, such as service of process, are valid.

4. Under Code, § 1529, service of summons on a station agent of a railroad company is sufficient, and it matters not whether the office or principal place of business of the company is in the county in which the action was brought or not.

5. Where the declaration and summons were against the A. & V. "Railroad" Co., and the summons was served on the authorized agent of the A. & V. "Railway" Co., and a judgment by default taken against the A. & V. "Railroad" Co., execution may issue against the property of the A. & V. "Railway" Co., as the company, by failing to appear, waived the misnomer, just as much as if it had appeared and failed to plead it.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by Frederick Bolding, by his next friend, against the Alabama & Vicksburg Railway Company. Judgment having been rendered by default, and execution issued thereon, defendant petitioned to vacate and quash, and gave a supersedeas bond. The petition was denied, the supersedeas set aside, and judgment rendered on the bond. Petitioner appeals. Affirmed.

In the declaration defendant was called the Alabama & Vicksburg Railroad Company. The suit was brought to recover damages for personal injuries. A summons was issued commanding the sheriff to summon the Alabama & Vicksburg Railroad Company, and is indorsed: "Received Oct. 5th, 1890. R. J. Harding, Sheriff. By Ratcliff, D. S." It is also indorsed: "Executed this 20th day of Nov., 1890. R. J. Harding, Sheriff. By J. J. Gold, D. S." It is further indorsed: "Executed this writ personally upon defendant, by handing a true copy of same to C. W. Barbour, agt. of Ala. & Vicksburg Railroad Co. at Edwards, Hinds county, Miss., this 20th day of Nov., 1890. R. J. Harding, Sheriff. By J. J. Gold, D. S." The summons was returnable to the January, 1891, term of the circuit court for the second district of Hinds county. On the third day of that term a judgment by default was entered, and a writ of inquiry awarded, to be executed on the fifth day of the term. At that time the only return on the summons was, "Executed." Counsel for plaintiff then made an oral motion to set aside the judgment by default taken on a previous day, and asked leave to have the sheriff amend the return so as to show a personal service

on defendant. Plaintiff was allowed to show that service was executed personally by delivering a copy to C. W. Barbour, the agent of defendant, and the court allowed an amendment of the return, and sustained the motion setting aside the first judgment by default, and then, after the return on the summons had been amended, another judgment by default was taken, and a writ of inquiry was executed, and plaintiff's damages assessed at \$5,000. An execution was issued on this judgment, but afterwards defendant filed its petition for a writ of supersedeas against said judgment, setting up the foregoing facts, and praying that the judgment be set aside, the execution superseded and quashed. The writ of supersedeas was awarded, and the bond was made by defendant as was directed by the fiat. The contention of defendant was that the name in the proceeding was not its corporate name; that it had never in fact been served with summons; that service on its agent Barbour was not sufficient, as the corporation had its domicile in Jackson, in the first district of Hinds county, and had a resident director there, and an agent appointed to accept service, and that service was not had on either. Plaintiff answered said petition, denying all the allegations thereof. On the issue thus made the testimony of C. W. Barbour was taken. He testified that the summons had never been served on him. In answer to the following question, he said: "Question. You cannot state positively to the court if you received any copy of the writ? Answer. I would not state positively, because it might have been done. To the best of my belief, I did not, because I have no knowledge of it." It appears from the evidence that J. J. Gold had for several years acted as deputy sheriff, and he had been appointed in writing, but he had not been sworn in as required by law. He testified positively that he did serve the summons personally upon Barbour.

W. L. Nugent, for appellant. R. N. Miller and J. K. McNeely, for appellee.

CAMPBELL, C. J. The only ground on which the motion to vacate the judgment could be sustained is that it is void. Mere irregularities,—questions of error or no error,—such as might cause a reversal on appeal, and for which the judgment would not be pronounced void, cannot be availed of by motion before the court which rendered the judgment. It cannot, at a term subsequent to the judgment, reverse or annul it for mere errors of law in the proceedings. Only this court can do that.

The only ground, of those alleged, on which the judgment assailed could be held to be void, is that the defendant was not summoned as the law provides, so as to give the court jurisdiction to pronounce judgment against it. The sufficiency of the re-

turn of the summons on its face, and of the declaration on a demurrer, and the action of the court in allowing the judgment by default taken on the first return of the summons to be set aside, the return by the sheriff's deputy to be amended, and judgment by default to be again taken, and writ of inquiry to be then immediately executed and followed by judgment final, are all matters pertaining to the practice of the court, with a party properly before it, and involve a question of error or not, and not of jurisdiction. Was the defendant duly summoned? If not, the judgment should be vacated. If the defendant was summoned as the law requires, no relief can be had. The solution of this question involves both fact and law. It is a question of fact whether or not the summons was served on Barbour, as agent. The evidence is somewhat conflicting, and the circuit judge found the fact in favor of the plaintiff, and we are not willing to set aside this conclusion, believing it to be warranted. The questions of law are the sufficiency of service of the summons by Mr. Gold, describing himself as deputy sheriff; the sufficiency of a service of summons on Barbour, agent; and the validity of a judgment against the appellant on service of the summons issued against Alabama & Vicksburg Railroad Company. Although Gold had not qualified as prescribed by law for deputy sheriffs, he was acting as such under appointment by the sheriff; was a de facto officer; and, between third persons, his acts must be held valid. Service of summons on an agent such as Barbour was—a station agent—was sufficient to authorize judgment against the corporation he represented. Code, § 1529. It matters not whether the office or principal place of business of the corporation was in the county in which the action was brought or not. The declaration and summons were against A. & V. Railroad Company. The summons was served on Barbour, station agent of the Alabama & Vicksburg Railway Company, and the judgment by default was against the A. & V. Railroad Company, on which execution issued against A. & V. Railroad Company. The claim is that a valid judgment could not be given in this state of case under which to take the property of the A. & V. Railway Company. The question is as to the effect of the misnomer. There are cases which hold that one sued and served by a wrong name may disregard the summons. All agree that one summoned by a name not his own, and who appears and does not plead misnomer, waives it, and is bound by the judgment in the wrong name. There is no sound reason for a distinction in the two classes of cases. The true view is that one summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing of his opportunity to appear and object, whereby the true name

would be inserted in the proceedings, (Code, § 1581,) should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterwards be silent as to this matter. This view is sustained by the books. 1 Black, Judgm. § 213; Freem. Judgm.; Welch v. Kilpatrick, 30 Cal. 202; Insurance Co. v. French, 18 How. 404; Bank v. Jagers, 31 Md. 38; Hoffield v. Board of Ed., 33 Kan. 644, 7 Pac. Rep. 216; Waldrop v. Leonard, 22 S. C. 118; Smith v. Bowker, 1 Mass. 76; Manufactory v. Adams, 10 Mass. \*360; Guinard v. Heyinger, 15 Ill. 288; Parry v. Woodson, 33 Mo. 347; Waterbury v. Mather, 16 Wend. 611; Smith v. Patten, 6 Taunt. 115. There is no distinction in this respect between natural persons and corporations. When a summons is served on the authorized agent of a corporation, it is served on the corporation. He is the corporation for this purpose, and it is because of this that a judgment by default may be rendered at the return term against the corporation on whose agent summons is personally served, as we hold may be done. The case, Insurance Co. v. French, 18 How. 404, cited above, is, besides sustaining our view as to the misnomer, a decision directly in point as to the effect of service on an agent of a corporation. It binds the corporation just as if the service was on one designated by the charter to receive it, or authorized to do so by its power of attorney. It must be so, for process can be served on a corporation in no other way than by service on some officer or agent qualified by law for that purpose, and, "for the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer." Affirmed.

(69 Miss. 284)

#### ALABAMA & V. RY. CO. v. BOLDING.

(Supreme Court of Mississippi. Oct., 1891.)

##### APPEAL—SUPERSEDEAS—DISCHARGE.

Code 1880, § 1421, allowing a motion to discharge a supersedeas in any appeal, applies only to cases where a supersedeas should not have been permitted.

Frederick Bolding brought suit against the Alabama & Vicksburg Railway Company for damages. The writ was issued against the railway company, and was returned, "Executed this 20th day of Nov., 1890." On this return a judgment by default was rendered, and a writ of inquiry awarded to inquire of said damages, which was to be executed on the following Friday, the last day of the term. On the day the return was made, by leave of the court, without notice to the defendant, the former judgment by default was set aside, and a new judgment by default was rendered, without the issuance of a writ, or notice to the defendant, a jury was called, and the damages assessed at \$5,000. Execution was levied on the prop-

erty of the defendant, whereupon it presented its petition to the court, praying a supersedeas of the levy, and that the judgment be vacated. The court refused to vacate the judgment, and from that judgment defendants appealed to this court, and the judgment was affirmed. Defendants now appeal from the original judgment, and executed a supersedeas bond. Defendants asked and obtained an order that the mandate upon the judgment already affirmed be withheld, pending the consideration of this appeal, until the hearing of the appeal. This is a motion by plaintiff to discharge the supersedeas, and set aside the order staying the mandate in this cause, because the judgment superseded was reviewed by this court and affirmed on the former appeal to this court, (13 South. Rep. 844,) and said judgment is res adjudicata of all errors assignable of the proceedings on which this judgment superseded was rendered; because the defendant had waived all irregularities and errors which could be assigned; because defendant is estopped to prosecute this second appeal, and again supersede the judgment by the former proceedings in this court, and the judgment now superseded was merged and extinguished by the statutory judgment on the discharge of the first supersedeas. Motion denied.

R. N. Miller and J. K. McNeely, for the motion. Nugent & McWille, opposed.

CAMPBELL, C. J. The object of section 1421 of the Code of 1880<sup>1</sup> is to give to him whose judgment or decree is superseded the right to obtain the order of this court to discharge the supersedeas at any time before the appeal is returnable, so as to relieve against the superseding of a judgment or decree where the law does not allow a supersedeas; and the operation of the statute must be confined to cases in which, from the nature of the case, the law does not permit a supersedeas. If the case be one in which the law allows a supersedeas, and the objection to it goes to the merits of the appeal, or is founded on something in the nature of a bar to it, that cannot be a ground for action by the court under section 1421, but will be available when the case is heard on the appeal. The test is, is the judgment, decree, or order appealed from and superseded, viewed by the record of it, one in which the law provides for an appeal and supersedeas? If so, all questions involved in the appeal must be reserved until the case is heard in its order. Motion denied.

<sup>1</sup> This section provides that a motion to discharge a supersedeas in any appeal to the supreme court may be made before, and heard by, said court, on 10 days' notice to the opposite party, at any time before such appeal is returnable before said court, which shall hear such motion, and make such orders and render such judgment as may be proper in such case.

(30 Miss. 168)

# ALABAMA & V. RY. CO. v. BROOKS.

(Supreme Court of Mississippi. Oct., 1891.)

**LIBEL—QUALIFIED PRIVILEGE—MOTIVE—PUBLICATION—EVIDENCE—PLEADING—HARMLESS ERROR.**

1. Sustaining a demurrer to a plea, the substance of which was restated in other pleas, is not reversible error.

2. An agent of a railroad company, in answering a letter from attorneys putting in a claim for baggage of their client lost by the railroad company, has a qualified privilege, and, though he therein charged the client with the larceny of the baggage, the company will be liable only on proof of malice or the absence of honest belief in the truth of the statements of the letter.

3. Though the agent who wrote the letter testified that he honestly believed the facts therein stated, it was a question for the jury whether he did so believe, and what his motive was.

4. The agent having exceeded his privilege in answering the letter of the attorneys, the publication of the libel in his answer was complete when it was received and read by the attorneys.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by J. S. O. Brooks against the Alabama & Vicksburg Railway Company for libel. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for damages growing out of an alleged libel. On the 27th day of May, 1890, W. W. Bond, superintendent of defendant railway company, wrote the following letter: "(Claim of J. S. O. Brooks, \$1,155.) Messrs. Dabney & McCabe, City—Gentlemen: I have yours of 16th inst., inclosing very modest claim for only \$1,155, on account of the alleged loss of J. S. O. Brooks' valise. I have investigated this matter thoroughly, and find that this claim is based simply on Mr. Brooks holding one of our checks. This valise, together with his trunk, arrived at Vicksburg 'O. K.,' and he simply walked off with the valise without giving the baggage master an opportunity to take the check up, and the next day sent down the check, together with one for his trunk, and requested that we deliver this baggage. As the matter stands, I think that, if Mr. Brooks sees fit to press his suit, we will have to take some action in regard to his taking this property away while it was in the possession of the railroad company, without giving up his check. Yours, truly, W. W. Bond, Supt." Previous to this, Brooks had been a passenger on appellant's road from Vicksburg to Meridian, and had checked a trunk and valise. The valise was lost at Vicksburg, and after sufficient time to allow search to be made for, and the valise not being found, Brooks placed the claim in the hands of Dabney & McCabe, attorneys at Vicksburg, and the above letter was written in reply to a letter by them to Bond in regard to the claim. The declaration alleges that appellant's purpose in writing and publishing the aforesaid letter was to charge, among other things, and to have it believed,

that defendant had thoroughly investigated the claim propounded by plaintiff for the loss of a valise and its contents while in possession of the company, and to charge and have it suspected and believed that it had been found, upon investigation, that, after the valise had arrived at Vicksburg, plaintiff had wrongfully, willfully, maliciously, and feloniously and fraudulently gotten possession of his valise, and carried it away without surrendering the check, and that he was falsely and fraudulently trying to collect the value of the valise and its contents. The declaration alleges that the charge thus made was written and published wickedly and maliciously, intending to injure the plaintiff in his good fame and credit, and to bring him into public scandal, infamy, and disgrace, and did so, to his damage, \$5,000. The defendant filed the general issue, with notice that, under it, it would rely upon the defense that Bond had no authority to represent them as to matters of lost baggage. Defendant filed a second plea, to which plaintiff demurred, and the demurrer was sustained. Defendant then filed its third and fourth pleas, setting up substantially the same defense as the second plea, to which a demurrer was sustained, and a demurrer to these pleas was overruled.

Nugent & McWille, for appellant. Dabney & McCabe, for appellee.

COOPER, J. If it be conceded that the demurrer to the second plea should have been overruled, no reversible error would be shown, since under the general issue, and under the third and fourth pleas, the defendant had advantage of all matters of defense set up in the second plea. In truth, the whole controversy was upon the facts set up by that plea, and which, upon the demurrer being sustained, were substantially restated in pleas 3 and 4. The defenses introduced were that Bond had no authority, as agent of the defendant, to write the letter, and, if he had, that, under the circumstances, it was not a libel. The extent of the agency of Bond was fairly submitted to the jury, and it cannot be said that the verdict, by which it is found that he was the representative of the defendant in relation to the business in which the letter was written, is not supported by the evidence. Bond himself was examined as a witness, and did not deny his authority to act for the company. He professed, by acting, to have authority. Other executive officers of the company recognized his right so to act, and ample other evidence appears of record to show that his act was within the scope of his duty.

The court, by instructions to the jury, gave to the defendant the benefit of its defense that the letter alleged to be libelous was in reply to a communication from the plaintiff's attorneys. It told the jury that the

circumstances created a qualified privilege, and that the defendant could only be liable upon proof of malice, or the absence of honest belief in the truth of the statements contained in the letter; in other words, that the defendant was not liable if its servant, in making reply to the letter of the attorneys, kept himself within the privilege of the occasion, but was liable if he took advantage of the opportunity afforded by the occasion to maliciously libel him, or to write concerning him libelous matter which he did not believe to be true. That Bond intended by his letter to charge the plaintiff with larceny of the lost baggage, or with having lawfully taken it away, and then to have conceived the purpose of fraudulently recovering its value from the defendant by reason of his yet having its check in his possession, was admitted by him while testifying. It is true he affirmed that he honestly believed these facts to be true; but whether he did or did not so believe was a question for the determination of the jury, and his assertion is not conclusive of what the motive was. *Starkie, Ev. § 89; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. Rep. 208.* One to whom application is made for information may, within the limits thereof, write or speak words which, under other circumstances, would subject him to suit for libel or slander, but "the scope of the defamatory matter must not exceed the exigency of the occasion." *Cooke, Defam. 35.* Nor can he take license from the occasion to gratify his malice, or to state, as facts, libelous matter which he does not believe to be true. The exemption from responsibility for libel in privileged communications is of two classes: First, those of absolute privilege, in which no action lies, though the motive be malicious, in which class are included legislative and judicial proceedings. *13 Amer. & Eng. Enc. Law, 406; Verner v. Verner, 64 Miss. 321, 1 South. Rep. 479.* Second, qualified privilege for libel, in which no inference of malice arises from the mere fact of the prejudicial statement, but the plaintiff must prove malice in fact. "The term 'privileged,' as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge." *Lewis v. Chapman, 16 N. Y. 369; Wright v. Woodgate, 2 Cromp., M. & R. 573; Toogood v. Spyrring, 1 Cromp., M. & R. 181; Delany v. Jones, 4 Esp. 193; Laughton v. Bishop, L. R. 4 P. O. 504; Spill v. Maule, L. R. 4 Exch. 232; Clark v. Molyneux, 3 Q. B. Div. 237.* The plaintiff, recognizing the occasion of the publication as privileged, assumed the burden of establishing the malice of the defendant's superintendent, and by the verdict of the jury shows that he has supported his con-

tention in that behalf. We are not prepared to say that the verdict is not correct.

The publication was complete when the libelous letter was received and read by Messrs. Dabney & McCabe, the plaintiff's attorneys. This necessarily follows from the establishment of the fact (settled by the verdict) that the defamatory statement was not covered by the privilege of the communication. The letter from the attorneys called for any lawful reply from the officers of the defendant, but it did not invite any malicious defamation of their client; and the defendant's superintendent, by exceeding the privilege, deprived his principal of any defense it might have had if he had kept within it. Affirmed.

(99 Miss. 541)

### MOORE v. REDDING.

(Supreme Court of Mississippi. April, 1892.)

EXTENSION OF NOTE—QUESTION FOR JURY—CONSIDERATION.

1. A promise to pay interest is a sufficient consideration for a promise to extend the time for the payment of a note.

2. Whether the maker and payee of a note entered into an agreement to extend the time for the payment of a note is a question of fact, on the evidence, for the jury.

Appeal from circuit court, Yazoo county; J. B. Chrisman, Judge.

Action by A. Redding against J. P. Moore. From a judgment for plaintiff, defendant appeals. Reversed.

This is a suit in assumpsit by appellee against appellant on a joint note of R. G. Hudson and appellant, payable to Mary S. Powell, and by her indorsed to her mother (plaintiff) as a gift. The note is as follows: "One year after date we promise to pay to the order of Mary S. Powell four hundred dollars, with ten per cent. interest from date, value received. [Signed] R. G. Hudson. J. P. Moore." On the back of the note are the following indorsements: "Int. for one year, forty dollars, paid, and same extended one year, March 5th, 1888." "Int. for two years, eighty dollars, paid, and the same extended one year longer, Apr. 18th, 1890." R. G. Hudson having removed out of the state, suit was brought against Moore, the resident maker. Moore filed a number of pleas, all except a part of the fourth and the seventh setting up the defense that he was an accommodation maker, of which plaintiff had notice, and that he was discharged because of an extension given Hudson for a definite time for a valuable consideration. On all the pleas, issue was joined, except the fourth and seventh, which were demurred to, and the demurrer was sustained. The plaintiff introduced the note and testimony of Mrs. Powell, and rested. Mrs. Powell testified, in substance, as follows: That when the note became due, in March, 1888, she went to see Mr. Hudson, but did not find him in his office, and

a few days afterwards she saw him, and told him that the note was due, and wanted to know what he was going to do about it. Hudson replied that he would pay the interest, and carry the paper. She told him that she needed the money, and he replied: "Well, I will keep it until you need it, and, when you do, give me twelve days' notice, and I will raise it for you," and she said all right. That, a few days afterwards, Hudson sent her the interest, and wrote her a note asking her to send him the note. She sent the note to him, and he returned it, with the first indorsement written on it. She remembered nothing as to the second indorsement except that the interest paid was the accumulated interest for two years since the payment of the first interest. Defendant introduced the deposition of R. G. Hudson, who testified as follows: That Moore was an accommodation maker. That they were in the habit of going on each other's paper to raise money. He thought Mrs. Powell knew the nature of the transaction. That the indorsement on the note correctly expressed the only agreement about the extension between Mrs. Powell and himself that he had any recollection of. Defendant testified that he did not receive any of the money, and that, if the paper had been presented to him for payment when it was due, he would have paid it, but, as it had been extended about three years, he refused to pay it; that he had no knowledge of the extension. Defendant then rested, and asked a peremptory instruction, which was given.

Williams & Williams, for appellant. T. H. Campbell, for appellee.

COOPER, J. There can be no controversy about the law of this case. Moore signed the note sued on as surety for R. G. Hudson, now a nonresident of this state, and the fact of his suretyship was known to Mrs. Powell, the payee of the note. Appellee, the present owner of the note, received it as a gift from Mrs. Powell long after the transactions which are relied upon by Moore as discharging him from liability. It is not suggested that he knew of, or consented to, the supposed contract for extension between his principal and Mrs. Powell.

It is the well-settled law, in this state and elsewhere, that the mere passive conduct of the creditor in failing to pursue the principal debtor, or a mere agreement not to do so, does not release the surety. It is equally well settled that if the creditor, without the consent of the surety, enters into a contract with the principal, by which the right of action is suspended for a specific time, the surety is released. A contract, of course, implies a consideration, and the agreement of the parties upon the same. The authorities cited and relied on by counsel for appellant and appellee group them-

selves around this central question, and illustrate particular circumstances under which, in the various states of case, extensions have been held to have been, or not to have been, under and by virtue of contracts. Whether there is a contract or not is a question of fact for the decision of the jury. Its effect, if proved, is for announcement by the court.

The decisive inquiry in this case was whether Mrs. Powell agreed that Hudson should retain the money for another year on interest, and Hudson agreed so to do. The right to use the money for a year would be a sufficient consideration to uphold Hudson's promise to pay interest, and his promise to pay interest during that time a sufficient consideration to support Mrs. Powell's promise to extend the payment of the principal sum. It is wholly immaterial what rate of interest is agreed on by the parties. It may be the same, or a greater or less, rate than that stipulated for by the original contract. The right to have the use of money for a defined time, and the right to have interest at any agreed rate, for any defined time, are alike deemed valuable in law; and reciprocal promises—one by the creditor, to permit the money to remain on interest, and the other by the debtor, to retain it on interest—mutually support each the other. *Brown v. Proffit*, 53 Miss. 649. Whether Mrs. Powell and Mr. Hudson entered into such contract was a question of fact which, under the evidence, should have been submitted to the jury. Judgment reversed, and cause remanded.

(69 Miss. 833)

#### ALSOBROOK v. EGGLESTON et al.

(Supreme Court of Mississippi. April, 1892.)

PARTITION—COMMISSIONER'S SALE—EXCEPTIONS TO REPORT—ABANDONMENT—CONFIRMATION OF SALE—WHAT CONSTITUTES—ADVERSE POSSESSION.

1. Where the decree for a sale of land in partition was not complied with by the commissioner, and the report of the sale was promptly met by exception by the owners, the fact that no further steps were taken raises the presumption that the sale, not the exception, was abandoned.

2. Currency placed by the purchaser in the commissioner's hands to pay for the land was refused by the owners, the commissioner's deed was never recorded, nor did it appear that the purchaser claimed any interest thereunder after the exception was filed. Four years after the commissioner's sale, he bought the undivided half interest of one of the cotenants, promptly recording his conveyance. *Held* not to show a confirmation of the sale by act of the parties.

3. The purchase of one cotenant's interest raised a presumption that he recognized the title of the other cotenants; and a payment of taxes by him, and claim of ownership of the whole tract, do not constitute an adverse holding, unless notice was brought to such cotenants that their title was denied.

Appeal from chancery court, Tallahatchie county; W. R. Trigg, Chancellor.

Partition by the heirs of W. B. Alsobrook against the heirs of W. H. Eggleston and others. From a decree dismissing the bill, complainants appeal. Reversed.

This is a bill for partition by appellants against appellees, alleging that W. B. Alsobrook, ancestor of appellants, died seised and possessed of an undivided one-half interest in the lands described in the bill; that A. Payne owned the other half, and sold to W. C. Eggleston, ancestor of appellants. The answer denies that Alsobrook died seised and possessed as alleged, and avers that the lands were patented by the state of Mississippi to Payne. The patent was introduced on the hearing. The answer also sets up proceedings instituted in chancery in Tallahatchie county in 1861 by Payne against Alsobrook's heirs for partition. The record in this case was read by agreement in this case. Most of the lands—not all—were decreed to be sold, and were sold July 2, 1862, and were purchased by W. C. Eggleston. By the decree the commissioner was directed to sell the land upon a credit of six months, and to take the bond of the purchaser, with sufficient sureties; but there was a report of the commissioner made November 19, 1866, stating that the purchaser paid his bid in Confederate money at the time of his purchase, and the commissioner filed the Confederate money with his report. The appellants filed exceptions to the report at that time, but no action was taken, and the proceedings were abandoned. Eggleston took possession under his deed, and has continued in possession ever since. Eggleston purchased the interest of Payne in 1868. The evidence shows that Eggleston paid the taxes on all the land, and in 1880 sold 40 acres of it; but the evidence does not show that the heirs of Alsobrook had any knowledge of his adverse claim. The answer, besides claiming title by virtue of the commissioner's deed, claimed title by adverse possession thereunder; also under some tax titles purchased by Eggleston. There was a decree in favor of defendants, dismissing the bill of complainants, from which they appeal.

W. B. Marshall and W. S. Eskridge, for appellants. R. H. Golladay, for appellees.

COOPER, J. The effect of the decree made upon the petition of Payne against the heirs at law of Alsobrook for sale of the lands for partition was to conclusively settle the equitable right of Alsobrook's heirs to one-half of the lands therein described. There was no lawful execution of that decree by Davidson, the commissioner appointed to make the sale. He was required by law to make sale of the lands upon credit of six months, and to take bond with security from the purchaser in double the amount of the purchase money, and it was his duty to make report of his action at the next term of the court. But he substituted his

own will for that of the law, of which the purchaser was bound to take notice, and received Confederate money as payment for the land, which he retained in his hands until after the overthrow of the Confederacy, and then, and not till then, reported to the court his action in the premises, and brought into court the worthless funds. This report was promptly met by proper and just exceptions, after which no action was taken either on the report or the exceptions thereto. Counsel for appellees say that the exceptions were abandoned, but we find no evidence thereof in the record. The commissioner had no authority to receive the money, and, though it was paid to him, he held it as the mere depositary of the purchaser. *State v. Cox*, 62 Miss. 786. Confirmation by the court or by the act of the parties was essential to give validity to the sale and conveyance. *Henderson v. Herrod*, 23 Miss. 434; *Sanders v. Dowell*, 7 Smedes & M. 206; *Gowan v. Jones*, 10 Smedes & M. 164. The office of exceptions to a report of sale is to prevent confirmation; and when a report of sale is made, and exceptions thereto are filed, and no further steps are taken, the inference is that the sale, and not the exception, is abandoned. There is no evidence of a confirmation in pais. The purchaser paid nothing for the land. He placed certain currency in the hands of his depositary, the commissioner, to be used for that purpose; but the owners of the land refused to receive it, and repudiated the sale. Eggleston, the purchaser, seems to have appeached his condition, for, four years after the commissioner's sale, he purchased the undivided one-half interest of Payne in the land, and accepted a conveyance thereof from him, which conveyance was promptly recorded. The deed from the commissioner seems never to have been recorded, and, so far as complainants are shown to have known, he never claimed any interest thereunder after their exceptions were filed. We find nothing in the record from which an affirmance by the parties could be inferred.

There is no sufficient evidence of an ouster of complainants from the land, and an adverse holding by Eggleston. His entry upon the land, and deadening one hundred acres of timber thereon, and building two cabins there, were before the exceptions to the report had been filed; and doubtless this action on his part was upon the expectation that the sale would be confirmed. But three years after this he recognized the title of Payne to one-half of the land, and, inferentially, that of complainants to the other interest. After he had acquired Payne's title, he was, in law, entitled to hold the land, and the presumption is that he held in recognition of the right of his cotenants. Until notice was brought to them of the fact that their title was denied, they might rely upon the presumption that it was recognized. The

lands are wild and unoccupied, (except 40 acres sold by Eggleston to one Wade, less than 10 years before this suit was commenced,) and payment of taxes and claim of ownership was not sufficient evidence of an ouster, nor of adverse holding by Eggleston. The complainants were entitled to relief. The decree is therefore reversed, and cause remanded.

(69 Miss. 804)

BUCKLEY et al. v. BALDWIN et al.

(Supreme Court of Mississippi. April, 1892.)

APPOINTMENT OF RECEIVER—GROUNDS.

On application of B., a member of an insolvent firm, and a partner in another business with his mother, to whom he conveyed his interest therein, together with his interest in lands owned jointly by them, a receiver was appointed for the assets of the insolvent firm. Creditors of such firm filed a bill asking that a receiver be appointed for its assets, and for the property conveyed by B. to his mother, alleging that she was a partner in both firms, that the appointment of a receiver on B.'s application and the conveyance to B.'s mother was to defraud complainants, and that she was selling the goods conveyed to her. The bill showed that she was solvent, and the land conveyed to her worth more than the amount of complainants' debts. *Held* not to show sufficient grounds for the appointment of a receiver.

Appeal from chancery court, Clarke county; S. Evans, Chancellor.

Bill by Baldwin & Putnam and others against J. E. Buckley and others for a receiver for defendants' property. From a decree granting the bill as prayed, defendant Buckley appeals. Reversed.

There were filed in this cause two bills by complainants. One is described as the original, the other as the amended, bill. The gravamen of the bills is that the complainants are creditors of Sim Perry & Co., and that M. W. Buckley, was a member of the firm of Sim Perry & Co., of Newton, Miss., and also a member of the firm of J. E. Buckley & Son, at Enterprise, Miss., both of said firms conducting a mercantile business. The bills allege that the said firm of Sim Perry & Co. was a partnership doing business under the firm name of Sim Perry & Co., and that the individual members composing said firm are Sim Perry, M. W. Buckley, and Mrs. J. E. Buckley. They further allege that the said M. W. Buckley, on the 9th day of January, 1892, with intent to defraud his creditors, entered into a conspiracy with Mrs. J. E. Buckley and Sim Perry, and, in furtherance of said conspiracy, filed a bill against Sim Perry in which he alleged that he and Sim Perry were the only partners of the Newton firm, and that said Sim Perry, on account of his conduct, had rendered it impracticable to continue said partnership business, and procured the appointment of a receiver for the business of Sim Perry & Co., and that there was turned over to said receiver \$8,000 worth of merchandise, and \$20,000 worth of choses in action, belonging

to said Newton house; that these assets were actually worth \$9,300. It further alleges that said M. W. Buckley, as a further scheme to defraud complainants and other creditors, on the 11th day of January, 1892, made and executed a bill of sale conveying his one-half interest in the goods, wares, and merchandise in the store of J. E. Buckley & Son at Enterprise; also his one-half interest in the choses in action; also his interest in certain real estate, estimated by complainants at \$18,290. The bill further charges that Mrs. J. E. Buckley was a partner of the said firm of Sim Perry & Co. at Newton; and that she participated in said fraudulent scheme; and that the debt which said bill of sale was made to pay was not real; and that the consideration was wholly inadequate; and that said transaction was a fraud upon complainants; and that Mrs. J. E. Buckley had real estate in Clarke and other counties; and that she was selling her goods, wares, and merchandise; and that she was renting out her lands, taking notes therefor; and that the property was being disposed of and placed beyond the reach of creditors. The bill prays that a receiver be appointed for all the property, including the firm of J. E. Buckley & Son, of Enterprise, Miss. The bill alleged that an immediate necessity for the appointment of a receiver exists. It asked that the sale from M. W. Buckley be canceled, and the property conveyed be subjected to complainants' debts. Complainants applied to the chancellor in vacation for the appointment of a receiver. No notice was given to the defendants of the application. Counsel for Mrs. Buckley, having heard of the application, appeared before the chancellor in her behalf, and asked to be heard before the appointment of a receiver, they having filed an answer for M. W. Buckley, in which, under oath, he denied all the allegations in the bill touching the fraudulent conduct alleged against the defendants. This answer stated that J. E. Buckley was confined to her bed by sickness, and was unable to answer the bill. The chancellor declined to hear said answer, or to consider the same, or to hear said counsel, except as a matter of courtesy. Counsel declined to argue the matter. The chancellor appointed two receivers, directing them to take charge of the property that had been conveyed by M. W. Buckley to J. E. Buckley, and to take charge of all the estate of Mrs. J. E. Buckley and J. E. Buckley & Son. Mrs. J. E. Buckley, one of the defendants, obtained from Chief Justice CAMPBELL an appeal and supersedeas from the order making said appointment.

Miller & Baskin and Brame & Alexander, for appellant. Hamm, Witherspoon & Witherspoon, for appellees.

CAMPBELL, C. J. The bill as originally presented, and as amended, fails to contain

a sufficient showing for the appointment of a receiver, and one should not have been appointed. The bill itself shows clearly that there was no occasion for, or propriety in, the appointment of a receiver; and, on the contrary, that there should not be such interference by the chancellor with the business and property of the appellant. Creditors have rights which should be upheld. So have others, which must not be disregarded in the effort to enforce the rights of creditors. When a proper case is made for a receiver, the power to appoint should be exercised, but, even then, with due regard to the situation and circumstances of the case and the rights and interests of defendants, and never without notice to them and opportunity to be heard, unless there is a satisfactory showing of a necessity for such urgency. The order appointing a receiver is reversed and vacated, at the cost of the complainants in this court and the court below.

(89 Miss. 735)

#### OGLESBY v. BINGHAM et al.

(Supreme Court of Mississippi. April, 1892.)

ACTION TO ENFORCE VENDOR'S LIEN—LAND HELD IN ENTIRETY—RIGHTS OF SURVIVOR.

1. Where the widow and children of intestate agree that she shall take a child's part, instead of dower, and join in conveying the land, receiving in part payment the purchaser's note, which is given to the widow as her distributive share, her heirs may enforce a vendor's lien on the land, since she did not convey a dower interest which terminated at her death, but, together with the children, conveyed a fee in part payment of which the note was given.

2. A deed of land executed to a man and his wife jointly creates in them an estate by the entirety, and on her death he becomes sole owner.

Appeal from chancery court, Webster county; Baxter McFarland, Chancellor.

Bill by R. J. Bingham and others against C. F. Oglesby and others. From a decree for complainants, C. F. Oglesby appeals. Affirmed.

This bill was filed to enforce a vendor's lien for land sold by Mary J. Young and the children of her husband, A. G. Young, to C. F. Oglesby and his wife. Mrs. Mary J. Young and the six children of A. G. Young by a former marriage agreed verbally among themselves that Mrs. Young should take a child's portion of the estate of her late husband, who died intestate, in lieu of her dower. The estate owed nothing, and there was no administration. Afterwards the widow and four of the children, two of them having received advances during the lifetime of the father, in consideration of which they relinquished their claim to part of the estate, conveyed the land in controversy to C. F. Oglesby and his wife, H. C. Oglesby, and jointly executed a warranty deed, dated February 20, 1880. Part of the purchase money was paid cash, and C. F. Oglesby exe-



cuted his note payable to Mrs. Mary J. Young for \$328.92 for balance of purchase. In the settlement of the estate between these four children and Mrs. Young the note was given to Mrs. Young as part of her share of the estate. Mrs. Young died, leaving no will, owing no debts, and there was no administration of her estate. Mrs. H. C. Oglesby died. Her death was suggested, and her minor children were made parties to the bill. C. F. Oglesby sets up in his answer that Mary J. Young only had a dower interest in the land, and the note was given in purchase of her interest; that it could only bind the estate conveyed; that as to Mary J. Young there was nothing on which the lien could attach. The children of Mrs. H. C. Oglesby contend that their mother, as one of the heirs of A. G. Young, was entitled to an interest in the land, and under the deed to herself and husband she took a half interest in the land which descended to her heirs. From a decree for complainants, directing the land to be sold, C. F. Oglesby appealed.

A. F. Fox, for appellant. Leverett & Gore and R. O. Beckett, for appellees.

COOPER, J. The assignment of error and argument of counsel for appellant proceed upon the erroneous conclusion that Mrs. Young conveyed to him a dower interest in the land, and that the notes for which the lien on the land has been decreed were given for that interest. It may be true that, as between Mrs. Young and the heirs at law of A. G. Young, deceased, she would only have been entitled to a dower in the land, but, by an arrangement satisfactory to themselves, it was agreed that Mrs. Young should take a child's part in the estate; at least they proceeded upon the supposition that such were her rights, and, so believing, they joined with her in conveying the land to the defendant and his wife, (who was one of the heirs at law of A. G. Young, and who had received from her father, during his life, advancements equal to her part of the estate,) and, as part of the purchase price, the notes sued on were executed by the defendant. The estate taken by the defendant and his wife was by entirety, and by her death the defendant has become sole owner. Mrs. Young did not convey to the defendant a dower interest in the land. She and the other grantors conveyed a fee, and the note is a part of the purchase price of that fee. He got precisely what he contracted to get. He has not paid the purchase price. It is no concern of his what agreement the grantors made among themselves for distribution of the purchase price. They have not attempted to repudiate it, if they could do so; and the defendants will be protected by payment of the notes to the representatives of Mrs. Young. The decree is affirmed.

(69 Miss. 740)

ANDREWS v. STATE ex rel. COVINGTON.  
(Supreme Court of Mississippi. April, 1892.)

OFFICE AND OFFICER—TENURE—QUO WARRANTO.

1. Code 1880, § 398, providing that the term of office of all officers in the state "not otherwise provided for by law," shall be limited to four years, "and until the successor therein shall be duly qualified," does not apply to officers (the clerk of the circuit and chancery courts) elected under the constitution of 1869, section 19 of article 6 of which limits the term of office to four years, and does not provide for his holding office until qualification of his successor.

2. Const. 1890, § 136, providing that "all officers named in this article shall hold their offices during the term for which they were selected, unless removed, and until their successors shall be duly qualified," etc., refers to officers elected under its provisions, and does not extend the terms of office of persons then in office.

3. An information in the nature of quo warranto, manifestly brought as a private suit by the relator under Code, § 2587, for the purpose of trying his right to an office, is not on behalf of the state to evict the incumbent, and is demurrable if relator is not entitled to the office, though the incumbent has no right to continue therein.

4. In quo warranto to try title to an office, a demurrer by relator to a plea that relator was not a qualified elector at the time of his election should not be sustained, as it admits that relator was not a qualified elector, and therefore that, under Const. § 250, so providing, he was ineligible to office.

5. Where the law requires one desiring to enter upon an office to execute an official bond, and have the same approved by certain designated officials, he is not entitled to the office until the bond is approved, though he alleges that he tendered a sufficient bond, and that such officials conspired to disapprove the same, and thereby deprive him of the office.

Appeal from circuit court, Quitman county; R. W. Williamson, Judge.

Quo warranto by the state on the relation of W. T. Covington against J. D. Andrews to try the right to the offices of clerk of the circuit and chancery courts of Quitman county. Defendant's demurrer to the petition was overruled, and he filed a plea, a demurrer to which was sustained, and judgment rendered for relator. Defendant appeals. Reversed.

It appears from the petition that relator was elected to the offices in question, and received his certificate and commission, and took the oath of office, but that the bonds which he tendered to the defendant, the then incumbent of the office, and the president of the board of supervisors, were not approved by them. The petition alleged that they were disapproved in pursuance of a conspiracy between such officials to deprive him of his office. The plea filed by defendant after his demurrer had been overruled, showed that defendant had been elected to the offices in question for the term prior to the term in dispute, and that he was holding over after the term because no successor had qualified, and further alleged that relator at the time of his alleged election, and at the time his petition was filed, was not a qualified elector.

J. W. & W. D. Cutrer, for appellant. Ira D. Oglesby and James R. Chalmers, for appellee.

COOPER, J. The facts disclosed by the petition present a case in which it would be eminently proper for the state to proceed against the appellant, whose term of office expired on the first Monday in January, and who is exercising the functions of the offices of clerk of the circuit and chancery courts of Quitman county without shadow of right. Appellant was elected to said offices under the constitution of 1880, and by section 19 of article 6 the term of office was limited to four years. Section 396 of the Code of 1880<sup>1</sup> by express declaration applies only to terms of office "not otherwise provided by law." But the terms of office of the circuit and chancery clerks are "otherwise provided for by law," viz. by the fundamental law, the constitution. Section 136 of the constitution of 1890<sup>2</sup> refers to officers elected under its provisions. It has not the effect of extending the terms of office of persons then in office. The terms of officers extended by the convention was by ordinance; and by section 284 it was declared that all other officers should hold until the expiration of the time for which they were respectively elected or appointed. But, while we think the appellant has no right to continue in office, we cannot assent to the proposition that the present action is one in behalf of the state to evict him therefrom. This action is manifestly brought as a private suit by the relator, under section 2587 of the Code, for the purpose of trying his right to the offices of clerk of the chancery and of the circuit courts of Quitman county. As such it must fail, for the reason that appellee has not shown himself to be legally entitled to be inducted therein. By his demurrer to the plea of the defendant he admits that he was not a qualified elector of the state at the time of his election, nor at the time of the institution of this suit, and, not being such elector, he is, by section 250 of the constitution, ineligible to office; that section being that "all qualified electors, and no others, shall be eligible to office, except as otherwise provided in this constitution." There is no other provision relative to the offices relator claims the right to hold. But relator's petition was also subject to demurrer. He shows by it that he has not qualified himself (if otherwise competent) to enter into the discharge of the duties of the office by having given an official bond ap-

proved by the proper authorities, as the law requires. The law requires that one desiring to enter upon the offices named in the petition shall, as a condition precedent thereto, execute and have approved by certain officials designated an official bond for each office. The tender of a good bond, if rejected by the approving officer, cannot be held to be a compliance with this statutory condition. Nothing short of what the law requires is sufficient. Judgment reversed, the demurrer sustained, and petition dismissed.

(69 Miss. 764)

BOARD OF SUP'RS OF LOWNDES CO.  
v. LEIGH et ux.

(Supreme Court of Mississippi. April, 1892.)

HABEAS CORPUS—PROCEDURE—PAUPERS—POWERS OF COUNTY BOARD.

1. On petition for a writ of habeas corpus to procure possession of children alleged to be in the possession of defendant, where the return to the writ is that the children cannot be found, it is error for the court, under such circumstances, to hear and determine a demurrer to the petition, as the bodies of the children must be before it; but it should issue a writ directed to defendants, requiring them to produce the children, or show to the satisfaction of the court their inability to do so.

2. Under Code 1880, § 637, the board of supervisors has jurisdiction of poor orphans, and is authorized to direct the supervisor of the proper district to bind them out; and where such an order is made, and those who have custody of the children refuse to surrender them to the supervisor, the board may sue out a writ of habeas corpus.

3. The fact that the order of the board directing the proper supervisor to bind out such orphans erroneously directs that they be not "placed in the hands of either of the parties now contending for them," does not affect the supervisors' right to their custody.

Appeal from circuit court, Lowndes county; Lock E. Houston, Judge.

Petition by the board of supervisors of Lowndes county against F. M. Leigh and wife for a writ of habeas corpus to obtain the custody of certain poor orphans. The petition was dismissed on demurrer, and petitioners appeal. Reversed.

The petition showed that there had been a contest before the board for the custody of the children in question, between defendants and one Snell, and that the board thereupon made an order that one J. W. Gardner should take charge of them, and secure a suitable home for them, the order further providing that they should not be "placed in the hands of either of the parties now contending for them." The petition alleged that, at the time the order was made, the children were in defendants' custody, and that Gardner demanded their delivery to him, but that defendants refused to surrender them. A writ was issued, and returned by the sheriff with the indorsement that it had been executed on defendants, but that the children were not found. In this state of the case, defendants filed a demurrer to the petition, which was sustained.

<sup>1</sup> Code 1880, § 396, provides that "the term of office of all officers in this state, not otherwise provided for by law, shall be limited to four years, and until the successor therein shall be duly qualified."

<sup>2</sup> Const. 1890, § 136, provides that "all officers named in this article shall hold their offices during the term for which they were selected, unless removed, and until their successors shall be duly qualified," etc.

Harrison & Landrum, for appellants. J. A. Orr, for appellees.

CAMPBELL, C. J. The return "Not found" made the writ of habeas corpus in this case a failure, and the court should not have proceeded further with the case until it had secured the bodies of the children. Especially should it not have permitted the appellees to be heard until relieved of the suspicion, created by the allegations of the petition, coupled with the return made by the sheriff, that the children had been removed or concealed to evade the writ. The proper procedure would have been to issue a writ, directed to the defendants, requiring them to produce the bodies, or show to the satisfaction of the judge that they could not. They should not be permitted to test the question in dispute about the custody of the children until the children are before the judge, to be disposed of by his determination.

A demurrer to a petition for habeas corpus seems to us bad practice, but the judge erred in sustaining the demurrer to the petition, which presents a proper case for the issuance of the writ. The board of supervisors has jurisdiction of poor orphans, and is authorized to direct the supervisor of the proper district to bind out such poor orphans, etc. Code 1880, § 637. The petition shows that the board ordered one of its members, presumably the proper one, to take charge of these children, and secure for them a good home, etc., and that this member called on the appellees for the children, and they refused to surrender them, as they should have done. Undoubtedly, in this condition of things, the writ of habeas corpus was the appropriate means of securing the rightful custody of these children withheld from the person entitled thereto. Code 1880, § 2519. That part of the order of the board of supervisors directing that the children be not "placed in the hands of either of the parties now contending for them" may be nugatory, but the order for the supervisor of the proper district to procure a home for the children was free from objection, and he was entitled to the custody of the children; and he who had the children in his custody, on the facts stated in the petition, had no right to withhold them. The case of *Jack v. Thompson*, 41 Miss. 49, is not applicable. Apparently, the supervisor of the district is entitled to the custody of the children, that they may be dealt with according to law, and he is entitled to the writ of habeas corpus, whereby to obtain that custody. The power of the law should be exhausted to secure the presence of the bodies of these children before the judge as its minister, and then the case should be disposed of as may be proper when the facts are disclosed. We know nothing of the contention between parties as to the custody of the children, and say nothing as to that, but we do say that

the petition presents a case calling for the exercise of the power of the law to enable the constituted authorities of the county to perform the duties with which they are charged by law with respect to poor orphans in their county; and no one should be permitted to defy the law or its constituted authorities, or to trifle with its machinery. Reversed and remanded.

(69 Miss. 678)

### BROWN v. CRANE.

(Supreme Court of Mississippi. April, 1892.)

#### ATTACHMENT—NONRESIDENCE—DOMICILE.

1. Though one's domicile may be in another state, he may reside in this state, and in such case an attachment will not lie against him as a nonresident.

2. It appeared that defendant in attachment had a domicile in another state, but resided in this state for a few months prior to, and at the time of, the levy of the writ; that she expected to continue to so reside a few months longer, and then, after a temporary absence, to reside here permanently. This was known to plaintiff, and the writ was in fact executed in person on defendant. *Held*, that defendant was a resident, and the attachment could not be maintained.

Appeal from circuit court, Yazoo county; J. B. Chrisman, Judge.

Attachment by Summerfield Brown against Mary P. Crane on the ground of nonresidence. From a judgment for defendant, plaintiff appeals. Affirmed.

Calhoun & Green, for appellant. Barnett & Thompson, for appellee.

WOODS, J. It was long ago determined that "domicile" and "residence," under our attachment laws, were not convertible terms, and that a person may have his domicile in one state, and his residence, temporarily, in another. *Bowers v. Ross*, 55 Miss. 213. Granting that Mrs. Crane's husband had his domicile in Pennsylvania, (which is not satisfactorily shown by the evidence,) and that her domicile was that of her husband, she may yet have been a resident of this state at the time of issuing and levying the attachment writ. The evidence offered for the plaintiff in attachment (and no other was offered) shows that Mrs. Crane had actually resided in this state for a few months prior to the taking out and levying of the writ; that she was residing on her plantation, in this state, at the very time; and that she expected to continue to reside in the state for a few months longer, when she contemplated a temporary absence until the following October; and that thereafter it was her purpose to remove her household effects to her dwelling house on her plantation in Washington county, and thereafter make that her permanent abode. All this, moreover, was known to the attaching creditor. It is apparent, too, that the writ was, without trouble or delay, executed in person on Mrs. Crane by the proper officer in the county where the plaintiff knew she

could be found. On these facts being shown by plaintiff, the peremptory instruction of the court below for the defendant was altogether correct, for the ordinary process of the law could have been executed upon the debtor in any of the modes recognized by our statute for the serving of process upon residents of the state. Affirmed.

(69 Miss. 200)

**BUSH v. SOUTHERN BREWING CO.**  
(Supreme Court of Mississippi. Oct., 1891.)  
PRINCIPAL AND AGENT—CONTRACT—AGENT'S AUTHORITY.

Where an agent is indicted for conducting his principal's business without paying a local privilege tax, to which he believes such business is not justly liable, a contract by such agent, in the name of his principal, with an attorney, to defend him against the criminal prosecution, is not within the scope of his agency, and the principal is not liable thereon, in the absence of express authority to the agent to make the contract.

Appeal from circuit court, Warren county; J. D. Gilland, Judge.

Action by John N. Bush against the Southern Brewing Company to recover for professional services rendered by plaintiff as an attorney at law in defending one H. O. David, defendant's agent, against an indictment for conducting its business in an unlawful manner. From a judgment entered on the verdict of a jury directed by the court in favor of defendant, plaintiff appeals. Affirmed.

M. Marshall, for appellant. Anderson & Russell, for appellee.

COOPER, J. In the year 1889 the appellee, resident in the state of Louisiana, established an agency in the city of Vicksburg for the sale of its manufacture (beer) in "original packages," brought into this state from Louisiana. This agency was in charge of one Henry C. David. The United States internal revenue license was taken out, but whether the fee was paid by the appellee or by David is not distinctly shown. For the purposes of this decision, we assume it to have been paid by the appellee. The privilege tax (\$50) imposed by the laws of this state upon dealers in malt liquors was not paid, and the agent, David, was indicted for transacting the business without having first paid such tax. The appellant, Bush, was employed by David, in the name of the Southern Brewing Company, as an attorney at law to defend him on the charge preferred. David was tried and convicted, and was preparing to bring his case by appeal to this court, when he died, and the prosecution was thereby abated. The appellant thereupon presented his account for professional services in defending David to the appellee, who denied liability therefor, whereupon this suit was instituted to enforce payment. On the trial, the plaintiff introduced evidence tending to prove the facts above

set forth, and also to show that the agent, David, being in doubt as to the liability of his principals for the tax imposed, it being, as it was contended, engaged in interstate commerce, consulted with the district attorney in reference thereto, who thereupon submitted the matter to the attorney general of the state, who advised that, until the question should be determined by the courts, payment of the tax should be insisted on. Thereupon, as it is stated in the testimony, to determine the question, the district attorney caused an indictment to be found against David. It does not appear that the appellee was notified by David of the course of events, or that he had any express authority to engage counsel to defend him at its expense. The above facts having been proved by the plaintiff, and also that the sum for which suit is brought was a reasonable fee, the plaintiff rested his case, whereupon the defendant asked the court to instruct the jury to find a verdict in its favor, which was done, and the plaintiff appeals.

We do not dissent from the principles of law propounded by counsel for appellant, but we fail to perceive their applicability to the facts of this case. Whether the proposition be stated in the form that an agent may bind the principal by contracts within the scope of his agency, or that an agent may secure indemnity from the principal for any loss or injury suffered by him for doing an act, apparently lawful, under the direction of the principal, we assent to its correctness. But, though the principle as stated be correct, it profits the plaintiff nothing unless the facts of his case entitle him to its application. Assuming, first, that the business of the principal was an unlawful one, because the tax imposed by our law had not been paid, the agent was neither entitled to indemnity against the consequences of indictment and conviction, nor for indemnity against the expense incurred for fees of counsel, for the reason that one may not appoint an agent to violate the law. One engaging as agent for another to transact a business prohibited by law, and who is proceeded against for doing the prohibited act, can have no recourse against his principal for indemnity. "Ex turpi causa non oritur actio." On the other hand, if the business transacted was a lawful one, the principal was under no obligation, express or implied, to defend the agent against an unjust and baseless prosecution for engaging in it. The agent knew as well as the principal the character of the business in which he was employed. He appreciated the danger of indictment for transacting it without first having paid the tax imposed by law, and consulted the representative of the state upon the probable result, and was, it must be assumed, informed that an indictment would be presented unless the tax was paid. It is not suggested by the evidence that the principal was informed that the agent would

proceed without payment of the tax, in order that a test case might be made for the decision of the question. The agent and the district attorney were the only parties to the arrangement for an indictment, if one was agreed on, and we are unable to perceive upon what ground indemnity could be awarded to him for the expenses incident thereto. As we have said, the question involved is whether the contract between the agent and the appellant was within the scope of the agency, and, if the agent might not have secured indemnity against the principal if he had paid the fee due to the appellant, he could not bind the principal by contracting in his name with the attorney for services to be rendered in his defense. The judgment is affirmed.

(71 Miss. 115)

JONES, County Treasurer, v. MELCHOIR, Sheriff.

(Supreme Court of Mississippi. Oct. 16, 1893.)

COUNTY WARRANTS—RECEIPT IN PAYMENT OF TAXES—WHEN ALLOWED—SPECIAL ACT—REPEAL.

Code 1892, § 318, providing for the registration of county warrants, if the board of supervisors shall so order, and for their payment in the order of their registration, except where there are funds sufficient to pay all warrants, but excepting warrants used in payment of taxes from its provisions, does not repeal Act Feb. 8, 1890, providing that in the county of Bolivar all warrants shall be registered and paid in the order of their issue, unless there be enough funds in the treasury to pay all warrants of prior date, and that the treasurer and tax collector of such county shall only pay or receive such warrants in the order of their issue.

Appeal from circuit court, Bolivar county; R. W. Williamson, Judge.

Mandamus by George P. Melchoir, sheriff, against C. L. Jones, county treasurer. From a judgment granting the writ said Jones appeals. Reversed.

Chas. Scott, for appellant. Fred Clark, for appellee.

WOODS, J. The appellee, in his character of sheriff and tax collector of Bolivar county, filed his suit in mandamus, by which he sought to have the appellant, as treasurer of said county, required to receive from him \$8,000 of the warrants of said county, which he, the appellee, had received in his collection of taxes, for various county funds, in the year 1892. These warrants, the appellee alleged in his petition, were legally receivable in payment of taxes in said county by virtue of sections 904, 3803, Code 1892. The appellant demurred to this petition, and for cause sets up that the local act of February 8, 1890, entitled "An act to pay off and fund the outstanding debt of Bolivar county and provide a revenue therefor, and for other purposes," was unrepealed and operative, and that under that act he could not legally receive any of the said warrants in settlement of taxes collected by the appellee, it

nowhere appearing in petitioner's complaint that the said warrants had been registered as required by said local act, or that there was money in the county treasury to pay all warrants of that county of a prior date of issue. This demurrer being overruled, the appellant set up the same defense by plea, and to this plea the appellee demurred. His demurrer being sustained, and appellant declining to make other plea, a judgment was entered for a peremptory mandamus on the treasurer in accordance with the prayer of the petition, and from these proceedings of the court, and its final judgment, the county treasurer appeals.

It will be readily seen that the controversy is determinable on the solution of this question, viz. has the act of February 8, 1890, been repealed by the provisions of the Code of 1892? The act of February 8, 1890, is a purely local act, and was devised to meet the necessities of a single community. It was a scheme which purposed to deal in a peculiar way with the bonded and simple debt of that county, and which contained unusual methods of issuing and paying warrants. It was a departure from the general law in its requirements as to the registration of warrants, their payment, and the prerequisites to their receipt by the tax collector in his collections from year to year. It was, in a word, an elaborate local act, containing a peculiar scheme for dealing with the finances and revenues of a single county. The contention of appellee's counsel is that this act stands repealed by virtue of the provisions of the Code of 1892, and we are referred to various sections of the Code in support of this view. Section 2 of the introductory chapter of the Code of 1892 provides that the Code shall be in use and shall supersede all prior statutes and clauses therein revised and repealed. Clearly, the local act of February 8, 1890, is not revised in the new Code. Section 3 of the same introductory chapter of the Code declares that all acts and parts of acts, the subjects whereof are revised, consolidated, and re-enacted in the new Code, or repugnant to the provisions contained in it, are repealed. That the subject of dealing with the revenues, finances, and debts of Bolivar county, as contained in the act of February 8, 1890, is not revised, consolidated, and re-enacted in the Code of 1892 is palpably manifest. Are the provisions of that local act repugnant to those of the new Code? The local act makes compulsory the registration of all warrants with great particularity of detail, and requires their payment by the treasurer, and their receipt by the tax collector, in the order of the date of their issue, except when it shall appear that there is at the time money in the treasury sufficient to pay all warrants of prior date of issue; and, moreover, it is provided in this local scheme of financial administration that the revenues of one year shall not be used to pay warrants of any other year, until all

obligations of the current year shall have been met. The 318th section of the Code of 1892 provides for the registration of county warrants, if the board of supervisors shall so order. The registration is compulsory in Bolivar, and permissive elsewhere. Section 318 provides for the payment of county warrants in the order of their registration, except when there are funds sufficient to pay all warrants. These provisions are not repugnant to those of the act of February 8, 1890. We see as little ground for the contention of appellee when we look to the concluding paragraph in section 318, which declares that it shall not apply to warrants used in payment of taxes. We must read the laws together, to ascertain if they are inharmonious, repugnant the one to the other. Thus read as a whole, we shall find this result: "All county warrants, if so ordered by the board of supervisors, shall be registered, and the county treasurers shall pay such warrants in the order of their registration, unless there be in the treasuries sufficient funds to pay all registered warrants, provided this section shall not apply to warrants used in payment of taxes; but in the county of Bolivar all warrants shall be registered, regardless of the wish or order of the board of supervisors, and they shall be paid in the order of the date of their issue, unless there be sufficient funds in the treasury to pay all warrants of prior date, and the treasurer and the tax collector of said county shall only pay or receive such warrants in the order of their true date of issue." Thus read together, all thought of repugnance vanishes. And that they are to be thus read, in effect, the local act qualifying the general statute, is demonstrated by section 8 of the Code of 1892, which declares that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be expressly so provided herein." The local act of February, 1890, for the benefit of Bolivar county in its financial administration, is not revised and brought forward in the Code of 1892, and is not affected by the adoption of the Code. Judgment reversed, and petition dismissed.

(69 Miss. 826)

#### JOHNSON v. STONE.

(Supreme Court of Mississippi. April, 1892.)

#### CONVERSION—EVIDENCE—PLEADINGS—INSTRUCTIONS.

1. Defendant at the same time, and as a single transaction, sold land and personalty to plaintiff on credit, giving a deed of the land, and agreeing to deliver possession of all the property at a certain time. Defendant refused to deliver possession at the time, contending that he and plaintiff had rescinded the entire sale. *Held*, in an action for conversion of the personalty, that plaintiff, whose contention was that defendant had become dissatisfied with the sale, might testify that, prior to the time for delivering the property, defendant borrowed the deed, and refused to return it, claiming

that the sale had been rescinded by mutual consent.

2. One cannot give in evidence a pleading filed by him in an action not tried, as, even if the allegations thereof were those of the party, they would be only hearsay.

3. An instruction stating in what cases admissions should have weight is erroneous, this being on the weight of evidence.

Appeal from circuit court, De Soto county; James T. Fant, Judge.

Action by M. J. Stone against J. D. Johnson for conversion. Judgment for plaintiff. Defendant appeals. Reversed.

On the 20th day of September, 1890, J. D. Johnson and M. J. Stone entered into a contract of purchase and sale of a farm, farming implements, and farm stock thereon. At that time a memorandum in writing was made by Johnson, the vendor, of the property to be sold and terms of sale, as agreed between Johnson and Stone. For the tract of land, Stone was to pay \$5,000 in four annual installments, and \$900 for the implements and farm stock. On the 25th day of September, Johnson and Stone met at the office of one R. B. Holiday for the purpose of consummating their trade. A deed of conveyance, with general covenants of warranty, was executed by Johnson for the land. At the same time, Stone executed his four notes, and a deed of trust to secure the purchase money for the farm and stock, farm implements, etc., and delivered them to Johnson. The deed of conveyance was delivered to Stone, at the same time, for the land and stock and farm implements. Possession of the real and personal property was to be delivered by Johnson to Stone on the 1st day of January, 1891. On that day, Stone demanded the possession of the property, real and personal, and Johnson refused to deliver it to him. Stone then brought ejectment for the land, this suit, which was an action of replevin, in its beginning, for the recovery of the personal property, and subsequently an action of replevin for the recovery of the deed. The sheriff was unable to get possession of the property, and the suit was then amended, and was prosecuted for the conversion of the property and the damages for the detention. To this action Johnson interposed, as his defense, that on the 1st day of December, 1890, or the 30th day of November, the trade had been canceled. Defendant stated that on that day, by mutual consent, the contract was rescinded, and was corroborated by several witnesses, who claimed to be present at the time. Plaintiff denied positively that he ever consented to rescission, and denied that he even saw Johnson at the time Johnson claimed the agreement was had. The plaintiff showed at the trial that the deed to the land had been taken from him by Johnson and forcibly retained. Defendant objected to the introduction of this testimony, but his objection was overruled. The plaintiff was also allowed, over defendant's objection, to introduce evidence of the suit of replevin,

brought by appellee against Johnson and his attorney, Foster, to recover the deed, and the declaration in that case was read in evidence. The following instructions were given for plaintiff: "(1) The court instructs the jury, for the plaintiff, that admissions may be the strongest or the weakest evidence. If there be a full, deliberate statement made by a party to one interested to hear, as subject-matter then or afterwards in suit, such admissions are entitled to weight, for the mind of the party was distinctly directed to the subject; but a single separate declaration, casually made in loose or idle conversation, would not, of itself, deserve much consideration. But the admissions of either party, if in evidence, must go to the jury, along with the evidence in the case, to be considered by them, and the jury should give them such weight, in connection with all the evidence in the case, as they may think them reasonably entitled to. (2) The jury are instructed that if Johnson sold his land to plaintiff, and made him a deed to it, and took a deed in trust back to secure the deferred payment, then it was not necessary for the wife to join in the deed in trust to secure said deferred payments, but the same was secured by the deed without her signature or consent. (3) It is entirely lawful for a sale of land to be made upon condition that, upon default of first payment, the purchaser shall forfeit his trade, and become a tenant of his vendor, and pay a fixed rent. In such case the jury are instructed that the rent is a lien upon all the agricultural products grown upon the premises, by whomsoever raised." "(6) The court instructs the jury that if they believe from the evidence that the defendant, J. D. Johnson, sold to the plaintiff, M. J. Stone, in September, 1890, the property sued for in this action, on a credit, taking the buyer's note for the purchase money, payable in December, 1891, and a trust deed on said property to secure the payment of such purchase money, and that possession of said property, under said sale and purchase, was to be given to Stone, January 1, 1891, and that said property was in defendant's (J. D. Johnson's) possession or control, and retained by him when this suit was commenced, in January, 1891, then they will find for the plaintiff, and will assess the value of said property from the evidence in this cause, and also the value of the use of such property from the 1st day of January, 1891, till date of their verdict." An instruction was also given for plaintiff, instructing the jury that they might find punitive damages if they believed that the retention of the property by Johnson was unlawful, and in willful disregard of the rights of Stone. Plaintiff recovered a verdict and judgment, from which Johnson appealed.

Ira D. Oglesby and H. R. C. Foster, for appellant. Morgan & Buchanan, for appellee.

COOPER, J. The facts of this case are peculiar, and, under its circumstances, we do not think the conduct of the defendant in reference to his caption of the deed to the land was irrelevant evidence on the trial of the issue herein involved. The plaintiff's contention is that the defendant, having sold to him his farm and stock upon credit, became dissatisfied with the sale, and set himself to annul it; that, in furtherance of this purpose, he seized the deed for the land (which had been delivered to the plaintiff) when the plaintiff had handed it to Foster, the defendant's attorney, to aid him in the preparation of a contract to secure the rent for the first year if the first installment of the purchase money should not be made, and, in further prosecution of the same scheme, set up a false claim that plaintiff, a few days thereafter, had, by agreement with him, rescinded the whole contract. True, this is controverted by the defendant, but the agreement for rescission upon which he relies, and which he seeks to establish, has relation not only to the contract for the sale of the personal property, but also to that of the land. It is to be borne in mind that the sale of both personalty and realty was, in fact, one transaction, though evidenced by different instruments, and that the alleged rescission was as to both. The personalty and realty are inseparably blended at the beginning and alleged end of the negotiations, and it is immaterial that a part of the subject-matter is land, and a part realty. If the sale had been of personalty only, a part of which had been delivered at the time of the sale, and a part agreed to be thereafter delivered, and if the defendant, contending that he had a right to coerce the plaintiff into compliance with certain agreements claimed by him to have been made in reference to the sale, had seized, by force, the personalty delivered to the plaintiff, and declared that it should only be returned to him upon his submitting to defendant's claim, and had afterwards refused to deliver up the other personalty at the time fixed by the original agreement, and, being sued for such property, had set up a rescission of the whole sale by agreement with the plaintiff, it would not be doubted that it would be competent for the plaintiff to show, and for the jury to find, that the defendant was engaged in one single scheme, and was actuated by one illegal purpose common to all the property. If, under such circumstances, what he did or said at one time or another would be competent evidence, though one act or declaration might relate to only a part of the whole property, it is impossible to deny the competency of the testimony here, for there is no difference in principle in the case presented from the one supposed. Certainly, an act competent as evidence, because the property to which it relates is a part of a mass, loses nothing of its relevancy.

cy for the mere reason that a part of the property is land and another personality.

The court, however, erred in admitting the declaration filed by the plaintiff in the suit brought by him against Foster and the defendant to recover the deed to be read in evidence in this case. The allegations of the declaration were the mere statements of the pleader, and, even if they were the statements of the plaintiff, they would be only hearsay. A party cannot, by putting an *ex parte* statement in the shape of pleading, give it competency as testimony.

The second instruction for the plaintiff is upon the weight of evidence, and should not have been given. The law knows nothing about the relative value of admissions; that is a matter for the consideration of the jury. Counsel may argue the probable value of such admissions to the jury, and show the circumstances under which they were made as affecting their weight; but the fact that this may be done, or that a text writer or court states in argument "that an admission casually made is of little weight," does not make it a proper subject to be given in charge to the jury. We fail to perceive any necessity or propriety in giving the instructions marked "2" and "3" in the record. The sixth instruction was clearly erroneous. There was no contention about the existence of all the facts therein recited. It ignores the real contention of the defendant, that there had been a rescission of the contract of sale, and peremptorily tells the jury to find for the plaintiff if it believes certain uncontroverted facts, which certainly did exist, but which, existing, did not touch the real contention developed by the evidence. The judgment is reversed.

(69 Miss. 808)

**LOWENSTEIN et al. v. GOODBAR et al.**  
(Supreme Court of Mississippi. April, 1892.)

**SALE—AGENCY—IMPUTED NOTICE—FRAUDULENT  
CONVEYANCE—MISTAKE.**

1. A creditor purchased his debtor's stock of goods, in consideration thereof releasing his own claim, and assuming other claims against the debtor. *Held*, that one who, in negotiating the sale, was the agent of the seller, was not, by reason of the fact that he was instructed by the buyer to draw up the bill of sale, and to take possession of the property for him till his agent arrived, such an agent of the buyer that his knowledge that some of the claims to be paid by the buyer were fictitious would be imputed to the buyer, and make the purchase fraudulent as against other creditors of the seller.

2. Where an agreement is made by a debtor with several creditors, by which he is to be released from all their claims, and he is to convey his property to one of them, who is to pay the indebtedness to the others, the fact that the buyer's agreement with the other creditors is that he will pay their claims out of the proceeds of the property, while the seller understands that the buyer assumed the claims absolutely, is not a material mistake affecting the sale, as in either case the seller gets his release, and the buyer the goods.

Appeal from circuit court, Sharkey county; J. D. Gilland, Judge.

Action by H. J. Wright, for use of B. Lowenstein & Bros., against Goodbar & Co and others. Judgment for defendants. Plaintiffs appeal. Reversed.

This is an action against Goodbar & Co. as principals, and I. A. Cartright and T. T. Orendorf, sureties, on a certain indemnifying bond executed by defendants in the course of an attachment proceeding by Goodbar & Co. against W. R. Hudson & Co. W. R. Hudson, under the firm name of W. R. Hudson & Co., on the 6th day of January, 1890, sold out to B. Lowenstein & Bros., of Memphis, Tenn., his stock of goods at Rolling Fork, Miss. Possession was at once given. Several hours afterwards Goodbar & Co. sued out an attachment against W. R. Hudson & Co., and instructed the sheriff to levy it upon a sufficiency of the goods which had been sold to Lowenstein & Bros., to satisfy the same. The sheriff demanded an indemnifying bond of Goodbar & Co., and in compliance with this request the bond sued on was given in the penalty of \$600. The following pleas were filed by defendants: (1) The general issue; (2) that the property levied on was not the property of B. Lowenstein & Bros.; (3) the sale by Hudson & Co. was fraudulent and void, and made with intent to hinder, delay, and defraud defendants in the collection of their debt. On the same day defendants filed two additional pleas, setting out (1) that the bond of indemnity sued on was not, as the law directs and requires, returned and filed with the attachment writ, on the return of the writ; (2) that the suit was brought on the alleged bond of indemnity, before the said bond or writ of attachment was either filed or returned in court. Issue was taken on the first of the additional pleas, and a demurrer was filed to the second. Plaintiffs replied to the third plea, denying that the sale to Lowenstein & Bros. by Hudson & Co. was fraudulent and void, or made with intent to hinder or delay defendants in the collection of their debts. The parties went to trial on the issues made on the first, second, third, and fourth pleas. Plaintiffs showed at the trial that the consideration of the sale was the release by them of debt due by Hudson of \$2,879, they also assuming debts of Hudson as follows: To Waddill, Catchings & Co., \$2,350; W. B. Catchings, \$1,500; R. L. McLaurin, \$2,000; and the discharge of Hudson of these debts. Defendants contended that some of the debts assumed by Lowenstein & Bros. were fictitious, and that the sale from Hudson to Lowenstein & Bros. was incomplete and invalid, because Lowenstein & Bros. claimed that in assuming the debts of the other creditors they agreed to pay them out of the proceeds of the goods purchased, if sufficient; some of the cred-



itors contending that they were to pay them absolutely, defendants contending that the minds of Lowenstein & Bros. and Hudson did not meet in the trade. It was also contended that R. L. McLaurin, who wrote the bill of sale, represented Lowenstein & Bros., and that his debt was fictitious; his notice of the fictitious character of his own debt was imputable to them. These questions were presented to the jury by proper instructions. There was a verdict and judgment for the defendants. Plaintiffs appealed.

J. H. Watson, for appellants. W. V. Sullivan and Nugent & McWille, for appellees.

COOPER, J. The verdict in this case is not supported by the evidence, and the instructions asked and secured by the defendants should not have been given. There is nothing to suggest that Lowenstein & Bros. had any notice that any of the claims against Hudson, the payment of which they assumed, were simulated or exaggerated, if in fact they were. Neither H. J. nor R. L. McLaurin was their agent to negotiate a purchase from Hudson. The terms of the sale had been agreed on in Memphis between H. J. McLaurin, acting for Hudson and R. L. McLaurin, and Percy and Waddill, acting for Waddill, Catchings & Co., and B. F. Catchings and Lowenstein & Bros., acting for themselves. R. L. McLaurin had no other agency for appellants than to receive possession of the stock of goods in consummation of a sale, the terms and consideration of which had already been fixed by the parties. He was but to put in form the bill of sale of the goods, and this he did for all parties, and to take possession of the goods until the arrival of appellants' representative. He was never agent of appellants in such sense that his knowledge of the character of his own professed demand against Hudson, as simulated in whole or in part, should be imputed to Lowenstein & Bros., and operate to defeat the sale which was being made or arranged by all the other parties. The transaction is capable of but one construction. Hudson was insolvent, and had determined to secure Waddill, Catchings & Co. and W. B. Catchings in their demands. He also owed Lowenstein & Bros., and was willing to carry out any arrangement which H. J. McLaurin should make for him, the effect of which would be to secure the payment of the debts due to Waddill, Catchings & Co. and W. B. Catchings. H. J. McLaurin went to Memphis to negotiate for Hudson, having an eye in the negotiation, however, towards the securing his own debt, which, for private reasons, he transferred to R. L. McLaurin before leaving Rolling Fork. R. L. McLaurin remained at Rolling Fork, to execute there,

under the direction of H. J. McLaurin, (Hudson's representative,) any plan that might be agreed on in Memphis for the payment of the creditors Hudson desired to prefer. It was agreed in Memphis that Lowenstein & Bros. should buy the entire stock of goods of Hudson, and, in consideration thereof, should assume the payment of the debts of Waddill, Catchings & Co., W. B. Catchings, and R. L. McLaurin, and, in addition thereto, should discharge their own demand against him. The agreement was telegraphed to R. L. McLaurin, who prepared a bill of sale of the goods, which Hudson signed, and also received possession of the stock for Lowenstein & Bros. R. L. McLaurin negotiated no purchase for Lowenstein & Bros. from Hudson. The sale was agreed on in Memphis, and, so far as the record suggests, R. L. McLaurin's agency for Lowenstein Bros. consisted only in receiving the possession of the goods. Under these circumstances, it was error to submit to the jury the question whether R. L. McLaurin was the agent of Lowenstein & Bros. in purchasing the stock so as to affect the good faith of their purchase by reason of his knowledge of the character of his claim against Hudson.

It was also error for the court to submit to the jury the question whether or not the minds of Hudson and Lowenstein & Bros. met upon the contract of sale. The inquiry, in view of the undisputed testimony, was wholly immaterial. Hudson's desire was to secure his own discharge from certain agreed debts. He may have understood, and probably did understand, that Lowenstein & Bros. became absolutely and unconditionally bound to immediately pay them to the parties to whom he was indebted. It was no concern of his, however, what arrangements these creditors and Lowenstein & Bros. had made, as between themselves, for the time or condition of the payments. Hudson was not at all injured by the fact that Waddill, Catchings & Co. were to be first paid, and they not until Lowenstein & Bros. should sell the goods bought of Hudson, nor that McLaurin should not be, in fact, paid at all, unless the goods should bring a sufficient sum to pay all the debts for which they were bought. Hudson was instantly and absolutely discharged from all these demands by the sale of the goods. As to him, there was no essential difference between the contract he understood he was making and the one Lowenstein & Bros. understood they were making. In truth, there was no mistake, either as to the subject-matter of the contract or as to the consideration. Lowenstein & Bros. got exactly what they intended to get, and what Hudson intended for them to have,—the goods. Hudson got precisely what he intended to get,—a discharge from certain debts. Hudson probably did not know the terms of the collateral agreement

between Lowenstein & Bros. and these creditors, but this was immaterial. Mr. Benjamin thus formulates the rule in cases of mistake: "Where there has been a common mistake as to some essential fact forming an inducement to the sale,—that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties,—the sale is voidable." Benj. Sales, § 415. It is difficult to perceive upon what grounds the creditors of Hudson may treat the sale as void, when, at most, it would have been voidable by him, (if the mistake had been in reference to an essential fact,) and which he has not sought to avoid. Judgment reversed, and cause remanded.

(71 Miss. 120)

**FAUST v. MURPHY et al.**

(Supreme Court of Mississippi. Oct. 16, 1893.)

**CLERK OF CHANCERY COURT—SURETIES ON BOND—LIABILITIES—SUBSTITUTION OF SURETY.**

1. Code 1880, § 2117, providing that in certain cases the clerk of the chancery court shall be appointed as guardian of a minor having property, but that he shall not be required to give bond as such guardian, and his official bond shall cover his liability as such, is not repealed by Act March 9, 1882, § 2, providing that the chancery court may require the clerk to give a bond as such guardian; and on the failure to require a bond under the latter provision the Code provision controls.

2. Code, § 413, declaring that the board of supervisors may require or receive substituted sureties on an official bond, "when some of the sureties have removed or become insolvent, or when some of the sureties petition for relief and others do not," does not authorize such action because of the death of a surety, since that does not release his estate from liability for future defaults by the officer during the latter's continuance in office.

Appeal from circuit court, Noxubee county; S. H. Terral, Judge.

Action by Annie I. Faust, a minor, by guardian, etc., against T. S. Murphy and others, as sureties on the official bond of one Robert C. Patty as clerk of the chancery court. From a judgment for defendants, plaintiff appeals. Affirmed.

O'Neill & Williams, for appellant. Mayes & Harris, amici curiae. A. C. Bogle, J. W. Drake, and Rives, Rives & Stokes, for appellees.

**COOPER, J.** The declaration in this cause is vague, uncertain, and defective. If any official liability of R. C. Patty, the late chancery clerk of Noxubee county, is stated at all, it is only by inference, suggestion, and argument that it is to be discovered. We say this much to exclude the conclusion that the judgment of the court below would have been reversed by us but for the other grounds on which it is supported, and which we consider and decide at the earnest request of counsel, without regarding the defects of the declaration. Stating the case

as we suppose it was intended to be set forth, the facts are as follows: Robert C. Patty was elected to the office of clerk of the chancery court of Noxubee county for the term beginning on the first Monday of January, A. D. 1888. He gave an official bond, as prescribed by law, with J. W. Patty, Charles B. Ames, and Jacob Holberg as sureties thereon, by the terms of which the obligors bound themselves, "their heirs, administrators, and executors," conditioned that the said Robert C. Patty should "faithfully perform and discharge all the duties of said office of clerk of the chancery court, and all acts and things required by law or incident to the said office, during his continuance therein." During his said term of office he was, as such officer, appointed guardian of the estate of Annie I. Faust, a minor. The said Patty died in December, A. D. 1890, and upon settlement of his account as such guardian, made by his administratrix, a balance was found due to his ward, for which a decree was made by the court having jurisdiction of such guardianship on which execution has been properly issued and returned nulla bona. In August, 1888, C. B. Ames, one of the sureties upon Patty's official bond, died, which fact he communicated to the board of supervisors of Noxubee county, and, he consenting thereto, and waiving the notice provided by statute, the said board ordered that new sureties be supplied in the room and stead of C. B. Ames, deceased, within 30 days from the date of said order, and within that time T. S. Murphy, J. L. Griggs, and B. J. Allen subscribed said official bond in the room and stead of C. B. Ames, deceased. The breach of the bond assigned is that neither the said Robert C. Patty during his life, nor his administratrix since his death, have accounted with and paid over to the said minor, Annie I. Faust, nor to her guardian, Walter Price, duly appointed to such guardianship since the death of said Patty, the estate and moneys of the said minor in his hands as such guardian. This action is against T. S. Murphy, J. L. Griggs, and B. J. Allen only, neither J. W. Patty nor Jacob Holberg nor the representative of C. B. Ames, deceased, being sued. The defendants demurred to the declaration as presenting no cause of action against them, and their demurrer was sustained, from which judgment the plaintiff appeals.

It is argued for the appellees (1) that the sureties upon the official bond of the chancery clerk are not liable for his default as guardian touching the estates of minors committed to him as such clerk; (2) that, if such sureties are so liable, yet they, the appellees, never became bound as such sureties upon such bond, because there was no authority in law for the board of supervisors of Noxubee county to require sureties to be supplied on the official bond of said clerk in the place of C. B. Ames, de-

ceased, and no authority in law for them to accept additional or substituted sureties thereon. Section 2117 of the Code of 1880 provides that, "if no one will qualify as guardian of a minor who has property, and is in need of a guardian, it shall be the duty of the chancery court of the county in which such minor resides to appoint the clerk of such court to be the guardian of such minor, who shall discharge the duties of guardian of such minor according to law, and under the orders and direction of the chancery court, and subject to be dealt with as for a contempt for any failure so to do; but he shall not be required to give bond as guardian in such case, and his official bond shall cover his liability as such guardian, and he shall be bound and liable in all respects as any other guardian." It is conceded by counsel that under this law the sureties of the clerk would be liable for his acts as guardian, but they contend that this section of the Code, in so far as it provided for such liability, was repealed by the provisions of an act approved March 9, 1882, (Acts, p. 114.) which provided "that in all cases arising under section 2117 of the Code of 1880, and where the estate of the minor exceeds the sum of ten thousand dollars, and the clerk of the chancery court is appointed to discharge the duties of guardian to such minor under the provisions of said section 2117, the chancery court shall require of such chancery clerk a bond with good and approved security in the amount required for guardian's bonds and conditioned and payable as such bonds are now required by law." Section 2: "That in all cases wherein the chancery clerk is appointed to discharge the duties of guardian of a minor under section 2117 of the Code of 1880, and whose estate is less than ten thousand dollars, the chancery court may require of such chancery clerk a bond, with sufficient sureties, payable and conditioned as required by law for guardian's bond and in such penalty as may be deemed sufficient by the court, and if the chancery court fails to require such bond, any relative of the minor may petition the court to require such bond to be given, or if one has been given may petition the chancery court for a bond in a larger penalty or with better security, and the chancery court shall decree thereon according to right and justice and the protection of the estate of the minor." The argument of counsel is that under the Code the liability of the official bond is declared, coupled with the provision that no bond as guardian shall be required; that the act of 1882 provides that when the estate of the minor exceeds in value \$10,000 a bond as guardian shall be required; and when the estate is of less value such bond may be required by the court, and, if it is not, that any relative of the minor may by petition secure its execution; that the provisions of this act are directly in conflict with that of the Code declaring that

no bond shall be required, and therefore both cannot coexist; that in this conflict the last expression of legislative will must prevail, and that, if this Code provision fails, so must that connected with and dependent on it, which declares liability on the official bond for the acts of the clerk as guardian. There is no suggestion in the pleadings here that the estate of Annie I. Faust exceeded in value the sum of \$10,000, and, since no bond as guardian seems to have been required by the court, as it would have been the duty of the court to have required if the estate had been of that value, we must, upon the presumption of due performance of official duty, assume that the estate was not of that value. We will leave the question of the effect of a failure to require bonds in that class of estates open for determination when it arises.

We fail to perceive any conflict between the second section of the act of 1882, having reference to estates of less value than \$10,000, and section 2117 of the Code. By the Code, liability on the official bond of the clerk is declared, but by the act of 1882 it is further provided that a specific bond may be required. Where this is not done, the Code provision controls. But the appellees were never in law the sureties on the official bond of Patty, the chancery clerk. We are unable to distinguish this case from that of *State v. Matthews*, 57 Miss. 1. The death of Ames, one of the sureties, did not in any degree affect the bond of the officer. The surety had bound himself, his heirs, executors, and administrators, that Patty, the clerk, should faithfully discharge his duties as such officer "during his continuance in said office." His death did not release his estate from liability for future defaults by the officer. *Hightower v. Moore*, 46 Ala. 387; *Green v. Young*, 8 Greenl. 14; *Insurance Co. v. Davies*, 40 Iowa, 469; *Chamberlain v. Dunlop*, (N. Y. App.) 28 N. E. Rep. 906, and note thereto, 22 Amer. St. Rep. 807; *Bank v. Yard*, 150 Pa. St. 351, 24 Atl. Rep. 635. Section 403 of the Code of 1880 has effect only to cure irregularities in bonds which by law are required or may be given. Section 411 of said Code has no relation to the point involved in this case. It relates to the subject of new bonds to be given by public officers under the states of case therein provided for. But a new bond was not required in this case, and hence this section has no relevancy to the question involved. The board of supervisors and the officer manifestly proceeded under section 413 of the Code, which declares that "when the insufficiency of an official bond arises from the fact that some of the sureties have removed or become insolvent; or when some of the sureties petition for relief and others do not, the place of such insufficient or such relieved sureties on the bond, may be supplied by new and approved sureties, executing the original bond, subscribing it with an expla-

nation of the purpose for which they subscribe it; and this shall not in any manner vary the liability of the former sureties on the bond, except as released, as aforesaid, on their petition for that purpose, but such bond shall bind all its subscribers, and the change thus made shall be noted on the record of the bond." It is not pretended that any of the sureties on the bond had removed or become insolvent, nor had any one of them petitioned for relief from the bond, and it is only under such circumstances that authority exists for the board to require or receive substituted sureties. The judgment is affirmed.

(45 La. Ann. 1065)

**BAXTER v. HEWES et al., (BAUMAN, Intervener. No. 1,436.)**

(Supreme Court of Louisiana. July Term, 1893.)

**PARTNERSHIP INSOLVENCY — FEES OF LIQUIDATOR.**

1. In fixing the quantum meruit of the services of a liquidator of a partnership appointed by the court, the judgment of the lower court is entitled to great weight, and will not be disturbed unless manifestly erroneous.

2. The fees of attorneys employed to file and homologate the liquidator's account are a proper charge against the estate, and do not lose that character because they are partially devoted to maintaining the liquidator's charge for his services, which forms a proper element of his accounting.

(Syllabus by the Court.)

Appeal from district court, parish of Iberia; Felix Voorhies, Judge.

Action between J. P. Baxter, executor, and H. B. Hewes and others. F. W. Bauman, liquidator of the firm of Milmo, Stokoe & Co., intervened. From the judgment the intervener appeals. Modified.

P. H. Meutz and W. J. Burke, for plaintiff. Foster & Broussard, L. T. Dulaney, and Weeks & Weeks, for defendants and intervener.

FENNER, J. Intervener, F. W. Bauman, was appointed liquidator of the partnership of Milmo, Stokoe & Co., a firm engaged in the lumber and lumber-milling business, with powers limited to the care and custody of the partnership property, and to the collection of its debts. The property was valuable, consisting of sawmills, planing and shingle mills, lumber in the yard, swamp land, logs cut and ready for rafting, a steamboat, mules, carts, etc., besides accounts and bills receivable. The liquidator furnished a bond of \$1,000. He served for about one year. During that time he collected about \$7,000 of the debts, and also about \$4,000 for lumber sold by him with the consent of the parties interested. His other duties were confined to the care and superintendence of the property, the operation of the business being entirely suspended. His duties were responsible, and no doubt occupied most of

his time and attention. He filed an account, which was accepted and approved without opposition, except as to two items, viz. (1) his compensation as liquidator; (2) his charge for fees of his attorneys, who filed his account. As to his own compensation, witnesses were examined by both parties, who gave various estimates as to the quantum meruit of his services, varying from \$1,200 or \$1,500 to \$3,500, which was claimed. The judge a quo fixed the amount at \$2,000, from which the liquidator appeals. We have read and weighed the testimony, and find in it nothing which would justify us in disturbing the judge's finding, which, on such a matter, is entitled to great weight, and is not to be interfered with except for manifest error. We think, however, the judge erred in rejecting entirely the claim for attorneys' fees. It appears that all the legal advice and services required by the liquidator up to the moment of filing his account had been rendered without charge by the counsel of plaintiff in the suit. At that time the plaintiff's counsel, considering that the liquidator's account must include his fees for services, and would thus involve a conflict of interests between the liquidator and their client, advised the liquidator "to procure the services of an attorney to represent him in filing his account, and incidentally in collecting his fees as liquidator." Accordingly the liquidator employed Messrs. Weeks & Weeks for that purpose. The account was already made up, and Messrs. Weeks & Weeks had nothing to do but to file it, and to claim in his behalf the fees for his own and for his attorneys' services. There was no litigation over the account except as to these two items. The judge, in his opinion, admits that the liquidator had the right to employ counsel to assist him in filing his account, and in having the same homologated, "and that the fees of attorneys incurred for such purpose constitute a legal charge against the assets of the estate," but he adds: "When the liquidator employs counsel merely to protect his own individual interest, as in this case, the court is of opinion that it is neither just nor equitable that the estate should be made responsible." Now, in this case it is admitted that these attorneys were employed to file the account, and to have it homologated, and that they actually performed these services. This alone is sufficient to establish his right to claim a fair fee for his attorneys. The fees of the liquidator form a necessary element of his account, and we think the professional services rendered in defending this item of the account were fairly chargeable to the estate, especially in a case like the present, where the trial had and evidence taken were essential to furnish the judge a basis for intelligent action in fixing the amount. Considering, however, that the attorneys had no labor in framing the account, and encountered no opposition except as to these par-

ticular items and the brevity of the trial thereon, we think a fee of \$100 will be a sufficient allowance. It is therefore adjudged and decreed that the judgment appealed from be amended by reversing that portion thereof which rejects the demand for attorneys' fees, and by now allowing and fixing the same at the sum of \$100, and that, as thus amended, the judgment be now affirmed; appellees to pay costs of this appeal.

(71 Miss. 125)

**HUMPHREYS v. STAFFORD et al.**

(Supreme Court of Mississippi. Oct. 30, 1893.)

**PARTNERSHIP PROPERTY — DISTRIBUTION AMONG CREDITORS—CONCLUSIVENESS OF DECREE.**

Where, in a proceeding by the widow of one of the members of a firm, all of whom are deceased, for the administration and distribution of firm assets, and the appointment of a receiver, a decree is made on a master's report, after appearance of all the creditors, finding the amounts of the claims of the respective creditors, and the order of their payment, such decree is a final one, and conclusive of the rights of the parties.

Appeal from chancery court, Bolivar county; W. R. Trigg, Chancellor.

Bill by Sarah A. Wilson for the administration and distribution of the assets of a certain firm, and for the appointment of a receiver. From a decree dismissing his petition for the payment to him of a certain fund, D. George Humphreys appeals. Affirmed.

Mayes & Harris, for appellant. Chas. Scott and Woods & Woods, for appellees.

COOPER, J. In the year 1879, a mercantile firm composed of John P. Tobin, J. D. Ziegler, and R. M. Wilson, and doing business under the firm name of John P. Tobin & Co., was dissolved by the death of one of its members, and within the course of a few weeks the other members, also, died. At the time of the dissolution, the firm owned a considerable stock of merchandise, and some real estate, and it held many open accounts and promissory notes, and was heavily involved in debt. The members had individual property, and were individually indebted. Among the liabilities of the firm was a debt due to Brooks, Neely & Co., which was secured by a deed of trust upon real estate and some of the personalty of the firm. Judgments had been rendered and enrolled against the firm by Keep, Raymond & Co., and by Cyrus Bussy & Co. In December, 1889, Sarah A. Wilson, suing in her own behalf, and in behalf of such other creditors of the firm of John P. Tobin & Co. as might become parties thereto, exhibited her bill in the chancery court of Bolivar county, praying for the administration and distribution of the assets of said firm, and for the appointment of a receiver therefor. The bill states that, since the death of the members of the firm of Tobin & Co., the trustees in the

deeds executed to secure the debt to Brooks, Neely & Co. had collected and shipped to said firm large quantities of cotton, covered by said deeds, and that probably the entire debt had been discharged, from the proceeds thereof; that it was not desired to interfere with the execution of said trust deeds, but that it would be necessary for said trustee, and the firm of Brooks, Neely & Co., to account for the property received by them, for which reason, only, they were made defendants to the bill. On the filing of the bill, an order of publication was made, requiring all creditors of the firm of Tobin & Co. to appear before the master, and establish their demands, and a receiver was appointed to take charge of the entire assets of said firm. In compliance with this order, many creditors of the firm appeared, and presented their demands. Indeed, so far as the record discloses, all creditors so appeared. The master made his report to the court, showing the names of the creditors who had propounded their claims, and the sums and character of the respective claims. Certain exceptions were filed to this report, and, among them, one by the appellant, based upon the refusal of the master to allow the claim he had presented for its full amount. The exception of appellant was sustained, and thereupon the master made a supplemental and amended report. Upon the original and amended reports, the court then proceeded to make a decree, which, in effect, directed the receiver to pay, in the order of their priority, the judgments in favor of Keep, Raymond & Co. and of Cyrus Bussy & Co., which were declared preference claims; then to pay, in equal proportion, all other of the proved and allowed claims, setting off against any of such claims any amounts appearing on the books of Tobin & Co. as charges, and, in case of any controversy as to the validity of such offsets arising, to make no payment to such party until the adjustment thereof could be made. It was further ordered that certain claims propounded by W. and R. M. Wilson should not be paid until all other claims allowed should be first paid. This order was made on the 8th day of November, 1880. In May, 1881, the receiver applied to the court for an order to sell certain real estate belonging to said firm of Tobin & Co., among which was the E. ½ of section 31, township 24 of range 6 W., in Bolivar county. The order was made, and in pursuance thereof the sale was made and reported, and confirmed. The land above described brought at such sale the sum of \$395, which sum was paid to the receiver, and is yet in his hands. In September, 1888, the appellant presented his petition to the court, in which he states that he sold to Tobin & Co. the E. ½ of section 31, above described; that the purchase price thereof was never paid, but was represented by the notes proved and allowed against the estate of Tobin & Co., and for the payment of which a lien was reserved

in the conveyance to Tobin & Co.; that the land had been sold by the receiver under an order of the court, and its proceeds yet remained in his hands. The prayer is that the right of the petitioner to this fund be recognized, and the receiver directed to make payment thereof to him, on account of his proved claim. To this petition, the receiver, and all the other creditors of Tobin & Co., answered, setting up the decree of date November 8, 1880, hereinbefore referred to, as a final and conclusive adjudication of the rights of the petitioner, and of the other creditors of Tobin & Co., to participate in the distribution of the proceeds of the partnership. On hearing, the court dismissed the petition, and Humphreys prosecutes this appeal.

The single question presented by this appeal is whether the decree of November 8, 1880, is final or interlocutory. If the decree is an interlocutory one, the appellant presents a perfect equitable right to the fund in court; but, if it is a final decree, the court is powerless to afford relief. That the decree is final, and therefore conclusive of the rights of the parties, we entertain no doubt. All creditors appearing, under the decree, to prove their claims, became parties in interest in the cause; and, as such, each was entitled, not only to prove his own claim, but to contest with other creditors the validity of claims presented by them. 2 Daniell, Ch. Pr. 1210, note 4, and authorities there cited. Being parties to the proceeding, they are bound by subsequent orders and decrees, according to their nature and effect. It is often found difficult to assign a decree to its proper class, as final or interlocutory, because of the slight gradations by which interlocutory decrees approach those which are final; the difficulty being, not so much in determining what is a final decree, as of distinguishing when they possess the elements which bring them within the class. In *Cocke v. Gilpin*, 1 Rob. (Va.) 20, Judge Baldwin sought to establish a criterion by which the difficulty was to be solved, and declared that, "when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree upon which the question arises is to be regarded, not as final, but interlocutory. I say the further action in the cause, to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and as founded on the decree itself, or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case." Having established his test, the learned judge proceeded to apply it to the case before the court, and concluded that the decree under examination was interlocutory, and not final;

and so thought the majority of the court. But Judge Brooke dissented, and, accepting the test proposed by Judge Baldwin, thought the decree final in its nature, and that his brethren were, in effect, overruling *Harvey v. Branson*, 1 Leigh, 108, in which we think Judge Brooke was right. We are unable to perceive any matter left undetermined by the decree in this case, made on the master's report; which was material to the determination of the cause. The decree found who were the creditors of the firm of Tobin & Co., the amounts of their respective claims, and the order in which they should be paid. If executed according to its terms, all the relief which could be afforded would be given, and, where this is shown, the decree must, we think, be held to be final. *Cook's Heirs v. Bay*, 4 How. (Miss.) 485; *Torrence v. Kerr*, 27 Miss. 787; *Ledyard v. Henderson*, 40 Miss. 260; *Cromwell v. Craft*, 47 Miss. 44; *Harvey v. Branson*, 1 Leigh, 108; *Neall v. Hill*, 16 Cal. 145; *Clark v. Dunnam*, 46 Cal. 204; *Evans v. Dunn*, 26 Ohio St. 439. The decree is affirmed.

(71 Miss. 130)

#### WILKERSON v. HUDSON et al.

(Supreme Court of Mississippi. Oct. 16, 1893.)  
FORCIBLE ENTRY AND DETAINER — PURCHASER AT TAX SALE—WHEN ACTION MAY BE BROUGHT.

Under Code 1892, § 4, which provides that any "right accruing or accrued" shall not be affected by the adoption of such Code, the right of a purchaser of land sold for taxes in March, 1892, to bring an action of unlawful detainer, is governed by Code 1880, which provided that he was entitled to such action after one year from date of the sale, and not by Code 1892, which gives such right after two years from date of the sale.

Appeal from circuit court, Noxubee county; S. H. Terral, Judge.

Action of unlawful detainer by J. L. Wilkerson against H. C. and M. A. Hudson to recover possession of certain land purchased by plaintiff at tax sale. From a judgment for defendants, plaintiff appeals. Reversed.

A. C. Bogle, for appellant. Rives, Rives & Stokes, for appellees.

CAMPBELL, C. J. The single question in this case is whether the purchaser of land sold for taxes in March, 1892, was entitled to the action of unlawful detainer after one year, as provided by the Code of 1880, in force when he purchased, or whether he had to wait two years, as provided by the Code of 1892. It is not denied that the right to redeem the land sold in March, 1892, was governed by the Code of 1880, which gave one year for redemption, and remained in force as to that, by virtue of section 274 of the constitution of 1890, notwithstanding that section 79 of that instrument secures the right of redemption "for a period of not less than two years." But the claim

is that, while the right is governed by the Code of 1880, the remedy, as to time for its enforcement, is governed by the Code of 1892, and by it the right to unlawful detainer is limited to the period between two years after the sale and three years. The only change made by the Code of 1892 on this subject is as to the time in which the remedy may be availed of. It provides the same remedy and the same court as did the Code of 1880, but, in view of the fact that as to all sales of land for taxes under the Code of 1892 the time for redemption is two years, a change of time for the purchaser to employ the remedy was made. It is obvious that this provision is confined to cases of sales made under the Code of 1892, and that it was not intended to enlarge the time given by the law under which they purchased to those who bought under the Code of 1880. That Code gave them one year in which to bring unlawful detainer, after one year from the sale; and unless it be held that the Code of 1892 enlarged the time in which they might have this remedy, it must follow that the Code of 1892 applies alone to sales under it, and as to which its provisions as to time are appropriate. If this plaintiff had delayed to bring his action until two years after the sale at which he purchased, he would justly have encountered the objection that he had waited too long; that his rights were not in any respect governed by the Code of 1892, which was made for and is appropriate to sales under it, where the time for redemption is two years. The question is, how to maintain the right of the plaintiff to sue, after one year, in view of the fact that section 4461a of the Code of 1892 has superseded and taken the place of section 538 of the Code of 1880. The answer is that, as to sales which took place while the Code of 1880 governed, that still governed as to every "right accruing or accrued" because of section 4 of the Code of 1892, which so provides, and that the right of the purchaser of the land in March, 1892, for taxes, to sue by unlawful detainer, after one year, was accruing *pari passu* with the flight of time, and was preserved by the Code of 1892, there not being in it any provision inconsistent with the assertion of this right when accrued by the expiration of one year. While the subject of the right of a purchaser at a sale for taxes to sue by unlawful detainer was revised, and the act in the Code of 1880 was consolidated and re-enacted by the Code of 1892, there is nothing at war with the right to sue in one year. The new provision was adapted to and designed exclusively for sales made under it, and did not refer to or have in view sales made under the former law; and, as the same remedy is provided by the new as by the former law, and the only change as to sales under the new law and actions under it is as to

the time when they may be brought, it may be affirmed that the accruing right of the purchaser to sue in one year according to the former law was not intended to be and was not affected by the Code of 1892, and that section 4, already referred to, expressly preserves the accruing and subsequently accrued right of this plaintiff to sue by unlawful detainer, after one year from the date of his purchase. This view accords with the expressed purpose of the Code of 1892, as of all former Codes, to affect or disturb former transactions as little as possible. The various statutes of limitation are by express provision to apply to and govern rights of action accrued under them, except where a bar has accrued under the provisions of the Code; and the purpose is shown to make the Code prospective, except as to proceedings which relate to forms and remedies, and not to time. If section 4 of the Code, contained in all our Codes, was not designed to preserve just such a right as that here involved, we are not able to say to what it would apply. A right accruing is one not yet matured, but growing, increasing by reason of time or other circumstance possibly,—as the right to plead the bar of the statute, or any other right in process of becoming a complete one; and the language of section 4 is appropriate and effective to preserve such a right unaffected by the new Code, and to accrue as if it had not been adopted, but the proceedings, as far as applicable, where change has been made, to conform to the new law. In this case the growing right was preserved unaffected by the new Code, and when it ripened into full maturity by the lapse of a year the very same proceedings provided by the former law were found to be provided by the new, the only change being one not affecting the proceedings, but one adapted to the time when a claimant under a purchase under the new Code should resort to this proceeding, if desired. The "right accruing or accrued" mentioned in section 4 of the Code is not a right of action as affected by the statutes of limitations, because an accruing right with reference to them, would, when accrued, be subject to the statute in force when it became complete, and such is provided for in section 2759 of the Code in express terms. The right of this plaintiff to sue in the action preserved by the new Code according to his accruing right, when it became operative, is the sort of right preserved by section 4. Had the remedy by unlawful detainer, as before given, been destroyed by the Code of 1892, a different question would have arisen; but in the state of the statutes it appears clear to us that the provisions and the spirit of the Code are carried into effect by maintaining the right to this proceeding, so far as it is dependent on time, to purchasers at sales for taxes under the Code of 1880. This right is con-

served according to the spirit and language of both the constitution and Code. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

(71 Miss. 1)

**BEW, Registrar, v. STATE ex rel. DISTRICT ATTORNEY.**

(Supreme Court of Mississippi. Oct. 16, 1893.)

**ELECTIONS AND VOTERS—REGISTRATION—WHO MAY REGISTER—PAYMENT OF TAXES—TIME OF REGISTRATION—SPECIAL COUNTY ELECTION—"LEGAL VOTES"—WHAT CONSTITUTE.**

1. Const. 1890, § 251, relating to registration of electors, and providing that electors shall not be registered within four months next before "an election" at which they may offer to vote, and Code 1892, § 3615, providing that at any time not within four months of "an election" the registrar may register the electors of his county at his office, refer to elections contemplated by the constitution, and have no reference to a special election held under Code 1892, § 1610, to determine whether or not liquors shall be sold within a county.

2. Const. 1890, § 241, prescribes the qualifications of an elector, among which are registration, and the payment, on or before the 1st day of February of the year in which he shall offer to vote, of all taxes of the two preceding years against him, and the production by him "to the officers holding the election satisfactory evidence that he has paid said taxes." Section 249 repeats the requirement of being registered, but does not make the payment of taxes a condition of registration. Section 242 provides that the legislature shall provide by law for the registration of all persons entitled to vote, and prescribes the oath to be taken by such persons, but makes no reference in the oath prescribed to payment of taxes. *Held*, that Code 1892, § 3612, in so far as it forbids the registration of persons who have not paid such taxes, is unconstitutional.

3. Const. 1890, § 251, which provides that "electors shall not be registered within four months next before any election at which they may offer to vote," does not prohibit registration within four months of an election, but establishes the rule that four months shall elapse after an elector's registration before he is entitled to vote.

4. "Legal votes," as used in Code 1892, §§ 1610, 1620, relating to special elections to determine whether or not liquors shall be sold in a county, in the absence of any specific provisions as to qualifications of electors thereat, mean those votes which would be legal at an election contemplated by the constitution and laws; and persons registered within four months of such election are not entitled to vote, though otherwise qualified.

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Petition by the state of Mississippi, on relation of the district attorney, for a writ of mandamus directed to J. R. Bew, registrar of Leflore county, to compel him to desist from registering persons until after a certain election thereafter to be held, and to refuse to register at any time such persons as had not paid certain taxes. From a judgment granting the writ the registrar appeals. Reversed, and petition dismissed.

S. R. Coleman, for appellant. A. H. Longino, for appellee.

CAMPBELL, O. J. Complying with the wishes of counsel, we proceed, without question as to the propriety of this particular proceeding, to consider the questions presented by it. They are: First. Does the fact that an election has been ordered under section 1610 of the Code of 1892 stop the registration of electors until after it is held, because of the provision of the constitution (section 251) that "electors shall not be registered within four months next before an election at which they may offer to vote," etc., and section 3615 of the Code of 1892, which is: "At any time not within four months of an election, the registrar may register the electors of his county at his office," etc? Second. Does the fact that an applicant for registration as an elector has not paid taxes for the two preceding years, although possessing the required qualifications as an elector other than this, preclude his registration as such? Third. Are the persons registered within four months of an election to be held under section 1610 of the Code of 1892 entitled to vote, if otherwise qualified? We answer each question in the negative. Neither the constitution in section 251, nor the Code in section 3615, had reference to an election held in pursuance of section 1610, but to elections contemplated by the constitution. The election provided for by section 1610 is not an election in the sense of the constitution or the law on the subject of registration and election constituting chapter 113 of the Code of 1892. It is a special device for determining whether or not liquors shall be sold within a county. It is not held by those charged with holding other elections, but by appointees of the board of supervisors and their appointees. It is a county matter, initiated in a certain way, and determined in the particular mode provided. It concerns the county alone. The legislature might have adopted any other mode of determining the question as to the sale of liquors in a county. It could prohibit it unconditionally, or on any condition it might prescribe. It has chosen to submit it to an election to be ordered and held as prescribed, but that is not an election in the sense of the constitution and registration law, as we have stated above.

The payment of taxes is not a condition of registration, but of voting. It is not a matter for the registrar but for the "officers holding the election." An applicant for registration is not required to satisfy the registrar that he has paid taxes, but he must satisfy the "officers holding the election" that he has paid the taxes required as a condition for voting. One possessing the requisite qualifications as prescribed by the constitution may be registered. Payment of taxes is not one of these qualifications. Registration and the right to vote are distinct things. One is not qualified to vote if not duly registered, but being duly registered does not entitle him to vote. It is an essential prerequisite, but does not qualify to vote. It is



that without which all other qualifications to be an elector go for nothing, but it is not sufficient to entitle one to vote. Registration is not made, by the constitution or law, even *prima facie* evidence of the right to vote. That is to be passed on by the officers holding the election, who are made "judges of the qualifications of electors." They would reject the ballot of one who had not been registered, and should not receive the ballot merely because the person offering it had been registered. They must judge of the qualifications of electors offering to vote, of which one necessary thing is registration. The constitution (section 241) prescribes the qualifications of an elector, and makes registration one of them, and section 249 repeats with distinctness the requirement of being duly registered, but it does not make the payment of taxes a condition of registration. On the contrary, it (section 241) requires the evidence of the payment on or before the 1st day of February of the year in which he shall offer to vote of all taxes to be produced to the officers holding the election, and "who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes," etc. Payment of taxes has reference to voting. One may be registered in January, or an earlier month, and if, on offering to vote at the November election afterwards, he shall produce to the officers holding the election satisfactory evidence that he has paid taxes as required, he should be allowed to vote, so far as the matter of taxes may affect his right. The constitution provides, in section 242, that "the legislature shall provide by law for the registration of all persons entitled to vote," and prescribes the oath to be taken by such persons, but makes no reference in the oath to payment of taxes. Any provision by law for the registration of persons entitled to vote must conform to the constitution, and not contravene it. So much of section 3612 of the Code of 1892 as forbids the registration of a person who has not paid all taxes, etc., is not in harmony with the constitution, but in violation of it, by imposing as a condition of being registered what the constitution has made a condition of voting. It confounds a plain distinction made by the constitution, and denies to one entitled by the constitution to be registered the right to be registered. This requirement is therefore illegal and void. It is a noticeable fact worthy of observation that the only reference of the constitution, in any of its multitudinous provisions, to payment of taxes in connection with qualified electors or voting, is in section 241, where the express requirement is that the payment of taxes shall be with reference to the year in which he shall offer to vote, and that satisfactory evidence that he has paid said taxes shall be produced to the officers holding the election. Then and there, at the election, and by the officers holding it, that

matter is to be attended to, according to the constitution. Section 243 of the constitution does not afford a reason for qualifying the observation made. It seems singularly misplaced in the article on "Franchise." It imposes a poll tax in aid of the common schools, and has no sort of connection with the franchise, except incidentally, as nonpayment of a poll tax may operate, by virtue of section 241 of the constitution, to cause a denial of the right to vote. Its sole office is to provide for a poll tax, and can have no influence on the matter under consideration. It would be better placed in article 8, "Education." While the occurrence of a special election within four months after registration does not invalidate registration, and the fact that such an election has been ordered and is to occur does not affect the right to be registered, persons registered are not entitled to vote at an election held within four months after their being registered. Section 251 of the constitution declares that "electors shall not be registered within four months next before any election at which they may offer to vote;" not that registration shall not be had within four months of an election, but it must be one at which the elector offers to vote. Whether or not one will offer to vote is a future event. The effect of the singular form of expression employed by this section must be, from the nature of things, not to prohibit registration within four months of an election, but to establish the rule that four months shall elapse between one's registration and his right to vote. There is nothing in the constitution inhibiting being registered at any time, even on the day of an election, but it does declare, in effect, that, although registered, one shall not vote at an election held within four months of his registration. This is the rule established for elections contemplated by the constitution. The statutes providing for an election to determine whether liquors shall be sold in a county contain no specific provision as to the qualifications of electors, but contain such general regulations as to authorize the assumption that the electors meant whose votes are to determine the question are those who would be entitled to vote at any election held in pursuance of the constitution and laws of the state; and as the rule for such elections is that a person shall not vote at one held within four months of his registration, it must apply to the special election to determine as to the sale of liquors in a county. The Code is to be considered as a whole, and with reference to the constitution, and, thus viewing it, the construction is justified that the terms "legal votes," as used in sections 1619, 1620, of the Code of 1892, mean those which would be legal votes at an election contemplated by the constitution and laws.

It results from these views that the registrar was improperly ordered to desist from registering any persons until after the elec-

tion to be held on the 14th October, 1893, and to refuse to register at any time such as had not paid certain taxes, but that persons registered within four months of the election will not be entitled to vote thereat, even though otherwise qualified. The learned circuit judge failed to draw the proper distinction between the right to register and the right to vote, as the legislature did, and erroneously assumed the validity of section 3612 of the Code of 1892, wherein we have shown it to be unconstitutional and void. The judgment is reversed, and the petition for mandamus is dismissed.

(71 Miss. 46)

**GOFF v. COLE.**

(Supreme Court of Mississippi. Oct. 30, 1893.)

**PARTITION—EVIDENCE OF TITLE—ADVERSE POSSESSION.**

1. In partition, where complainant claims title under her grandmother, and there is evidence that a portion of the land was conveyed by complainant's ancestor in 1873, she is not entitled to partition therein, though from the records there is ground for the conjecture that in some undisclosed way the title was reacquired by the grandmother.

2. Adverse possession is not proven by evidence of statements by the claimant's ancestor that he was in possession, where the nature of the land, whether wild or cultivated, or the nature and character of the possession, are not shown.

Appeal from chancery court, Sunflower county; W. R. Trigg, Chancellor.

Partition by Inez Cole against J. M. Goff. From a decree in favor of complainant, defendant appeals. Reversed.

R. N. Miller, for appellant. J. S. Sexton, for appellee.

**WOODS, J.** The contention of the counsel for appellant is correct, and the decree of the court below is erroneous to the extent complained of. Inez Cole was not entitled to partition, on the state of facts disclosed in the record, in the 347 acres of land conveyed away to G. W. Joiner and Stephen Brown by George Watts, attorney in fact of Benjamin F. and Elizabeth J. Martin, in the year 1873. These lands are not shown by any evidence before us to have ever been reconveyed to Elizabeth J. Martin, through whom appellee claims title. It is quite true, as counsel for appellee states in support of his position on this point, that the witness Barry does depose and say, (referring to the lands generally in Sunflower county owned by the Martins:) "He [Martin] sold it to a man named Burch. He afterwards took it back from Burch, and sold it two or three times, and took it back. He never could make it stick." But this statement is not altogether accurate; that is to say, it is incorrect as to these 347 acres sold and conveyed by George Watts, the attorney in fact of B. F. and E. J. Martin. From the record,

taken as a whole, there is ground for conjecture that these 347 acres were reacquired in some way by Elizabeth J. Martin in some undisclosed way, but there is no evidence on which to rest a well-grounded belief that such was the fact. So far as appears by this record, the title yet lodges where it was placed by George Watts, attorney in fact, in 1873. Equally unsatisfactory is the effort to maintain the right to partition of these particular 347 acres by Inez Cole on the ground of notorious adverse possession for more than 10 years in Elizabeth J. Martin and her heirs. The evidence as to possession is almost wholly the merest hearsay; and it is, moreover, so vague and definite as to forbid its application specifically to these lands whose title is disputed. The full extent and effect of the evidence is that Benjamin F. Martin said he was in possession of the Sunflower lands. What the nature and character of these 347 acres, whether wild or in cultivation, whether improved and inhabited or part of a wilderness, or what the nature and extent and character of the supposed possession, is not discoverable from the testimony taken in the case. This is not a case where the defendant is seeking to defeat the action by showing an outstanding title in some third party. It is a case in which, as the proofs now stand, he seeks, and successfully, to show that the person demanding partition of certain lands has no interest whatever in them. There was no estate in Elizabeth J. Martin remaining after the Watts conveyance in 1873, and it is vain to suppose a tenancy by curtesy in lands in which the wife had no estate. The cases of *Griffin v. Sheffield*, 38 Miss. 359, and *Day v. Cochran*, 24 Miss. 261, are sound authorities for the position of appellee's counsel, but the questions involved in those cases are not involved here. We repeat, the controversy here is as to the title to 347 acres of land. Appellee seeks partition and derives title through her grandmother, Elizabeth J. Martin. The appellant denies that the appellee has any title whatever, and shows that Elizabeth J. Martin conveyed the lands 20 years ago, and never reacquired title. The case is widely different from the case of *Martin v. Martin*, 13 South. Rep. 267, (decided at the last term of this court.) Reversed and remanded.

(71 Miss. 337)

**NIOLON et al. v. McDONALD et al.**

(Supreme Court of Mississippi. Oct. 30, 1893.)

**COMPENSATION OF TRUSTEES.**

Where a trustee makes a sale of land under a power and pays out money for the advertisement of notice of sale, required to be made under the power, he is entitled to compensation for his services, and for necessary outlays, though no provision for his payment is made in the deed.

Appeal from chancery court, Lauderdale county; W. T. Houston, Chancellor.

Bill by John M. Nolon and others against Hugh McDonald and others. From a decree allowing a trustee compensation for services in making a sale under a trust deed, complainants appeal. Affirmed.

L. B. Moody, for appellants. Walker & Hall, for appellees.

COOPER, J. No issue was made by the pleading touching the validity of the appointment of Hall as substituted trustee, nor that the amount claimed by him for his services as trustee was excessive; the position taken by complainants being that the trustee was entitled to nothing for his services, because he did not in fact make the sale under the deed. We therefore decline to consider and decide upon these points. The English rule that a trustee is not entitled to compensation for executing a trust unless provided for by the parties has not been accepted in the United States generally, nor in this state. On the contrary, it is settled in this state that he is entitled to reasonable compensation. *Shirley v. Shattuck*, 28 Miss. 14. The trustee here has performed some service in the execution of the trust, and for this he was entitled to compensation. He had also paid out money for advertisement of the notices of sale in a newspaper, and since, by the terms of the deed, he was authorized to so advertise, clearly he was entitled to be repaid for this outlay. Decree affirmed.

(30 Miss. 226)

ALLEN et al. v. HILLMAN.

(Supreme Court of Mississippi. Oct., 1891.)

EXECUTORS—CLAIMS AGAINST ESTATE—STATUTE OF LIMITATIONS—NEW PROMISE—PETITION TO SELL REAL ESTATE.

1. Code, § 2028, provides that all claims against the estate of a decedent, whether due or not due, shall be registered or be barred. Section 1814 provides that the clerk of the chancery court "may allow and register claims" against an estate. Section 2062 provides that the presentation of a claim, and having it registered, as required by law, shall stop the running of the general statute of limitations as to such claim. *Held* that, where the creditor procures his claim to be registered, the statute of limitations ceases to run, regardless of whether or not the proof of the claim is sufficient to make it a voucher to the personal representative.

2. Under Code, § 2047, which provides that any creditor of a decedent who has "procured his claim against the estate to be registered" has the right to file a petition for the sale of land of the decedent for the payment of debts, such creditor may file such petition, though there is some want of conformity in the proof of the claim to the requirement of the statute, and such proof is insufficient to make it a voucher to the personal representative.

3. Letters which merely acknowledge an indebtedness by the writer to the person to whom they are addressed, but do not refer to any particular account, or mention the amount of the debt, and which were not written to serve as an acknowledgment or a new promise, are insufficient to prevent the bar of the statute of limitations.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Petition by Walter Hillman against W. G. Allen, administrator of the estate of Mrs. S. C. Banks, deceased, and others, for the sale of certain lands belonging to such estate for the payment of a claim due therefrom to petitioner. From a decree allowing part of petitioner's claim, both parties appeal. Reversed and rendered.

Mrs. Banks died in September, 1884, and letters of administration on her estate were granted to defendant Allen, January 17, 1887, and on February 22d he published notice to creditors to prove their claims. Plaintiff, as a creditor, filed this petition against the administrator and heirs to sell lands to pay an account claimed to be due to him from deceased. The claim was an account for books, tuition, etc., from 1871 to June 23, 1885. The account had attached an affidavit, dated November 9, 1887, "that the within account is true and correct, and that no part has been paid except what has been credited." It was indorsed, "Registered Nov. 9th, 1887," and listed in registry of claims. There were several credits on the account,—some for farm products, and some for cash. The last credit was dated November 17, 1883. The petition averred that it was a mutual, open, current account, and the account was made an exhibit to the bill. There was a demurrer to this petition, which was overruled. Defendants then answered, denying that the account was a mutual account, and denying that deceased had any account against plaintiff, and averred that the items on the account were made and accepted as payment. They also denied that any amount is due on the account, and pleaded the three-years statute of limitations. The proof for plaintiff was his books of accounts, the testimony of his wife as to the correctness of the account, and various letters of deceased which were relied on as an admission of the debt. The letters do not refer to any particular account, and do not mention the amount of the debt. The court held that the petitioner could sue, that the account was a mutual one, and that all items within three years previous to the date of the first item of credit for farm products, in 1882, were not barred. An account was stated in accordance with that opinion, and a final decree rendered in favor of Hillman for \$500 of the account, and ordering the land to be sold. Defendants appeal, and plaintiff brings a cross appeal, contending that so much of the decree as did not allow the items of his account bearing date of more than three years before the date of the first cross demand was error.

D. Shelton, for plaintiff. Calhoon & Green, for defendants.

CAMPBELL, C. J. The demurrer to the petition was properly overruled, for the pe-

itioner had "procured his claim against the estate to be registered," within the meaning of section 2047 of the Code,<sup>1</sup> which has regard to the fact of registration rather than the sufficiency of the proof of the claim to justify a voluntary payment of it by the personal representative of the estate. Conceding the propositions contended for by the learned counsel for the appellant Hillman, as to the character of the account, as being a "mutual and open current account" within section 2871 of the Code, and that the statute of limitations began to run against it at the date of the last item credited to Mrs. Banks, which was November 17, 1883, it follows that all of the account accrued three years and six months before the registering of the claim, which stopped the running of the statute (Code, § 2062,<sup>2</sup>) was barred, unless the death of Mrs. B. in September, 1885, interrupted the running of time against the claim, or unless the claim was saved by a new promise or acknowledgment. It is settled that death, after the statute of limitations commences to run on a cause of action, does not stop it, and time continues to be counted, notwithstanding the lapse of an interval of greater or less duration after the death, and before the appointment of a personal representative, of the decedent. *Abbott v. McElroy*, 10 Smedes & M. 100; *Byrd v. Byrd*, 28 Miss. 144. Section 2683 of the Code provides for the contingency of death during the last year of the time required to bar a claim, and in that case adds a period equal to the portion of the last year expired before the death. It is admitted by Hillman's counsel not to be applicable here. The death of Mrs. Banks did not interrupt the running of time against the claim of Hillman, and the bar was complete in three years; and this period expired before letters of administration were granted. So much of Hillman's account as accrued within three years and six months of the date of registering his claim is not barred, because, as he could not sue for six months after grant of administration, that time is not to be counted against him. We think the presentation of his claim, and having it registered, as required by law, was suffi-

cient to stop the running of the three-years statute, without regard to the sufficiency or insufficiency of the proof of the claim necessary to make it a voucher to the administrator. The "register of claims" provided for by section 1822 of the Code is intended to show all claims proved and allowed against any estate, so that the administrator or executor, distributees or legatees, or heirs or devisees, creditors, and the court,—in fact, all concerned,—may have opportunity to know what claims are made against the estate. In order to secure this exhibit, "all claims against the estate of a deceased person, whether due or not, shall be registered," etc., or be barred. Code, § 2028. As it is made compulsory to present and have registered all claims, under penalty of loss, if this be not done, presentation and registration of a claim is made to stop the running of the general statute of limitations, and also gives the claimant the right to apply to the court, as provided by section 2047 of the Code. As said above, it is the fact of presentation of the claim, and having it registered, to which the statutes refer in section 2047 and section 2062. The clerk "may allow and register claims," (Code, § 1814,<sup>3</sup>) and it will not do to hold that the allowance and registering a claim go for nothing because of some want of conformity in the proof of the claim to the requirement of the statute. Whether the proof of the claim be sufficient to make it a voucher to the personal representative or not, if the claim is allowed and registered, the object of the statutes as to registration and its effect is accomplished.

The only remaining question is, do the letters of Mrs. Banks in evidence take the case out of the operation of the statute of limitations? This question must be answered in the negative, in view of the several adjudications with reference to this subject. While the letters show an acknowledgment of indebtedness by the writer to Hillman, they were not written to serve as an acknowledgment or promise of a debt in order to prevent the bar of the statute, and are not sufficiently precise and definite as to debt and amount to have that effect under the established rule. Only so much of the account of Hillman as bears date within three years and six months prior to the date of registering the claim is recoverable upon this record, and for that he is entitled to a decree. Reversed, and decree here. The costs of the appeal will be taxed against Hillman, and the costs of the court below against the other parties.

<sup>1</sup> Code, § 2047, provides that "any creditor of the decedent, who has procured his claim against the estate to be registered, shall have the right to file a petition, as the executor or administrator may, for the sale of land or personal property of the decedent, for the payment of debts," etc.

<sup>2</sup> Code, § 2062, provides as follows: "No suit or action shall be brought against an executor or administrator on any claim against the decedent, after the estate is declared insolvent; and the presentation of a claim and having it registered, as required by law, shall stop the running of the general statute of limitations as to such claim, whether the estate be solvent or insolvent."

<sup>3</sup> Code, § 1814, provides that the clerk of the chancery court, or his deputy, "may allow and register claims against estates being administered in the court of which he is clerk, or deputy clerk."

(52 Fla. 263)

WILSON et al. v. McCLENNY.

(Supreme Court of Florida. Nov. 8, 1893.)

## PAROL EVIDENCE MODIFYING WRITTEN CONTRACT.

The rule that prevents any written contract from being altered or varied by parol proof of another or materially variant verbal contract or agreement, made at the same time, does not prohibit the establishment by parol of a subsequent contract that alters, modifies, or changes the former existing written agreement between the parties.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; James M. Baker, Judge.

Action in debt by C. B. McClenny against Wilson & Hunting, partners. From a judgment for plaintiff, defendants appeal. Affirmed.

Fleming & Daniel, for appellants. John E. Hartridge, for appellee.

TAYLOR, J. The appellee sued the appellants in debt to recover a balance of \$1,500 due upon a contract under seal, for taking up and loading upon cars, at an agreed point, the rails, spikes, and fish-bar connections of a railroad of the appellants used in transporting logs for milling purposes. The cause was referred to and tried before a referee, and resulted in a judgment for the appellee (plaintiff) in the sum of \$1,500, and from this judgment the defendants have appealed. There was no controversy as to the contract upon which the suit was brought, nor as to the balance claimed to be due thereon; but the defendants, Wilson & Hunting, interposed a plea of set-off thereto, exhibiting as such set-off a promissory note for \$1,500 made by the plaintiff, payable to the defendants or order 60 days after its date. The plaintiff did not dispute the correctness or the validity of this note, but alleged, by way of replication to the defendants' plea of set-off thereof, that, at the time he gave it to the defendants, it was mutually agreed between them that the defendants were to accept and take the timber standing on a body of land, for which a part of the money raised from said note was used in purchasing, and to surrender to the plaintiff the said note, and that subsequently to the making of said note the defendants reaffirmed, and again agreed to surrender said note to the plaintiff whenever the plaintiff executed a bill of sale of said timber, with license to enter and cut the same, and that prior to the institution of his suit he had tendered to defendants a bill of sale for said timber, and had at all times been willing, and is now willing, to execute and deliver such bill of sale, and tenders the same with his said replication.

To this replication of the plaintiff, as the same was originally filed, the defendants interposed a demurrer upon various grounds, as follows:

(1) Because the replication was uncertain,

in that it did not describe the lands upon which stood the timber mentioned therein.

(2) Because it did not allege that the title to said land was in the plaintiff, or that he had the right to sell the timber thereon.

(3) Because standing timber is a part of the realty, and, until severed therefrom, is not the subject of sale.

(4) Because the replication is uncertain and evasive, and for other reasons is insufficient to be replied to.

(5) Because it seeks to change the terms of a written contract by fraud.

Upon the interposition of this demurrer, the plaintiff admitted the same, by filing an amended replication, in terms the same as the original, except that it described the lands upon which the timber stood, that it alleged the defendants agreed to take bill of sale to in payment of, and for a surrender of, said note of the plaintiff's. Upon the filing of this amended replication, the defendants at once joined issue thereon, and upon the issues thus made the cause was tried, with the result heretofore stated.

The errors assigned are:

(1) That the court erred in receiving and admitting in evidence certain documentary and other evidence on behalf of the plaintiff.

(2) In refusing to admit evidence offered on behalf of the defendants.

(3) The court erred in its findings of the law.

(4) There was error in rendering judgment in favor of plaintiff against defendants.

As to the first assignment of error above, it is too general, and is faulty in not specifying particularly the objectionable evidence therein alleged to have been improperly admitted; but we find in the record only one objection made by the defendants to the introduction of any evidence on behalf of the plaintiff, and that was to the introduction of a bill of sale or deed made by McClenny to the defendants to the standing timber on the lands, as set forth in the plaintiff's replication to the plea of set-off. No specific ground of objection thereto is stated in the record,—only a bald objection, which, from the record, seems to have been made after the paper was offered and admitted in evidence. And in the brief filed here no specific objection is urged to same, except that it is contended that it was not proved that it had ever been tendered by the plaintiff to the defendants prior to its introduction in evidence. The replication of the plaintiff to the defendants' plea of set-off, upon which the defendants joined issue of fact, not only alleges that the plaintiff had, all along, been ready and willing to execute and deliver such deed or bill of sale, but make present tender of such bill of sale or deed. With the issue thus presented and joined, there was no error in admitting the bill of sale, as it pointedly sustained the allegation of

the plaintiff's readiness and willingness at all times to execute and deliver same, but made good his present tender thereof.

As to the second assignment above, it is entirely too general to be considered; and, besides, it has been abandoned here, since nothing is urged in the briefs applicable thereto.

The third assignment is included in the fourth, that presents the question as to whether, under the pleadings and proofs, the referee erred in rendering judgment for the plaintiff. The pleadings upon which the issues were joined and tried present to us an issue of fact; and, in their brief, the main effort of the defendants is to convict the referee of error in his findings upon the facts adduced in support and rebuttal of such replication. Upon these facts, without rehearsing them here, we think, with the referee, that, although there is conflict between the statements of the witnesses, the preponderance of the evidence sustains the material allegations of the plaintiff's replication to the defendants' plea of set-off, by which they sought to defeat the recovery of their acknowledged indebtedness. As to the point made here that it was not permissible to vary the terms of a written contract by parol testimony, by showing that the promissory note pleaded in set-off was payable in timber, when, upon its face, it was payable in dollars, the contention of the appellants is true, to this extent: that it is not permissible to change the terms of a written contract by parol proof of any different or materially variant contract or agreement, made at the time of, or simultaneously with, the making of the contract sought to be varied. But this rule does not prohibit the establishment by parol of a subsequent contract that alters, modifies, or changes the former existing agreement between the parties. The replication of the plaintiff to the defendants' plea of set-off, while it does allege that it was understood and agreed, at the time the note pleaded in set-off was made, that it was to be paid in timber, contains, also, an averment that subsequently to the making of such note, the defendants, payees therein, again agreed to take the bill of sale to said timber in cancellation and payment thereof, and we think that the proofs sustain the substance of this latter averment, although the proofs do not sustain the date alleged on which such subsequent agreement was made.

Upon the issues as made by the pleadings, and upon the proofs, we find no error in the judgment and findings of the referee, and it is therefore affirmed.

(32 Fla. 339)

#### PURNELL v. REED.

(Supreme Court of Florida. Oct. 23, 1893.)

##### HOMESTEAD—ALIENATION BY WILL.

Under the provisions of section 4, art. 10, Const. 1885, where the holder of the home-

stead is without children, he or she (as the case may be) can legally dispose of the homestead by last will and testament, subject, however, where such disposition is made by the husband, to the widow's right to dower therein as provided for by statute.

(Syllabus by the Court.)

Error to circuit court, Duval county; James M. Baker, Judge.

Action in ejectment by Anna Purnell against Frances Reed, alias Frances Purnell. Defendant had judgment, and plaintiff brings error. Affirmed.

R. B. Hilton, for plaintiff in error. M. O. Jordan, for defendant in error.

TAYLOR, J. The plaintiff in error, as plaintiff below, sued the defendant in error in ejectment in the circuit court of Duval county for the recovery of a lot of ground within the corporate limits of the city of Jacksonville, on the corner of Laura and Orange streets, in area containing less than one-fourth of an acre. The cause was referred to and tried by a referee, and resulted in a judgment for the defendant, from which the plaintiff takes error here.

It appears from the proofs and findings of the referee that the lot in question is less than a half acre in area; that it is located within the corporate limits of the city of Jacksonville; that it was owned by one Jacob Purnell, who resided in a house located thereon, making it his home, and that he died there in July or August, A. D. 1888, the legal title to same still standing in his name; that he left a last will and testament, by which he devised the said lot and all other property owned by him to the defendant, Frances Reed, called in the will Frances Purnell, which will was duly probated, and under the same the defendant claims title to the lot as devisee. From the proofs and admissions of all parties the said Jacob Purnell died leaving no children surviving him. It was proved for the plaintiff that Jacob Purnell, many years prior to his acquisition of this lot, was regularly and legally married to the plaintiff, and that they lived together as husband and wife for several years, and then became separated, according to the proofs, because of his abandonment of the plaintiff; and that they lived apart from each other for several years prior to his death, and thus lived apart from each other at the time of his death; but there is no evidence of any divorce, or even any attempt at divorce, between them; he in the mean time, however, taking the defendant to his home on the lot in question, and living with her there in the capacity of his wife for several years prior to and up to the time of his death.

The effort of the plaintiff was to show that the lot in question was the homestead of her deceased husband, Jacob Purnell, who, though living apart from her for many years prior to and at the time of his death, was still her husband de jure, no divorce legally

severing the marital bonds between them ever having been rendered; and that, while this legal relationship of husband and wife existed between them, he could not, by will or otherwise, alienate such homestead without her consent. Her effort was to have his will, devising the property to the defendant, treated as a nullity, because of his supposed inability to devise the homestead by will without the consent of the plaintiff, his surviving legal wife.

The sole question presented for our determination is, can the husband, who dies without children surviving him, devise the homestead by will that is exempted to him under the constitution of Florida of 1885, where he leaves surviving him a legal wife, without the consent, and adversely to the interests, of such wife? This court, in construing the homestead provisions of the constitution of 1868, has repeatedly held that the homestead of a testator residing in this state, who dies leaving a wife and children, is not the subject of testamentary disposition, but that such property remains as though no will had been made, and descends to the heirs subject to the right of dower in the widow. *Wilson v. Fridenburg*, 19 Fla. 461; *Brokaw v. McDougall*, 20 Fla. 212; *Wilson v. Fridenberg*, 21 Fla. 386. But the precise question here is now presented for the first time, and must be solved under the provisions of the constitution of 1885, the husband owning the homestead having executed his will devising it, and having died, in 1888, subsequent to the adoption and ratification of the constitution of 1885, and dying, too, without children surviving him.

Were it not for the presence of section 4 of the "homestead and exemptions" article (10) in the constitution of 1885, we would be of the opinion that the homestead was not the subject of testamentary devise, and that it was inalienable, either by will or otherwise, when the legal relationship of husband and wife existed, without the consent of the wife, and this whether there were surviving children or not; but the section referred to, that was absent from the former constitution of 1868, provides as follows: "Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law." In construing the effect of section 2 of the same article 10, in the recent case of *Godwin v. King*, 31 Fla. 525, 13 South. Rep. 108, which provides that "the exemptions provided for in section 1 shall inure to the widow and heirs of the party entitled to such exemption," etc., we have said that the constitution of 1885 does not undertake, any more than did the constitution of 1868, to regulate the descent of

property; and that the respective shares of the widow and heirs are not determined by the homestead article in such constitution, but are ascertained under the law regulating dower and the descent of property in force in this state; and, in effect, that the homestead provisions of the constitution did not affect any of the widow's rights to dower, as provided for in the dower statutes as they now exist; that she was entitled to dower under the statute, notwithstanding the homestead provisions of the constitution, in all of her deceased husband's property, real and personal, including the homestead, and that the dower thus taken was, under the statute then and now in force, exempt from the debts of the husband, independently of its immunity from those debts under the homestead exemptions of the constitution. In brief, the widow's dower rights in her husband's estate, inclusive of that portion thereof denominated as the "homestead," as provided for in the dower statutes now existing, are entirely unaffected by the homestead provisions of the constitution, and remain the same as though the homestead provisions had never been ingrafted into that instrument. One of the provisions of our dower statutes (section 1, p. 475, *McClell. Dig.*; section 1830, *Rev. St.*) is that, "when any person shall make his last will and testament and not therein make any express provision for his wife by giving and devising unto her such part or parcel of real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto in the circuit or county judge's court of the county wherein she resides at any time within one year after the probate of such will, and then and in that case, she shall be entitled to dower," etc. This statutory provision, with all the others in relation to dower, remains unchanged and unaffected by the constitution. The framers of that instrument, in recognition of the fact that the statutory provisions for the widow's dower were liberally ample, and remained entirely unaffected by anything embodied by them in the organic law, and that under those statutes she was fully secured and protected in those rights, no matter what direction the husband might undertake by will to give to his property, inclusive of the homestead portion thereof, very consistently, as we think, ingrafted into that instrument the provision that where there were no children the husband could devise the homestead by last will and testament; the effect of which, when done in a manner unsatisfactory to the surviving widow, would be to relegate her to the assertion of her dower rights, enabling her, under the statute, to dissent thereto, which dissent, when expressed in time, practically annuls the will in so far as it undertakes to dispose of any part of the estate to which the widow would be entitled as dower under the statute. Our conclusion is that, under the provisions of section 4, art. 10, of the constitution of 1885,

where the holder of the homestead is without children, he or she (as the case may be) can legally dispose of the homestead by last will and testament, subject, however, where such disposition is made by the husband, to the widow's right to dower therein as provided for by statute.

The judgment appealed from is affirmed.

(32 Fla. 394)

**BORDEN et al. v. WESTERN UNION TEL. CO.**

(Supreme Court of Florida. Oct. 9, 1893.)

PLEADINGS—DEMURRER—PRACTICE.

In an action on the case for damages, if the declaration makes a case entitling the plaintiff to any recovery whatever, even though it be only nominal damages, a demurrer will not lie thereto because it claims other or greater damages than the case made legally entitles the plaintiff to recover; demurrer not being the proper way to test the extent of the recovery to be had. Such questions are properly raised and settled by objections to testimony at the trial, or in the shape of instructions to the jury as to the law applicable to the points raised.

(Syllabus by the Court.)

Error to circuit court, Nassau county; W. B. Young, Judge.

Action on the case by N. B. Borden & Co. against the Western Union Telegraph Company. From a judgment for defendant on demurrer to the declaration, plaintiffs bring error. Reversed.

Cooper & Cooper, for plaintiffs in error. John E. Hartridge, for defendant in error.

**TAYLOR, J.** The plaintiffs in error sued the defendant telegraph company in the circuit court of Nassau county, in case, to recover damages for the erroneous transmission of a telegraphic message. The defendant demurred to the declaration, the demurrer was sustained, and, the plaintiffs refusing to amend, final judgment on the demurrer was entered, and from such judgment the plaintiffs bring the case here on writ of error.

The declaration is as follows:

(1) "Nathan B. Borden and William D. Wheelwright, partners doing business under the firm name of N. B. Borden and Company, by Cooper and Cooper, their attorneys, sue the Western Union Telegraph Company, a corporation, for that heretofore, to wit, on the 20th day of August, A. D. eighteen hundred and ninety-one, the plaintiffs as such partners were lumber merchants, dealing in pine lumber, and buying and selling pine lumber, and filling orders for pine lumber, and the said defendant, to wit, on the said day, carried on the business of transmitting messages by telegraph for reward to defendant; and thereupon, to wit, on the day aforesaid, in consideration that said plaintiffs would pay to said defendant, to wit, forty cents, the defendant promised plaintiffs to

transmit correctly for them from Fernandina, in Nassau county, state of Florida, to G. F. Lough and Company, in the city of New York, the message following, to wit: 'Fourteen dollars is best we can do. Answer.' And the plaintiffs paid the said defendant forty cents, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to have said message correctly transmitted by defendant as aforesaid; yet defendant did not correctly transmit to said G. F. Lough and Company the said message as aforesaid, and transmitted to them another and different message, as follows, to wit: 'Fifteen dollars is best we can do. Answer.' And the said message of plaintiffs being to inform said G. F. Lough and Company, with whom plaintiffs were then negotiating for the sale by plaintiffs to them of a large quantity of pine lumber, of the price at which plaintiffs would sell them such lumber at Fernandina, aforesaid, and by reason of the said change and error in the said message which was so transmitted by said defendant as aforesaid, plaintiffs lost an order from and the sale to said G. F. Lough and Company of a large quantity of pine lumber, to wit, one million feet thereof, at Fernandina, aforesaid, at the price of fourteen dollars per thousand feet thereof, and with the profit thereon to plaintiffs of two dollars and fifty cents per thousand feet thereof, which lumber would have been so sold by plaintiffs, and which profit would have been so made and received by plaintiffs, if the said first-mentioned message had been correctly transmitted by defendant as aforesaid, to the damage of plaintiffs in the premises of forty-five hundred dollars. Wherefore plaintiffs bring this suit.

"(2) And for that heretofore, to wit, on the 20th day of August, A. D. eighteen hundred and ninety-one, the plaintiffs, as such partners, were lumber merchants, dealing in pine lumber, and buying and selling pine lumber, and filling orders for pine lumber, and the said defendant, to wit, on said day, carried on the business of transmitting messages by telegraph for reward to defendant; and thereupon, to wit, on the day aforesaid, in consideration that said plaintiffs would pay to said defendant, to wit, forty cents, the defendant promised plaintiffs to transmit carefully for them from Fernandina, in Nassau county, state of Florida, to G. F. Lough and Company, in the city of New York, the message following, to wit: 'Fourteen dollars is best we can do. Answer.' And the plaintiffs paid the said defendant said forty cents, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to have said message carefully transmitted by defendant as aforesaid; yet defendant did not carefully or correctly transmit to said G. F. Lough and Company the said message as aforesaid, and, by the carelessness and negligence of



defendant, its agents or employees, transmitted to them another and different message, as follows, to wit: 'Fifteen dollars is best we can do. Answer.' And the said message of plaintiffs being to inform said G. F. Lough and Company, with whom plaintiffs were then negotiating for the sale by plaintiffs to them of a large quantity of pine lumber, of the prices at which plaintiffs would sell them such lumber at Fernandina, aforesaid, and by reason of the said change and error in the said message, which was so transmitted by said defendant as aforesaid, plaintiffs lost an order from and the sale to said G. F. Lough and Company of a large quantity of pine lumber, to wit, one million feet thereof at Fernandina, aforesaid, at the price of fourteen dollars per thousand feet thereof, and with the profit thereon to plaintiffs of two dollars and fifty cents per thousand feet thereof, which lumber would have been so sold by plaintiffs, and which profit would have been so made and received by plaintiffs, if said first-mentioned message had been correctly transmitted by defendant as aforesaid, to the damage of plaintiffs in the premises of forty-five hundred dollars. Wherefore plaintiffs bring this suit.

"(3) And for that heretofore, to wit, on the twentieth day of August, A. D. eighteen hundred and ninety-one, the plaintiffs, as such partners, were lumber merchants, dealing in pine lumber, and buying and selling pine lumber, and filling orders for pine lumber, and the said defendant, to wit, on said day, carried on the business of transmitting messages by telegraph for reward to defendant, and thereupon, to wit, on the day aforesaid, in consideration that said plaintiffs would pay to said defendant, to wit, forty cents, the defendant promised plaintiffs to transmit carefully for them from Fernandina, in Nassau county, state of Florida, to G. F. Lough and Company, in the city of New York, the message following, to wit: 'Fourteen dollars is best we can do. Answer.' And the plaintiffs paid the said forty cents, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to have said message carefully transmitted by defendant as aforesaid; yet defendant did not carefully or correctly transmit to said G. F. Lough and Company the said message as aforesaid, and, by the gross carelessness and negligence of defendant, its agents or employees, transmitted to them another and different message as follows, to wit: 'Fifteen dollars is best we can do. Answer.' And the said message of plaintiffs being to inform said G. F. Lough and Company, with whom plaintiffs were then negotiating for the sale by plaintiffs to them of a large quantity of pine lumber, of the price at which plaintiffs would sell them such lumber at Fernandina aforesaid, and by reason of the said change and error in the said message, which was so transmitted by said defendant as aforesaid, plaintiffs

lost the sale to G. F. Lough and Company of a large quantity of pine lumber, to wit, one million feet thereof, at Fernandina, aforesaid, at the price of fourteen dollars per thousand feet thereof, and with the profit thereon to plaintiffs of two dollars and fifty cents per thousand feet thereof, which lumber would have been so sold by plaintiffs, and which profit would have been so made and received by plaintiffs, if said first-mentioned message had been correctly transmitted by defendant as aforesaid, to the damage of plaintiffs in the premises of forty-five hundred dollars. Wherefore plaintiffs bring this suit. And plaintiffs claim of defendant four thousand and five hundred dollars."

The grounds of the demurrer thereto were as follows: "(1) As to each and every count in said declaration, it is not shown that there is any cause and effect between the negligence alleged and the damages claimed. (2) That the said declaration nowhere shows a proper averment that the negligence charged was the proximate cause of the alleged damages. (3) The damages claimed are too remote and speculative. (4) The damages claimed are not the damages contemplated in law under the facts stated. (5) The facts set up do not constitute a cause of action."

The demurrer in this case should have been overruled, because demurrer was not the proper way either to present or have the issues settled that were sought to be raised thereby. It is conceded by the counsel for the appellee, and all the authorities agree, that, for such an error in the transmission of a message by a telegraph company as is here made the basis of this action, the erring company is liable, at least in nominal damages or the cost of the message, for its mistake. The plaintiffs, under the declaration in this case, even conceding every contention of the defendant in error to be true, were entitled to damages, at least to the amount paid out by them for the transmission of the message, and their recovery for that sum would, of course, carry with it in their favor the costs of the suit. The proper way to have raised the question presented as the grounds of this demurrer was by objections to testimony at the trial, or in the shape of instructions to the jury as to the law applicable to the points raised. Where anything is legally recoverable in a suit, demurrer is not the way to test the extent of recovery. In support of this question of practice we cite the case of Daughtery v. Telegraph Co., 75 Ala. 168, without reference to the rule for the admeasurement of damages in cases growing out of negligence in the transmission of cipher or unintelligible messages by such companies. Logan v. Telegraph Co., 84 Ill. 468.

The judgment of the court below is reversed, with directions to overrule the defendant's demurrer to the plaintiffs' declaration.

(32 Fla. 400)

**BORDEN et al. v. INTERNATIONAL OCEAN TEL. CO.**

(Supreme Court of Florida. Oct. 9, 1893.)

Error to circuit court, Nassau county; W. B. Young, Judge.

Action on the case by N. B. Borden & Co. against the International Ocean Telegraph Company to recover damages for the erroneous transmission of a message. From a judgment for defendant on demurrer to the declaration, plaintiffs bring error. Reversed.

Cooper & Cooper, for plaintiffs in error. John E. Hartridge, for defendant in error.

**TAYLOR, J.** At the present term we have passed upon a case brought here upon writ of error by the plaintiffs in error in this case against the Western Union Telegraph Company, as defendant in error, (13 South. Rep. 876.) in which the declaration, pleadings, and orders brought here for review were identical with this case. Indeed, with the exception of the differently named defendants, the records in the two cases are practically duplicates, the one of the other. The cause of action is the same in both cases. What is said in that case applies in every particular to this. Without reiterating, therefore, the judgment of the court below in this case is likewise reversed, with directions to overrule the defendant's demurrer to the plaintiffs' declaration.

**HODGES, Tax Collector, v. COFFEE.**

(Supreme Court of Mississippi. Oct. 30, 1893.)

TAXATION—DELINQUENT TAXES—DAMAGES—WHEN AUTHORIZED.

Meridian City Charter, § 4, provides that 10 per cent. damages on all city taxes not paid by December 15th shall accrue and be collected, but that "the collector shall only be entitled to 10 per cent. damages on all taxes collected by him by seizure or sale." *Held*, that where a citizen of Meridian tendered the amount of her taxes after the prescribed date, which was refused, and paid the damages in addition to the taxes under protest, reserving to herself the right to sue therefor, she could recover back the damages; the latter part of the section limiting the provisions of the former to taxes collected by seizure and sale of personal property.

Appeal from circuit court, Lauderdale county; S. H. Terral, Judge.

"Not to be officially reported."

Action by Ella C. Coffee against G. M. Hodges, tax collector of the city of Meridian, to recover an amount alleged to have been paid by her in excess of taxes due from her. There was judgment for plaintiff, and defendant appeals. Affirmed.

Appellee's taxes due to the city of Meridian for the year 1892 on her real and personal property in said city amounted to \$1,833.03. On January 31, 1893, she tendered to appellant, who was the tax collector for said city, the amount of her taxes. He refused to receive said sum, and demanded the additional sum of \$183.30 as damages accrued by reason of the nonpayment of the taxes by the 15th day of December, 1892. On February 6, 1893, appellee paid to the tax collector the full amount of her taxes; also the \$183.30 demanded as damages. She paid the amount

claimed as damages under protest, and reserved the right to sue for same. This is a suit brought by appellee against appellant to recover the said sum of \$183.30. Section 4 of the charter of Meridian provides "that on all city taxes unpaid after 15th day of December of each year ten per cent. damages shall accrue and be collected after said date." This section, after making provisions for the sale of personal property by the city collector, further provides: "The collector shall only be entitled to ten per cent. damages on all taxes collected by him by seizure and sale." In the court below the case was tried by the court without a jury on an agreed statement of facts substantially as above set forth. From a judgment in favor of the plaintiff, defendant appealed.

Cochran & Bozeman, for appellant. Fewell & Brahan, for appellee.

**CAMPBELL, C. J.** While the first part of section 4 of the act of February 25, 1888, amendatory of the charter of Meridian, plainly declares that 10 per cent. damages on all city taxes not paid by the 15th of December shall accrue and be collected, the last clause of the same section as plainly qualifies the former provision by limiting it to taxes collected by seizure and sale of personal property. The fact that other sections of the act mention "damages" does not affect the operation of the disqualifying clause, and merely suggests, what would probably be found true if the history of the bill were known, viz. that it was drawn to make the 10 per cent. a penalty for nonpayment of taxes by December 15th, and was amended by the last sentence of section 4, which completely changed the scheme as to this, and the term "damages" was left in the other sections. Affirmed.

(69 Miss. 476)

**HANON et al. v. WEIL et al.**

(Supreme Court of Mississippi. Oct. Term, 1891.)

APPEALABLE ORDERS—CHANGE IN POSSESSION OF PROPERTY.

An order of the chancellor vacating the appointment of a receiver absolutely or conditionally, and directing a return of the property to the person from whom it was taken, does not change the possession of property, within the meaning of Code 1880, § 2311, allowing the chancellor to grant an appeal from any interlocutory order or decree whereby the possession of property is required to be changed; and an appeal will not lie.

Appeal from chancery court, Lauderdale county; S. Evans, Chancellor.

Creditors' bill by Hanon & Sons and others against J. Pollock & Co. and Weil Bros. A receiver having been appointed to take charge of certain property which had been purchased by defendants, the chancellor, in vacation, made an interlocutory order, by which he was removed, and defendants were

allowed to give a forthcoming bond, and take possession of the property. From this order the chancellor allowed an appeal and supersedeas. Appellees move to discharge the supersedeas. Granted.

Miller & Baskin, J. R. McIntosh, and Braine & Alexander, for the motion. A. J. Russell, opposed.

CAMPBELL, C. J. An appeal does not lie from an order of a chancellor vacating the appointment of a receiver absolutely or conditionally, and directing a return of property to the person from whom it was taken. This is not a change of the possession of property, within the contemplation of section 2311 of the Code.<sup>1</sup> It is merely a restoration of the status quo as existing before the appointment of the receiver. The refusal to appoint a receiver may not be appealed from, and the removal of the receiver is not appealable. Motion to discharge the supersedeas is sustained.

(71 Miss. 110)

FOOTE v. DISMUKES et al.

(Supreme Court of Mississippi. Oct. 16, 1893.)

UNLAWFUL DETAINER—TAX TITLE—RIGHTS OF INFANTS.

Code 1880, § 538, provides that the purchaser of land at a sale for taxes, after one year, and within two years from the date of sale, may bring an action of unlawful detainer for the possession of the land, and a judgment in his favor shall be a bar to any action brought after one year to controvert the title. *Held*, that it is no defense to such possessory action that the land belonged to a decedent's estate, in which minor heirs were interested.

Appeal from circuit court, Noxubee county; S. H. Terral, Judge.

Action of unlawful detainer by H. W. Foote against D. G. Dismukes and another, for the possession of land. Defendants had judgment, and plaintiff appeals. Reversed.

This action was brought under Code 1880, § 538, which provides: "The purchaser of land at a sale for taxes, after one year from the date of his purchase, and within two years of such date, and his vendee, shall be entitled to bring the action of 'unlawful detainer' for the recovery of possession of such land; and a judgment in his favor in said action shall be a bar to any action in any court brought after one year from such judgment, to controvert the said title to said land."

The lands in controversy were sold March 31, 1890, for the taxes of 1889, and plaintiff became the purchaser. On October 1, 1891, plaintiff filed his affidavit for a writ of unlawful detainer, before a justice of the peace in Noxubee county, against defendants, who were in possession of the land. A judgment

in favor of plaintiff was appealed to the circuit court. On the trial in the circuit court, plaintiff introduced his deeds from the tax collector to the lands, and rested. Defendant D. G. Dismukes testified that all the land in controversy belonged to the estate of Mrs. S. A. Dismukes, deceased; that S. A. Dismukes died eight or nine years before the suit was brought, intestate, leaving, as her heirs, himself, the surviving husband, and ten children, and that no distribution or division had ever been made of the lands. After all the evidence was in, plaintiff moved to exclude all the testimony of defendant in regard to the title of the land previous to the sale of said lands for taxes. This motion was overruled by the court. The court then gave a peremptory instruction to find for the defendants, and plaintiff appealed from a verdict and judgment in accordance with said instruction.

H. W. Foote, for appellant. A. C. Bogle, for appellees.

WOODS, J. It is impossible for us to imagine upon what theory of law the court below admitted the evidence of the defendant as to the condition of the title to the lands in his children. The action was possessory, under section 538, Code 1880. Who the delinquent taxpayers were, was wholly immaterial. What their ages, was equally immaterial. The minor children of the defendant were not parties to the suit; but, if they had been, their minority did not exempt their lands from taxation. This manifest and fatal error is not attempted to be maintained by appellees' counsel, but his sole reliance for an affirmance rests upon objections to the bill of exceptions which are technical, and are unsupported by a fair interpretation of the record. It is sufficient to say we do not concur with counsel in his contention on this point. Excluding the evidence of the defendant, as should have been done, the plaintiff, on the record before us, was entitled to have had a peremptory charge. Reversed and remanded.

(70 Miss. 669)

GREENVILLE COMPRESS & WAREHOUSE CO. v. PLANTERS' COMPRESS & WAREHOUSE CO.

(Supreme Court of Mississippi. May 8, 1893.)

CORPORATIONS—ULTRA VIRES CONTRACT—ENFORCEMENT.

Two cotton compress companies made an agreement to consolidate, which was outside of their powers, and pending the procurement of a charter for the consolidated company both plants were put into the hands of a "governing committee" to manage. Subsequently the stockholders of one company voted against consolidation, and it was proceeding to act in disregard of the agreement, when the other company obtained an injunction against it to restrain any interference with the action of the "governing committee." *Held*, that the court erred in granting and perpetuating such injunc-

<sup>1</sup> Code 1880, § 2311, provides that the chancellor may grant an appeal "from any interlocutory order or decree whereby money is required to be paid, or the possession of property to be changed," etc.

tion, as it in effect specifically executed an ultra vires contract, and turned over the property of the defendant company to persons not parties to the suit.

Appeal from chancery court, Washington county; W. R. Trigg, Judge.

Action by the Planters' Compress & Warehouse Company against the Greenville Compress & Warehouse Company. From a decree in favor of plaintiff, defendant appeals. Reversed.

The directors of the Greenville Compress & Warehouse Company and the Planters' Compress & Warehouse Company agreed with each other to consolidate their two corporations to form a new one under the name of the Greenville Cotton Press Association, to be chartered for that purpose; the properties of each to be merged, at the valuations of \$90,000 for the latter and \$100,000 for the former. Pending the procurement of a charter for the latter and a consummation of the consolidation, the directors of the two presses turned over both presses to a "governing committee," to take complete possession of both, and manage the same for joint benefit. The proposition to consolidate was submitted to meetings of the stockholders of each corporation on the 20th day of August, 1891, and was by the stockholders present approved. Pursuant to this contract entered into, the governing committee proceeded to carry on the business of said presses, and in doing so decided, for the purposes of economy, to run but one press, and to lease out the other to third parties. This committee continued said joint management, and paid all running expenses, and divided the net earnings of the business between appellant and appellee on the basis of 100 for appellant and 90 for appellee. This division was accepted from time to time by both corporations. This management of the committee was continued until November 10, 1891. During the continuance of the joint management the press of appellee was shut down, and appellant's press was run by the committee. On the 10th day of November, 1891, the stockholders of appellant met and voted against consolidation. On the same day, at a meeting of appellant's directors, a resolution was passed reciting that, as the Planters' Warehouse Company had closed down for the season, it is fair and right that the Planters' Compress & Warehouse Company should have a share of the compressing of the present cotton season, agreeing to lease appellee's press, and to pay them as a rent two-fifths of the net earnings of the season as the same may be made by the finance committee of the Greenville Compress & Warehouse Company on May 1, 1892. Upon the passage of this resolution by appellant it proceeded to ignore the management of the joint committee, and to appropriate to itself all the earnings of the whole compressing and warehousing business. Appel-

lee thereupon filed its bill in the chancery court of Washington county, setting up such of the above facts as were in their knowledge, and asking for a discovery as to the remainder, and asking that appellant be restrained from any interference with the operations of the joint committee until the end of the cotton season, or until said corporations should be merged into one, and that said joint contract be enforced as to the division of the profits of the joint business through such period. On these facts a restraining order was granted by the chancellor. A motion was made to dissolve the injunction, but it was overruled, and the property retained within the control of the joint committee until the 1st day of July, 1892, by a decree of the chancellor. Appellant answered the bill, and made its answer a cross bill for an account of the earnings as received by appellee, which was dismissed. The joint committee made a report, showing its distribution of the net earnings for the season, and filed the same, and the court entered its final decree confirming the same. From this decree appellant prosecutes this appeal.

Skinner & Lewenthall, for appellant. Jayne & Watson, for appellee.

COOPER, J. The agreement between the directors of the respective companies was clearly beyond the corporate powers of either company to make, and it had not been fully executed when the appellant withdrew from it. There are some decisions which proceed on the apparent postulate that an ultra vires agreement executed fully by one of the corporations, or so far executed that the status quo cannot be restored, may be made the basis of an action; but in many of these cases it will be found that the measure of recovery would be the same whether the injury done to the plaintiff by the failure of the defendant to perform, or the benefit received by the defendant under the agreement, is taken as the standard. Cases of this sort may therefore be well assigned to that other and far more numerous class in which the right of recovery is not rested on the invalid agreement, but is recognized to exist, notwithstanding the agreement, upon the principle that the defendant may not repudiate the contract, and yet retain the benefit which has been derived under it. The decided weight of authority in England and America is that no action lies on the invalid contract; that no decree can be made by a court of equity for its specific performance, nor a recovery had at law for its breach; but that by proceeding in the proper court the plaintiff may recover to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094; *Davis v. Railroad*, 131

Mass. 258; Pearce v. Railroad, 21 How. 441; Railroad Co. v. Riche, L. R. 7, H. L. 653, L. R. 9 Exch. 224; In re Cork & Y. Ry. Co., 4 Ch. App. 748. The chancellor, by the very extraordinary course pursued in this case, has not only specifically executed the ultra vires agreement, but has done it by a peremptory injunction, by taking the property of the appellant from its possession and turning it over to persons not parties to the suit, and who were not appointed receivers of the court. At the final hearing the court found itself in the anomalous position of not being in condition to afford relief by final decree because pending the suit the defendant had worked out its own redress by receiving from the "joint committee" provided for by the agreement, which it relies on, its proportion of the proceeds of the enterprise. The court therefore dismissed the complainant's bill. It is to be regretted that an amicable settlement was not agreed on by the parties. The complainant should have promptly accepted the offer made by the defendant to allow it two-fifths of the net proceeds of the season's work. In view of the condition in which the matter has been brought by the course pursued by the court below it may be difficult to reach a complete settlement along strictly legal lines. The extent of the right of the complainant is sufficiently indicated by what we have said. We shall not now attempt to direct in what manner the account should be taken, but will only reverse the decree, and remand the cause for further proceedings. It is so ordered.

(71 Miss. 78)

## AVANT v. STATE.

(Supreme Court of Mississippi. Nov. 13, 1893.)

## ARSON—INDICTMENT—DESCRIPTION OF OFFENSE—EVIDENCE.

Where an indictment charged defendant with burning a "cotton house, worth \$10, in which was then and there 1,000 pounds of seed cotton, worth \$15, the said cotton house and cotton being then and there the property of S.," an instruction that if the jury believed the cotton burned belonged to S. they should convict, is fatally erroneous, though there was evidence that the cotton as well as the house was burned; the offense of burning the cotton not being charged in the indictment.

Appeal from circuit court, Panola county; Eugene Johnson, Judge.

"To be officially reported."

Hillis Avant was convicted of arson, and appeals. Reversed.

P. H. Lowrey, for appellant. Frank Johnston, Atty. Gen., for the State.

COOPER, J. The appellant appeals from a conviction for arson. The indictment charges that "Hillis Avant, late of the county and district aforesaid, on the 16th day of May, 1892, in said county and district, did unlawfully, willfully, feloniously, and maliciously set fire to and burn a certain cot-

ton house, worth ten dollars, in which was then and there one thousand pounds of seed cotton, worth fifteen dollars, the said cotton house and cotton being then and there the property of S. E. Holcomb, with the intent of him, the said Hillis Avant, to willfully, feloniously, and maliciously injure him, the said S. E. Holcomb." On the trial the fact was developed that the house alleged to have been burned was the property of the father of S. E. Holcomb; that it was burned on the night of January 25, 1891, and that the cotton it contained was the cotton of S. E. Holcomb. All that appears in evidence in relation to the ownership and possession of the house is the following, which is taken from the testimony of the witness S. E. Holcomb: "The land belonged to my father, but I worked it the year before the pen [house] was burned. The cotton in the pen belonged to me. My brother helped to make it, but I had bought his interest before the cotton was burned. My brother and I worked the land together." On the request of the state the court instructed the jury, *inter alia*, as follows: "No. 2. The court charges the jury that it makes no difference if the house belonged to Holcomb's father, if you further believe from the evidence beyond a reasonable doubt that it is the identical house as alleged in the indictment, and S. E. Holcomb had control, and not some other house; or if you believe from the evidence beyond a reasonable doubt that the cotton in the house was the cotton of S. E. Holcomb, as alleged in the indictment, and that the defendant willfully set fire to and burned it,—then you will still find him guilty." The attorney general, in his brief, construes this instruction as announcing the proposition that it was unnecessary to prove the ownership of the house as laid in the indictment, if its identity was otherwise established, and his argument is to sustain the instruction as thus construed. If this were the meaning of the instruction, we should think it clearly erroneous, for it is well settled that in arson the ownership must be proved as laid, whether the indictment be at common law or upon a statute. 2 Bish. Crim. Proc. § 36; Martin v. State, 28 Ala. 71; Martha v. State, 28 Ala. 72; Carter v. State, 20 Wis. 647; Boles v. State, 46 Ala. 204. At common law the offense was against the security of habitation, and the ownership was laid in him who had the occupancy, though that occupancy might be wrongful, (2 Bish. Crim. Proc. §§ 36, 37;) but under statutes making punishable the burning of a building not used as a dwelling it has been held that the ownership may be laid in the owner of the land, though leased to a tenant, (People v. Fisher, 51 Cal. 319; People v. Simpson, 50 Cal. 304; State v. Moore, 61 Mo. 276; 2 Bish. Crim. Proc. § 37.) The instruction under consideration is not clearly expressed, but we construe it as informing the jury that,

though the house burned in truth belonged to the father of S. E. Holcomb, yet the jury should convict (1) if the house had been identified, and was in control of S. E. Holcomb; or (2) if the house belonged to the father, and was not in control of S. E. Holcomb, if the jury believed the cotton burned was the property of S. E. Holcomb. So construed, the instruction is fatally erroneous. The appellant might have been indicted for arson of the cotton, (Code 1880, § 2710,) but that was not done. The indictment is clearly for the arson of the house only. It is true it avers that certain cotton was in the house, but whether the cotton was burned or was taken from the house and saved does not appear from the indictment. The testimony, it is true, discloses the fact that the cotton was also burned. But one may not be convicted on evidence alone; conviction must be on indictment supported by evidence. "The verdict of a jury does nothing more than verify the facts charged." *Com. v. Odlin*, 23 Pick. 275; *Sullivan v. State*, 67 Miss. 346, 7 South. Rep. 275. In effect the jury was told it might convict the appellant of an offense not charged in the indictment. The judgment is reversed, and a new trial awarded.

(71 Miss. 202)

**HARPER v. STATE.**

(Supreme Court of Mississippi. Nov. 13, 1893.)

**LARCENY—POSSESSION OF STOLEN GOODS—PRESUMPTION.**

The possession of stolen goods raises no presumption of defendant's guilt, such possession being merely a circumstance for the jury's consideration in determining the question of his guilt.

Appeal from circuit court, Attala county; C. H. Campbell, Judge.

Ed. Harper was convicted of crime, and appeals. Reversed.

Anderson, Haden & Davis, for appellant. Frank Johnston, Atty. Gen., for the State.

**WOODS, J.** The evidence of recent possession by the accused of any goods proved to have been burglariously stolen from the storehouse of Kelly & Mills is very unsatisfactory, and the evidence of the burglary itself, as it appears in the record, is also very unsatisfactory. But we reverse the judgment of the court below because of error committed in giving the first instruction asked by the state. This instruction is clearly in the face of the rule laid down in *Stokes v. State*, 58 Miss. 677, and reaffirmed in *Matthews v. State*, 61 Miss. 155. The law raises no presumption from recent possession of stolen goods. Such possession is a circumstance for the jury's consideration in determining the question of the defendant's guilt, and, in the absence of a reasonable explanation, the jury may infer guilt. This instruction is peculiarly obnoxious, inasmuch as

possession, and not recent possession, is said by it to raise the legal presumption of guilt; hence it is doubly erroneous. Reversed and remanded.

(71 Miss. 61)

**CUNNINGHAM v. DILLARD et al.**

(Supreme Court of Mississippi. Oct. 16, 1893.)

**DEED—IMPLIED COVENANT—SEISIN.**

Under Code 1892, § 2440, (Code 1880, § 1196,) providing that the words "grant, bargain, sell" in a deed shall operate as an express covenant that the grantor was seised of "an estate," there is not an implied covenant that he was seised in fee, though the habendum is, to have and hold "in fee simple."

Appeal from chancery court, Noxubee county; T. B. Graham, Chancellor.

"To be officially reported."

Action by J. B. Cunningham against G. G. Dillard, administrator, and others, on a covenant. Judgment for defendants. Plaintiff appeals. Affirmed.

A. C. Bogle and J. W. Drake, for appellant. Rives & Rives, for appellees.

**COOPER, J.** The statutes of this state in reference to conveyances of land provide that "the words 'grant, bargain, sell,' shall operate as an express covenant, to the grantee, his heirs and assigns, that the grantor was seised of an estate, free from incumbrances, made or suffered by the grantor, (except the rent or services that may be reserved,) as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in the conveyance; and the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches, as if the covenants, above mentioned, were expressly inserted." Code 1880, § 1196; Code 1892, § 2440. Mrs. Frances Jeffries, by the use of the statutory words, conveyed to one Mrs. Caroline P. Givens a tract of land in consideration of the payment of \$750, the habendum of the deed being in these words: "To have and to hold the above-described property unto the said Caroline P. Givens, her heirs and assigns, forever, in fee simple, against the claim or claims of any and all persons whatsoever." Mrs. Givens conveyed the land by deed with general warranty of title to the appellant. Mrs. Frances Jeffries died on the 26th day of August, 1890, having by will devised her estate to the appellees other than G. G. Dillard, who is the administrator cum testamento annexo of her estate. After the death of Mrs. Jeffries the appellee Fannie Jeffries brought an action for the recovery of an undivided one-half interest in the lands conveyed by Mrs. Frances Jeffries to Mrs. Givens, and succeeded therein by proof of the fact that Mrs. Jeffries had only a life estate therein, and that the plaintiff in that action, Fannie Jeffries, was the owner of the remainder in fee. The complainant in the present

action seeks to recover from the representative of Mrs. Jeffries one-half of the purchase price received by her from Mrs. Givens, for breach of the covenant of title contained in the conveyance from Mrs. Jeffries to Mrs. Givens. The defendants demurred to the bill of complaint, and their demurrer was sustained, and complainant's bill dismissed, from which decree he prosecutes this appeal.

Counsel for appellant seeks to maintain his suit by extending by implication the extent of the covenant of warranty. His contention is that by the habendum of her deed Mrs. Jeffries characterized the estate she professed to convey as a fee simple, and that by necessary implication the warranty springing from the use of the statutory words "grant, bargain, and sell" is to be construed as a warranty of seisin of a fee-simple estate. This position cannot be maintained. The warranty is created and measured by the statute. The statute declares that the deed shall be considered "as if the covenants above mentioned were expressly inserted." Now, if we take the conveyance executed by Mrs. Jeffries, and write it so as to express the covenants implied by law, we have—First, a granting clause sufficient to transfer whatever estate the grantor had in the land; second, an habendum in fee; third, a covenant that the grantor is seised of an estate, (not in fee, nor for life, but some estate of freehold,) free from incumbrances made or suffered by the grantor, (except the rents and services that may be reserved,) and also for quiet enjoyment against the grantor, her heirs and assigns. It is not suggested that there has occurred a breach of any of these covenants. It is conceded that the grantor was seised of an estate, viz. an estate for life. The complaint is that she was not seised of an estate in fee. But she did not expressly covenant that she was, and the statute does not impose such covenant by reason of the use of the statutory words. The effort of complainant is to enlarge the effect of the statute by extending its terms by implication. This cannot be done. The decision in *Weems v. McCaughan*, 7 Smedes & M. 422, which is relied on by appellant, goes only to the point that the statute is not operative if the conveyance, though using the statutory words, contains also express covenants, the court saying: "The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants. But when the party declares how far he will be bound to warrant, that is the extent of his covenant." To the same effect are *Hoy v. Taliaferro*, 8 Smedes & M. 727; *Duncan v. Lane*, Id. 744. In *Bush v. Cooper*, 26 Miss. 600, Judge Handy, in delivering the opinion of the court, declared that it had been held "that under our laws the terms 'grant, bargain, and sell' in a deed of conveyance of them-

selves import covenants of general warranty of title and against incumbrances, and for quiet enjoyment, as effectually as though such covenants had been expressly contained in the deed. *Weems v. McCaughan*, 7 Smedes & M. 422; *Hoy v. Taliaferro*, 8 Smedes & M. 727; *Duncan v. Lane*, Id. 744." In neither of the cases cited by the learned judge had the court in the remotest degree referred to the extent of the statutory covenant. In each case there had been express covenants, and in each the declaration was made that the statute did not apply because of the existence of the express covenant. The decision in *Bush v. Cooper* was manifestly right. The statute then in operation was as follows: "In all deeds or conveyances whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words 'grant, bargain, sell' shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: That the grantor was seised of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, (except the rents and services that may be reserved,) as also for quiet enjoyment against the grantor, his heirs and assigns," etc. A judgment had been recovered against Bush and enrolled, thus forming an incumbrance on the land. Bush afterwards conveyed the land by a deed containing the words "grant, bargain, and sell," and no express covenant. He was afterwards adjudicated a bankrupt, and discharged. After his discharge the land was sold under the judgment, and he became the purchaser. It was held that he could not assert the title thus acquired against his grantee. In that case there was a plain breach of the implied covenants of his conveyance. But the statute has been radically changed since that decision. There the implied covenant was by the express words of the statute that the grantor was seised of an indefeasible estate in fee simple; now it is that he is seised of an estate. Mrs. Jeffries was seised of an estate, though but for life, and, so far as the complainant has shown, there has been no breach of such covenant or of any other contained in her deed. The decree is affirmed.

(71 Miss. 208)

#### GRAHAM v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)  
CRIMINAL LAW—UNLICENSED DEALER IN PISTOLS.

A pawnbroker, who, in a solitary instance, takes a pistol in pledge for repayment of a loan, and sells it for payment of his debt, is not a dealer in pistols, within Code 1892, § 3399, providing that dealers in pistols shall pay a privilege tax of \$100, and is not subject to the penalty against unlicensed dealers in pistols.

Appeal from circuit court, Warren county;  
John D. Gilland, Judge.

"To be officially reported."

Sandy G. Graham was convicted of dealing in pistols without a license, and appeals. Reversed.

Dabney & McCabe and W. E. Mollison, for appellant. Frank Johnston, Atty. Gen., for the State.

WOODS, J. The remarkably concise and lucid agreed statement of facts in the record before us shows no amenability in the appellant as a violator of section 3399, Code 1892. There is no evidence that he was a dealer in pistols. He was not engaged in buying and selling pistols, so far as the transcript discloses the facts. He was a licensed pawnbroker, and, as an incident—a solitary incident—to that business, he took a pistol in pledge for repayment of a small sum loaned his customer. The loan not having been repaid at its maturity, he sold the pledge. He resorted to his security for payment of his debt. And in this he committed no offense. May one not sell a pistol, which, for any reason, he may wish to dispose of, without subjecting himself to the penalty denounced against unlicensed dealers in pistols,—persons engaged in the business of buying and selling pistols? May not a man lend his neighbor a dollar, and take a pistol in pledge for repayment of his loan? And may he not lawfully dispose of the pledge in order to repay himself, if necessary? A fortiori, may not the licensed pawnbroker, in a solitary instance, and as an incident in the management of his business, do the same thing? We express no opinion as to the liability of pawnbrokers, where the evidence shows an effort to evade the statute on their part,—as for example, when they habitually acquire and keep pistols, and offer the same for sale, just as other dealers in like goods usually do in their business. It will be soon enough to determine this question when we have a case presented which requires its adjudication. We confine ourselves to the case in hand. The evidence was insufficient to support the verdict, and the peremptory instruction asked for defendant below should have been given. Reversed and remanded.

(71 Miss. 196)

#### MONROE v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)

##### RAPE—EVIDENCE.

On a trial for rape of an 11 year old girl, the evidence relied on to convict was the testimony of the girl herself. The alleged crime occurred at noon, at a farmhouse, and no complaint was made to the neighbors; and there was a horn at hand, generally blown as a signal of an unusual occurrence, but not blown on the occasion of the alleged crime. There was no sign of struggle, and no suggestion of any choking or blows to disable, and no tearing of the girl's clothes. She stayed at home till night, and then told her brother of the alleged rape, who said he was going "to tell ma," and she then went to meet her mother, and told her. *Held* insufficient to sustain a conviction.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

"To be officially reported."

George Monroe was convicted of rape, and appeals. Reversed.

W. J. Vallor, for appellant. Frank Johnston, Atty. Gen., for the State.

CAMPBELL, C. J. No error was committed by the court in the trial of the case, but in our opinion the verdict should not be permitted to stand. It is true that conviction of this detestable crime may be had on the uncorroborated testimony of the person raped, but it should always be scrutinized with caution; and, where there is much in the facts and circumstances in evidence to discredit her testimony, it is not sufficient to sustain a verdict of guilty. 1 Hale, P. C. 635 et seq.; *Innis v. State*, 42 Ga. 473; *People v. Hulse*, 3 Hill, 309; 19 Amer. & Eng. Enc. Law, p. 958. The observations of the court in *People v. Hulse*, 3 Hill, 309, are just and appropriate, and commend themselves to our judgment. There is much in the testimony of the girl charged to have been raped by the accused to throw doubt on her testimony. There is not a single corroborating circumstance to support her statement, and much to suggest its falsity. Under the Mosaic law, "if the tokens of virginity be not found for the damsel" given in marriage, and complained of as not a maid, she was conclusively held to have played the whore, and was immediately "stoned with stones" to death. Dent. xxii. 13 to 21, inclusive. But this damsel, only 11 years old, not only could not have any token of virginity found for her, but examination by her mother and another woman, in search of tokens, failed to discover any. Not only this, which would have been conclusive as to her former whoredom, and caused the ignominious death of a Jewish wife, but no sign of any struggle was shown. There was no suggestion of any choking or blows to disable, or bruising the arms or wrists, or tearing the clothes of the girl, or the bedclothes, or any circumstance, even the most trivial, to support her testimony. The rape occurred at 12 o'clock noon, and, although it was on a plantation, she made no complaint to any neighbor. Although there was a horn at hand, the blowing of which was a signal of something unusual having occurred at the house, it was not blown for this unusual (?) occurrence. The girl waited at home until about night, when, having told her little brother, she says, who said he was going "to tell ma," she went to meet her mother, and told her. The strong probability is that the account of the affair given by the accused is correct, and that the girl consented, and having been detected by the little brother, or from some other cause, she determined to tell. We regard her testimony as incredible, and are not willing for the terrible consequence of the verdict to be



visited upon the accused until a fuller investigation shall be had, which will no doubt result in his conviction again, if he is guilty.

While profoundly impressed with the necessity for a rigid enforcement of the laws against crime, and particularly those protecting human life, so often disregarded with impunity, we are unwilling to sanction a conviction on evidence which not only fails to satisfy the mind of the guilt of the accused, but rather suggests grave doubt of it. We might greatly lighten our labors by deferring, in all cases, to the verdict approved by the presiding judge as to the facts; but our duty is "to administer justice without respect to persons, and do equal right to the poor and to the rich," (an obligation which it required no constitutional mandate to impose, and which every judge felt and observed before it was considered necessary to insert it in the oath to be taken,) and experience has shown that it sometimes occurs that conviction is had upon testimony that ought not to produce this result; and hence our duty to see, in every case, that the verdict is sustained by sufficient evidence, lest injustice be done to the poor or to the rich, both of whom are equally to be protected against wrong by the courts. While both stand alike before the law, and have equal rights, and are entitled to equal protection at the hands of courts and juries, it is an indisputable fact that the poor and humble are less likely to escape conviction by their peers in the jury box than those who possess the means of surrounding themselves in time of trial with hosts of friends, and all the aids and helps to withstand the prosecution. It is true now as when uttered in words of wisdom thousands of years ago, that "wisdom is a defense, and money is a defense," (Eccl. vii. 12,) and its potency is often felt in criminal trials. It is not that the law makes a difference, or that judges make a difference, or that juries may recognize a distinction, on account of riches or poverty; but it results chiefly from the advantage which money gives him who has it over him who has it not, in securing its possessor every opportunity for a successful defense. It secures counsel and friends and witnesses, and the benefit of every favorable circumstance to tell in favor of the accused. It is true, in the nature of things, that the man who has ample means of defense has the advantage of him who is less fortunate. Hence the disposition, which we are not ashamed to confess we have, to guard jealously the rights of the poor and friendless and despised, and to be astute to protect them, as far as we properly may, against injustice, whether proceeding from willfulness or indifference. In the state of our society, we are admonished of the propriety of constant vigilance on the part of judges to guard against injustice liable to result from passion or prejudice, or popular views of the necessity for a rigorous

enforcement of the law in certain classes of cases, without due regard, in some instances, to the merits of the case. Such is the gallantry of our people, and their jealous regard for the honor of women, and their universal readiness to protect them, and to avenge their wrongs, and especially the most outrageous which can be done one, according to law, and sometimes against law, that there is danger that sentiment may mislead juries, and triumph over right and justice, in the class of cases of which this is one, and of which we think this is an example. "Courts and juries cannot well be too cautious in scrutinizing the testimony of the complaining witness, and guarding themselves against the influence of those indignant feelings which are so naturally excited by the enormity of the alleged offense. Although no unreasonable suspicion should be indulged against the accuser, and no sympathy should be felt for the accused, if guilty, there is much greater danger that injustice may be done to the defendant in cases of this kind than there is in prosecutions of any other character. The evidence is always direct, and, whatever may be the just force of countervailing circumstances, honest and unsuspecting jurors may think themselves bound, of necessity, to credit that which is positively sworn." Reversed and remanded.

(71 Miss. 90)

#### STATE v. BROUGHTON.

(Supreme Court of Mississippi. Nov. 6, 1893.)  
EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—SURPLUSAGE.

An indictment for embezzlement alleging all the necessary ingredients of the crime charged is not vitiated by the improper insertion therein of the evidences of the supposed guilt of defendant.

Appeal from circuit court, Warren county; John D. Gilland, Judge.

An indictment against Frank Broughton for embezzlement was quashed, and the state appeals. Reversed.

Gibson, Henry & Voller and Frank Johnston, Atty. Gen., for the State. M. Marshall, for appellee.

WOODS, J. The pleader has incumbered, perhaps obscured, his indictment with a particularity of statement which was unnecessary. He has ventured upon averments which were needless, and may make his prosecution more difficult of successful accomplishment than if he had contented himself in stating the charge laid in the usual brief, simple manner. The evidences of the supposed guilt of the defendant were improperly inserted in the pleading, but this does not vitiate the indictment. All the allegations as to receiving certain sums from certain persons or corporations, and of the failure of defendant to enter the proper credits

In the accounts of such persons or corporations with the Standard Oil Company, as well as the conclusion that the intent was to injure these persons or corporations, may be treated as surplusage, and yet we shall find a sufficient charge of embezzlement contained in the pleading. We shall find that the indictment charges that the defendant was the clerk or servant of the Standard Oil Company, and authorized to collect and receive money from its customers and other persons having dealings with it; that, by virtue of his said employment, he took into his possession, and received for his principal, \$3,516.35; and that he feloniously made way with and embezzled the same, with intent to defraud his employer, and to the damage of the Standard Oil Company. These were the essential ingredients of the crime charged, and if the pleader has inserted more, and unnecessarily, whereby he may ultimately burden his prosecution, it is impossible for us to see either how the defendant may be injured, or how the superfluous matter can be held to vitiate an indictment perfectly valid otherwise. There are not two distinct offenses charged in either count or both counts. The defendant is not in either count indicted for the embezzlement of moneys collected by him as the agent or servant of the named customers of his principal. He is clearly charged, on any fair construction of the whole pleading, with the embezzlement of the money of the Standard Oil Company, whose clerk and servant he was. We do not think it can be said that the indictment seeks to make the guilt of the accused depend upon his alleged failure to enter the proper credits in the several accounts of his employer's customers. That unnecessary averment is contained in the indictment, but that is no ingredient of the crime charged. The indictment contains all necessary to be charged, and some superfluous matters in addition. But "utile per inutile non vitiatur." Reversed.

#### HORTON v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)

##### MALTREATING CONVICTS—INDICTMENT—INSTRUCTIONS.

Under an indictment charging that defendant "did unlawfully maltreat and abuse, and cause to be maltreated and abused," a certain convict, it is error to direct the jury to find defendant guilty, as charged, if it believe from the evidence that he maltreated or abused the convict, or caused others to maltreat and abuse him, or "permitted it to be done."

Appeal from circuit court, Attala county; C. H. Campbell, Judge.

S. O. Horton was convicted of abusing a convict, or permitting him to be abused, and appeals. Reversed.

Dodd & Armistead, for appellant. Frank Johnston, Atty. Gen., for the State.

COOPER, J. This appeal presents another instance in which a conviction which, probably, would have been secured if the jury had received no instruction whatever, must be vacated for an erroneous instruction. The appellant was indicted, jointly with A. Horton, for that, having in their custody the county convicts of Attala county, they "did unlawfully maltreat and abuse, and cause to be maltreated and abused, George Jones, a convict there and then in their custody, by then and there unlawfully and cruelly beating, striking, and wounding said George Jones with sticks, whips, and other means and things unknown to the grand jurors." The statute (Act March 9, 1892) made it a misdemeanor for any contractor, subcontractor, or other person having the custody of any convict, to maltreat or abuse any such convict, or to permit the same to be done. The indictment, it will be observed, contains no charge against the accused for having permitted such abuse or maltreatment. By the first instruction for the state, the jury was directed to find the appellant, who was alone on trial, guilty as charged, if it believed, from the evidence, he maltreated and abused, or caused others to maltreat and abuse, or permitted it to be done. Surely, the slightest consideration would have suggested that a person cannot be convicted of an offense not charged, however clearly established by the evidence. We cannot say that the error was unimportant in securing the conviction, and the judgment must be reversed, and a new trial awarded. So ordered.

#### BETHLEY v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)

##### HOMICIDE—VERDICT—SUFFICIENCY OF EVIDENCE.

In a murder case it appeared that five boys, two of whom were deceased and defendant, were together; that defendant was much taller than deceased; that the shot which killed deceased ranged upward, and that at the time the gun was discharged defendant was on higher ground than, and 8 or 10 feet from, deceased. The other three boys, 6, 12, and 13 years old, respectively, testified that at the time all were good-humored and friendly, and (in almost identical words) that defendant suddenly, with nothing to provoke him, said: "I won't run from any nigger when I have got my election twister. I will show you how to treat a nigger." Then he raised his gun to his shoulder and shot" deceased. Defendant claimed that the gun was accidentally discharged while he was taking a cap off it, and that an older brother advised him to go away for a while, which he did. Held, that the evidence was insufficient to support a conviction.

Appeal from circuit court, Wilkinson county; W. P. Cassidy, Judge.

Pink Bethley was convicted of murder, and appeals. Reversed.

J. H. Jones, for appellant. Frank Johnston, Atty. Gen., for the State.

CAMPBELL, C. J. Reluctant as we always are to set aside the verdict of a jury approved by the judge who presided in the trial where no error of law was committed and the sole question is as to the sufficiency of the evidence to sustain the verdict, we are constrained, by our conviction of the insufficiency of the evidence in this case to warrant the verdict rendered, to set it aside. The three boys who testify that they were present at the killing were respectively 6, 12, and 13 years of age, and each tells the same tale, with an exactitude of repetition of the same very singular expression as used by the accused, so as strongly to suggest a lesson learned, and throw doubt on their truthfulness. Their marvelous tale is that five boys were rabbit hunting, and two of these boys were the deceased, Elijah Hollis, and the accused. When the hunt was over they amused themselves shooting at targets. All were perfectly friendly and good-humored, and nothing occurred to disturb the perfect harmony which characterized their playful employment. But all of a sudden, with nothing to provoke or arouse him, the accused said: "I won't run from any nigger when I have got my election twister. I will show you how to treat a nigger." Then he raised his gun to his shoulder and shot Elijah. There was no quarrel. No one had tried to make Pink run, and he and Elijah were all the time perfectly friendly." This is the testimony of Jerry McWhorter, aged 12 at the time of trial. Sam Wilkerson, about 13 years old, testified to the very same words, with the mere change of one or two immaterial ones. Louis Payne, 6 years old, repeats verbally the same tale. These were the only eyewitnesses. It is shown that the accused was about 16 years old, and the deceased was so much smaller in size that he would come up to the shoulders of the accused when standing, as witnesses expressed it. The accused and deceased were standing 8 or 10 feet apart when the gun was discharged. The accused was not only much taller than the deceased, but stood on higher ground,—uphill from deceased, as the boys say; and yet it is shown that the shot ranged up, instead of down, in the body of Elijah, which does not consist with the tale of the three boys. They all agree more perfectly than the four writers of the gospels as to the very words spoken, and those words the most remarkable and extraordinary in the mouth of the accused and in the memory of the three boys, 6, 12, and 13 years of age; and all say there was perfect friendship and good humor among all, and that nothing occurred to evoke talk about election twister, and running from a nigger, or how to treat a nigger, and that the accused put his gun to his shoulder and shot Elijah, and that they were perfectly friendly at the moment. But, besides the great improbability of the tale told by these

boys with such astounding accuracy of expression, the undisputed fact that the accused was much taller than deceased, and stood on higher ground, and that the shot ranged up, instead of down, on the person of Elijah, shows the falsity of the testimony of these boys, and sustains the version of the unfortunate occurrence given by the accused. He says, Elijah had his gun (and he is corroborated as to this fact) and was pointing it about, and he, fearing that Elijah might discharge the gun and hurt somebody, asked him for it, and proceeded to take off one of the caps, and was about to remove the other, when the gun was discharged accidentally, and fatally to Elijah, and that he (the accused) went home, and was advised by an elder brother to go away for awhile, which he did. His flight suggests nothing as to his guilt, as we think, and the established facts overthrow the testimony of the boys, who saw the occurrence, whose account of it with such marvelous agreement arouses suspicion as to its fidelity to the facts as they existed. In our opinion, the verdict is manifestly wrong, and cannot be permitted to stand. If our convictions on the subject were not clear and decided, we would yield them to the verdict. Reversed and remanded.

(33 Fla. 313)

## MARTIN v. TOWNSEND.

(Supreme Court of Florida. Oct. 17, 1893.)

EJECTMENT—EVIDENCE—DEED BY COUNTY COMMISSIONERS—VALIDITY—QUORUM OF BOARD—SEAL.

1. By chapter 678 of the Acts of the Legislative Council approved February 17, 1833, and by chapter 11, Laws approved July 26, 1845, boards of county commissioners, while acting in their official capacity as a board, were fully authorized and empowered to sell and convey the lands of their county, not required for public uses, in such manner as they deemed best.

2. In conveying the public lands of their county, the execution of a deed thereto by county commissioners was an official act that such boards were expressly authorized by law to perform, and, in the performance of it, the judge of probate, while, under the law, he was, ex officio, a member and president of such board, properly acted under his own official title of "judge of probate;" the law, from the official act, and the participation with him therein of other members of the board of county commissioners, acting as such under their official titles, supplying the fact that such judge was acting therein in his capacity as an ex officio member of such board.

3. Under the statutes in force in 1852, the judge of probate, who was then, ex officio, a member and president of the board of county commissioners, with any two of the other members of such board, or, in the absence of the judge of probate, any three members of such board, constituted a quorum, with full power to transact any official business, or to perform any official duties. *Held*, that the execution of a deed of conveyance to a parcel of county land that such board had authority to sell and convey was such an official act as could be validly and effectually performed by such quorum of

said board, and that it was not necessary to the validity of such a deed that it should be executed by all, or any greater number than a legal quorum of such board.

4. Boards of county commissioners are quasi corporations, and their official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees.

5. In executing a deed to county lands, boards of county commissioners do not act for themselves, as individuals, but act officially, for and on behalf of their county; and in such case it is not necessary that, to the name of each of them signing such deed, an individual seal should be set. All that was necessary, in so far as the requisite of a seal was concerned, in order to make it a valid and effectual deed from the county, was to attach thereto some seal adopted by such board as the seal of their county. *Held*, further, that the affixing of the official seal of the probate court of the county to such a deed, with the following attestation clause: "In witness whereof, the said Simon Turman, judge of probate, William Hancock, Joseph Howell, Andrew H. Henderson, and Ezekiel Glazier, county commissioners, in their capacity as a board, have hereunto set their hands and seal of our probate court the day and year," etc.,—was such an adoption by the board of the seal named and used as made the deed upon which it was used the validly sealed instrument of the county.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county.

Action in ejectment by James P. Martin, administrator of the estate of Britania Wanton, deceased, against L. D. Townsend. From judgment for defendant entered on a nonsuit, plaintiff appeals. Reversed.

Barron Phillips and Thos. E. Wilson, for appellant. G. A. Hanson, for appellee.

**TAYLOR, J.** The appellant sued the appellee in the circuit court of Hillsborough county in ejectment, for the recovery of that lot of land in the town of Tampa described as "Lot 3 of Block 63," according to the general map of said town made by John Jackson, surveyor, in the year 1853. At the trial, in consequence of the rulings of the court, excluding the deed upon which the title of the plaintiff's intestate rested, the plaintiff took a nonsuit, and appeals from the judgment entered thereon.

The sole question presented for our consideration is the ruling of the court below, excluding the following deed from admission in evidence on behalf of the plaintiff:

"State of Florida, Hillsborough county. This indenture, made this 6th day of September, in the year of our Lord eighteen hundred and fifty-two, between Simon Turman, judge of probate, William Hancock, Joseph Howell, Andrew H. Henderson, Ezekiel Glazier, county commissioners, within and for the county and state above mentioned, of the first part, and William Cooley, guardian of Britania Wanton, a colored woman, assignee of James Gettis, assignee of Benjamin Cowart, assignee of John C. Oats, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of

forty dollars to the county treasurer of said county in hand paid, receipt whereof we do hereby acknowledge, have granted, bargained, sold, confirmed, and do by these presents grant, bargain, sell, convey, and confirm, unto the said party of the second part, her heirs and assigns, forever, a certain lot in the town of Tampa known and designated on the map or plan of the said town now on record, made by John Jackson, surveyor, and dated the 4th day of January, 1847, as lot No. three (3) in block No. ten, (10,) containing one-sixth part of one acre, more or less, together with all the rights, privileges, and appurtenances thereto belonging, and the remainders and profits thereof, and all the estate, title, and interest of the said party, in law or equity, in and to the same; to have and to hold the lot hereby conveyed, with all the appurtenances thereunto belonging, to the only proper use, benefit, and behoof of her, the said Britania Wanton, assignee as aforesaid, her heirs and assigns, forever. In witness whereof, the said Simon Turman, judge of probate, William Hancock, Joseph Howell, Andrew H. Henderson, and Ezekiel Glazier, county commissioners, in their capacity as a board within and for the county of Hillsborough and state of Florida, have hereunto set their hands and seal of our probate court the day and year above written.

"Simon Turman,

"Judge of Probate.

{ Hillsborough County Probate Court Seal. "Benjamin Hogler. "Martin Cunningham."	{ "Wm. Hancock, "A. H. Henderson, "E. Glazier,	} County Commissioners.

"State of Florida, Hillsborough County. Be it remembered that on the 6th day of September, 1852, personally came before the undersigned, clerk of the circuit court within and for the county of Hillsborough and state of Florida, Simon Turman, judge of probate, William Hancock, Andrew H. Henderson, and Ezekiel Glazier, county commissioners, in their capacity as a board within and for the county and state aforesaid, and acknowledged that they signed, sealed, and delivered the above deed, as their act and deed, for the purposes therein specified. Given under my hand and seal of our circuit court, at Tampa, this 6th day of September, A. D. eighteen hundred and fifty-two, and the 77th year of American Independence.

"Martin Cunningham,

"Clerk Ct. Ct., H. C., Fla.

"[Seal.]

"[Indorsed] Recorded in Book B, p. 66-67, September 10th, 1852. M. Cunningham, Clerk Ct. Ct., H. County, Fla."

The objections urged against the admission of this deed at the trial below, that were sustained by the court, are as follows:

"(1) Because it purports to be a deed from the county commissioners of Hillsborough county, when, in truth and in fact, it is only signed by Simon Turman, judge of probate, W. A. Hancock, A. H. Henderson, and E. Glazier, county commissioners of Hillsborough county; the board at that time consisting of five members, and only three of them signing as county commissioners.

"(2) Because the seal of the board of county commissioners is not affixed to said deed.

"(3) Because there is no seal affixed to said deed at or near the signatures of the parties who signed the same.

"(4) For that said deed relates that the seal of the probate court has been affixed thereto, there being nothing in said deed to show that said seal had been adopted as the seal of the board of county commissioners, and no law of the state of Florida designating that as the seal of said board.

"(5) For that said board of county commissioners were trustees of said property for the county of Hillsborough, and that it required the signatures of the entire board to make a valid deed."

In excluding the deed, the court below sustained all of these objections.

By the Acts of the Legislative Council of the Territory of Florida, (chapter 678,) approved February 17, 1833, a county court was established in each county, which was made a court of record, and was presided over by one judge, appointed by the governor and legislative council, whose general jurisdiction extended over civil causes involving amounts between \$50 and \$1,000, and over criminal causes below the grade of capital offenses; and he was clothed with general probate powers in the matter of the granting of letters testamentary and of administration, appointment of guardians for infants and lunatics, and in ordering the sale of, and distribution of, the estates of decedents.

By the fifth section of this act the county courts were required to hold two terms in each year, and it was thereby made the duty of each justice of the peace in the county to attend upon the first term of the county court in each year for the purpose of transacting county business. Any two of such justices of the peace, with the judge of the county court, or, in case of the absence of such judge, any three of such justices of the peace, were constituted a quorum for the transaction of county business. By the sixth section of said act, the said county courts, being in session for the transaction of county business, were clothed with full power to sell and dispose of any lands that belonged to their respective counties, for the use of such counties, in such manner as said county courts might deem best. And said courts, thus in session, were clothed with the general supervision of the public highways, the support of the poor, and the levy

of taxes for county purposes, etc. By the constitution adopted in 1839 for the then prospective state of Florida, the county courts were abolished, and by section 9, art. 5 of that instrument the power was delegated to the legislature to provide by law for the appointment in each county of an officer to discharge the duties usually pertaining to courts of ordinary or probate.

The legislature, in pursuance of this constitutional provision, by an act (chapter 6) approved July 25, 1845, directed the appointment by the governor, with the advice of the general assembly, of a judge of probate for each county, clothing him with general probate powers. By the second section of this act, it was provided that such judges of probate should have a seal of office, and, until such seals were provided, they were authorized to use their private seals.

By chapter 11, Laws approved July 26, 1845, the election of a board of four county commissioners in each county of the state was provided for, who were clothed with all the powers and were charged with all the duties that "by the laws of the territory appertained to the county courts when sitting for county purposes." By the second section of this act the said boards were required to hold at least two sessions in each year, at their respective county sites, on the first Monday in the months of April and September in each year.

Section 3 of this act provided "that the judge of probate in each county shall be ex officio a member and the president of said board, and shall keep or cause to be kept a regular record of its proceedings at each session thereof."

Sections 5 and 6 of said act provide that any three of said board, including the president, shall constitute a quorum for the transaction of business, and that if, for any cause, the judge of probate should not be present at any regular or called meeting of said board, the remaining members thereof, or any three of them, may organize the board by the election of one of their number to preside, and proceed to the transaction of business.

By chapter 112, Acts Cong. approved July 25, 1848, (9 Stat. 126,) the United States granted directly to the county commissioners of Hillsborough county, Fla., and their successors in office, 160 acres of land, for the use of said county, for county-site purposes, and, in express terms, provided that the proceeds of sales thereof were to be applied to the building of a courthouse, jail, and other public buildings for such county. The plaintiff introduced a patent from the United States, executed in conformity with this statute, and dated February 3, 1853, formally conveying directly to the county commissioners of said county 160 acres of land on the Hillsborough river, that, it was admitted, embraced the lot in controversy.

Under these circumstances, and under the provisions of the statutes above quoted from our own state legislative enactments, we are satisfied: (1) That the lot in controversy, prior to its conveyance by the county commissioners to Britania Wanton, was the property of the county of Hillsborough. (2) That the board of county commissioners of said county were fully authorized by law to sell and convey the same in such manner as they deemed best, and that they were the only authority in such county who could legally sell and convey the same. (3) That the judge of probate, at the date of the execution of said deed, was, *ex virtute officio*, a member of, and president of, such board of county commissioners, and, as such, within the powers and jurisdiction of said board, was clothed with the same powers as each of the other persons elected, *eo nomine*, to be members of such board. (4) That the execution of such deed for the conveyance of a part of the county lands was an official act that such board was expressly authorized by law to perform, and that in the performance of his part therein, as an *ex officio* member of such board, the judge of probate acted properly under his own official title of "judge of probate;" the law, from the character of the official act that he was performing, and the presence of the other officials with whom he acted, supplying the fact that he was acting therein in his capacity as an *ex officio* member of such board. (5) That a quorum of such board of county commissioners were authorized by law to transact all official business, and perform all official acts and duties devolving by law upon such board, and that, under the law in force when said deed was executed, the judge of probate, with two other members of said board, or, in the absence of the judge of probate, any three members of such board, constituted a quorum, with full power to transact any such official business, or to perform any such official duties, and that the execution of such deed of conveyance was such an official act as could be legally done and performed by a quorum of such board, and that it was not necessary to the validity of such deed that it should be executed by all, or any greater number than a legal quorum of such board. *City of San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106. Boards of county commissioners are quasi corporations, and their official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees. *Treadwell v. Commissioners*, 11 Ohio St. 183; *Jackson v. Hartwell*, 8 Johns. 330; *Reynolds v. Commissioners of Stark Co.*, 5 Ohio, 204; *Levy Court v. Coroner*, 2 Wall. 501; *Platter v. Elkhart Co.*, 103 Ind. 360, 2 N. E. Rep. 544; 4 Amer. & Eng. Enc. Law, p. 374, and authorities cited. In executing this deed, the board of county commissioners were not act-

ing for themselves in their individual capacity, but were, as a board, performing an official act that they were expressly authorized by law to perform for and on behalf of their county, and it was not necessary for each of them to affix to his own signature an individual seal. They were not acting in a private capacity, as individuals disposing of their own property, but were acting in their official capacity, as a quasi corporate body representing their county; and all that was necessary for them to do to make the instrument a valid deed from the county that they represented was to sign it in the presence of two subscribing witnesses, as they did, in their official capacity, and attach thereto some seal adopted by them as the seal of their county. This they did, as we think, very appropriately and effectually, in the attestation clause of the deed, as follows: "In witness whereof, the said Simon Turman, judge of probate, William Hancock, Joseph Howell, Andrew H. Henderson, and Ezekiel Glazier, county commissioners, in their capacity as a board within and for the county of Hillsborough and state of Florida, have hereunto set their hands and seal of our probate court the day and year," etc., followed by affixing the probate court seal mentioned.

Under the law as it then stood, no seals were provided for the counties, to be known, distinctively, as "county seals." Hence, the county commissioners, as a quasi corporation, in executing an instrument for and on behalf of their county that required a seal for its validity, were left free to adopt any device that would answer as a seal for the county. *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 150; *Porter v. Railroad Co.*, 37 Me. 349; *Foundry v. Hovey*, 21 Pick. 417; *Stebbins v. Merritt*, 10 Cush. 27; *Phillips v. Coffee*, 17 Ill. 154; *Tenney v. Lumber Co.*, 43 N. H. 343; 1 Dill. Mun. Corp. § 190; *Bradford v. Randall*, 5 Pick. 496; *St. Phillip's Church v. Zion Presbyterian Church*, 23 S. C. 297. Very appropriately, they, in express terms, adopted and affixed the seal of the probate court of their county, which seal was in the official custody of, and belonged to, the office of the judge of probate, who, by virtue of his office as such judge, was a member of, and president of, said board.

This court, in two cases, has recognized the seal of the probate court, affixed to instruments executed by county commissioners in their capacity as such, as being entirely sufficient to give effect to them as sealed instruments of the county. *Jefferson Co. v. Lewis*, 20 Fla. 980; *Johnson v. Wakulla Co.*, 28 Fla. 720, 9 South. Rep. 690. See, also, *Stockton v. Powell*, 29 Fla. 1, 10 South. Rep. 688. The excluded deed should have been admitted in evidence. The judgment appealed from is reversed.

(23 Fla. 401)

**CHRISTIE v. LOOMIS et al.**

(Supreme Court of Florida. Oct. 17, 1893.)

**ORATION OF SUPREME COURT—BY WHOM SERVED.**

Service of a citation of the supreme court may be made by the sheriff of a county as deputy of the sheriff of such court through or by the instrumentality of a deputy of such county sheriff.

(Syllabus by the Court.)

Appeal from circuit court, Alachua county; Jesse J. Finley, Judge.

Action between Walter Christie and L. J. Loomis and others. Judgment, from which Christie appealed. Appellees now move to dismiss the appeal. Motion denied.

W. W. Hampton, for the motion. Horatio Davis, opposed.

**RANEY, C. J.** Appellees move to dismiss the appeal on the ground that there has been no legal service of the citation. The return shows that the writ was served by the sheriff of Alachua county as deputy of the sheriff of the supreme court through or by the instrumentality of his own deputy. The sheriff of the county in which the supreme court may sit is, under section 1322, Rev. St., the sheriff of the court, and, as it sits in Leon county only, (section 4, art. 5, Const.; section 1311, Rev. St.,) the sheriff of Leon county is its sheriff; but it is provided by section 1324, Rev. St., that "all the sheriffs of the state shall ex officio be his deputies in their respective counties for the execution of process from said court." In the second article of the twenty-third chapter, § 1241, of the Revision, which article relates to the duties of sheriffs, it is enacted that "each sheriff shall in person or by deputy execute all process of the supreme court, circuit court, county court, and criminal court to be executed in the county and may serve all process of the county judge's court, justices of the peace courts, and board of county commissioners." In our judgment, a purpose of the last section was to require the sheriff of any county to execute any process of this court held by him either as sheriff of the court (where he may be such) or as ex officio deputy of its sheriff, and it gives him the power to perform the duty either in person or by deputy. The decisions cited in behalf of the movant were made before the Revised Statutes became operative.

The motion is denied.

(32 Fla. 415)

**STATE ex rel. MATHESON et al. v. KING,**  
Circuit Judge.

(Supreme Court of Florida. Oct. 9, 1893.)

**MANDAMUS TO COURT—REINSTATEMENT OF APPEAL AFTER DISMISSAL.**

Mandamus lies to compel a court to exercise its lawful jurisdiction where it refuses to take jurisdiction or to proceed in the exercise thereof, but not for the correction of errors

committed while exercising jurisdiction, nor where, as in this case, it is not shown that an error was committed while exercising jurisdiction.

(Syllabus by the Court.)

Original action in the name of the state at the relation of J. D. Matheson & Co. against Thomas F. King, circuit judge, for mandamus. Writ denied.

W. W. Hampton and Robt. W. Davis, for plaintiff.

**RANEY, C. J.** The alternative writ shows that relators are the owners of a judgment rendered in the "county court" of Alachua county for \$98.54 against Thomas Little and Arthur Simmons, and that on September 30, 1884, they took out a writ of garnishment thereon against the trustees of the Union Academy, and the trustees acknowledged an indebtedness to defendants, and the judgment defendants moved the "county court" to dismiss "the case and the garnishment proceedings," and on December 8, 1884, it dismissed said proceedings; and that two days after relators perfected their appeal to the circuit court of Alachua county, the defendant being judge thereof, from such judgment of dismissal, and filed a transcript of the record in such circuit court at the ensuing term; and upon the coming in of such transcript they filed their assignment of errors, setting forth the errors of which they complained. That upon such appeal coming on to be heard on December 18, 1885, the appellees moved to dismiss the same on the ground that "there was no bill of exceptions filed in this cause as provided by law, and the record does not show that there were any exceptions to the ruling of the lower court noted," and thereupon the circuit court gave judgment that the motion be granted, and the appeal be dismissed for want of said bill of exceptions and noting of exceptions; and the said judge has since and does now refuse to entertain said appeal, or hear relators upon the errors of said county judge. The command of the writ is that the circuit judge restore and reinstate such appeal, and hear petitioners upon the question of errors alleged to have been made by the county judge, or show cause at the time designated.

To this writ Judge King made a return, and afterwards a further return, the material effect of the two being as follows: (1) The appeal transcript does not show that the garnishees acknowledged an indebtedness to the judgment defendants, Simmons & Little; but it was admitted in argument by counsel for plaintiffs and defendants in execution that the garnishees did acknowledge their indebtedness to the defendant Arthur Simmons, and that such garnishees paid into the registry of the county court \$150 by consent of all the parties, entered into in writing, to abide the determination

of said garnishment proceedings, and the garnishees were discharged from further liability thereunder. (2) That the county judge did not send up to the ensuing term of the circuit court a transcript of all the record in the cause, but at such term (spring term, 1885) there was presented to the court for its consideration on appeal a number of loose and detached papers purporting to be garnishment proceedings in the suit of Matheson & Co. v. Simmons & Little, and the latter parties moved to dismiss the appeal because there was no record, which motion the court refused, and made "an order that the case be sent back in order that a certified copy might be sent up," and a certified copy was sent up to the fall term, 1885. (3) That the record does show there was no bill of exceptions, and no exceptions taken to any of the rulings in the court below. (4) That the appeal was brought before the circuit court, and it proceeded to consider the same, and, it appearing that there was no bill of exceptions by which the errors of the court below, if any, could be brought before the court for its consideration, the court decided that it should not inquire into any such errors, and rendered its judgment accordingly, and dismissed the appeal.

The alternative writ does not show the grounds upon which the county judge dismissed the garnishment proceedings, nor is the record of the county judge's court, or the assignment of errors, before us. The pleadings before us do not show what the assignments of error were. Neither the writ nor the return thereto indicate that the circuit judge denied the appellate jurisdiction of the circuit court; on the contrary, the return clearly shows that the appeal was considered, and on such consideration it was dismissed, on the ground that there was no bill of exceptions by which the errors, if any, of the lower court, could be inquired into. Upon this record it cannot be said that the circuit judge refused to consider assignments of error relating to the record proper, or held exceptions, or a bill of exceptions, to be necessary to the consideration of alleged errors apparent upon the record. It does not appear that there were any such assignments of error. It may be surmised, but the record nowhere shows it. A judgment of affirmance, instead of one of dismissal, may have been the proper judgment for the circuit judge to have entered, but the relator has no ground for complaint on this score. Mandamus lies to compel the court to exercise its lawful jurisdiction where it refuses to take jurisdiction, or proceed in the exercise of it, (*State v. Young*, 31 Fla. 594, and authorities cited, 12 South. Rep. 673,) but not for the correction of errors committed while exercising jurisdiction, (*Ex parte Brown*, 116 U. S. 401, 6 Sup. Ct. Rep. 387; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825; *Ex parte Baltimore & O. R.*

*Co.*, 108 U. S. 586, 2 Sup. Ct. Rep. 876.) See, also, other cases cited in *State v. Young*, supra. Here, however, it does not appear even that the assignments of error were of such a character that they, or any one of them, could be considered in the absence of a bill of exceptions, or that there has been any error committed in the exercise of jurisdiction.

In disposing of the case we do not commit ourselves upon the rather vexed question whether or not a proceeding of this kind is abated by a change in the incumbency of the office. *Merrill*, Mand. § 238; *High*, Extr. Rem. §§ 37, 38; *Commissioners v. Bryson*, 13 Fla. 281; *State v. Gates*, 22 Wis. 210; *State v. Warner*, 55 Wis. 273, 9 N. W. Rep. 795, and 13 N. W. Rep. 255; *Lindsey v. Auditor*, 3 Bush, 231; *Hardee v. Gibbs*, 50 Miss. 802; *County Court v. Sparks*, 10 Mo. 117; *State v. Puckett*, 7 Lea, 709; *People v. Wexford County Treasurer*, 37 Mich. 351; *People v. Bacon*, 18 Mich. 247; *State v. Guthrie*, 17 Neb. 113, 22 N. W. Rep. 77; *Thompson v. U. S.*, 103 U. S. 480; *Secretary v. McGarrahan*, 9 Wall. 298; *U. S. v. Boutwell*, 17 Wall. 604. The relators, however, are entitled to no relief on the case submitted, and the peremptory writ will be denied. It will be ordered accordingly.

(32 Fla. 420)

#### FREEMAN v. LOUISVILLE & N. R. CO.

(Supreme Court of Florida. Oct. 9, 1893.)

##### DEMURRAGE—WHO ENTITLED TO—PLEADINGS.

1. Where the owner of a ship sues a connecting railway carrier for damages for the detention of his vessel at the railway's terminal wharf, in consequence of the latter's alleged suspension in the receipt of such ship's cargo, and discloses by his declaration that such ship was under charter with a third person, not a party to the suit, to deliver her cargo to the defendant railway company, and that the railway company was under contract with such third person there to receive such cargo, and the same to carry further, *held* that, under these circumstances, the defendant railway company's duty to receive and carry the cargo was due directly and primarily to such third person, the charterer of the ship, and that he alone could properly sue for the breach of such duty; and that under these circumstances, if the plaintiff's ship was wrongfully delayed in consequence of the negligence of the railway company, as the agent of the charterer, such charterer, as principal, was directly and primarily responsible to the plaintiff as the ship's owner for her delay in consequence of his railway agent's wrongful suspension from receiving her cargo, and was the proper person for the plaintiff to have sued for his damage.

2. Where a declaration discloses such a state of facts, and fails further, in a separate count, not otherwise objectionable, to allege that the suspension in the receipt of the cargo complained of was wrongful, and fails to allege any facts from which it could appear that the alleged suspension was either tortious or inexcusable, a demurrer thereto is properly sustained.

(Syllabus by the Court.)

Appeal from circuit court, Escambia county; James F. McClellan, Judge.



Action on the case by R. R. Freeman against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Avery, for appellant. W. A. Blount, for appellee.

**TAYLOR, J.** The appellant sued the appellee, in case, for damages for an alleged detention of the former's ship in the discharge of her cargo at the latter's terminal wharf in the city of Pensacola, by refusing to receive such cargo for carriage over its line of road. The declaration was demurred to, and the demurrer sustained, and, upon the plaintiff's failure to amend, final judgment upon the demurrer was taken, and from that judgment the plaintiff appeals here.

The declaration demurred to is as follows:

"(1) That the defendant was on the 21st day of January, 1887, and still is, a common carrier of goods for hire over its railroad line, beginning on a wharf, which constitutes a part of its road, and extended into the Bay of Pensacola. That the said wharf was used by the defendant to enable it to receive, from ships, cargoes brought into the port of Pensacola for shipment over the defendant's lines, and for years past the defendant has received thereat, for shipment, such cargoes from vessels moored thereto. That on said day the plaintiff's ship, the John F. Krans, was, upon the invitation of the defendant, moored at the defendant's said wharf, and engaged in the delivery of cargo thereat for transportation therefrom over the defendant's line to points beyond the limits of said state. That the defendant invited the said vessel to said wharf, and commenced the receipt of her cargo thereat, as aforesaid, in pursuance of an agreement with the charterer of plaintiff's said vessel to receive and transport the same from said vessel. That after the 1st day of February, 1887, the defendant refused to receive cargo from said vessel for the period of ten days, and thereafter completed the receipt of said cargo, whereby the plaintiff's said ship was detained for the period of ten days over and above her lay days, and the plaintiff became entitled to demand and receive from the said defendant for such detention of his said ship the sum of fifty dollars per day, the customary demurrage charge for the detention of such a vessel, which the defendant refuses to pay.

"(2) That the defendant was on the 21st day of January, 1887, a common carrier for hire over its railroad line, beginning on a wharf, which constituted a part of its road, and extended into the Bay of Pensacola. That the said wharf was used by the defendant to enable it to receive, from ships, cargoes brought into the port of Pensacola for shipment over defendant's line, and for years past the defendant has received there-

at, for shipment, such cargoes from vessels moored thereto. That on said day the plaintiff's ship was, upon the invitation of the defendant, moored at the defendant's said wharf, and engaged in the delivery of cargo thereat for transportation therefrom over the defendant's said line to points beyond the limits of said state. That it was the duty of the defendant to receive the said cargo, all of which was, as defendant's agents well knew, brought into said port for shipment, under contract, over defendant's said line; but, to wit, on the 1st day of February, 1887, the defendant refused to receive further of said cargo of said vessel, and so continued to refuse for the period of ten days, whereby said vessel was detained for the period of ten days, and plaintiff sustained damage in the sum of five hundred dollars.

"(3) That on said day the plaintiff had his said ship in the port of Pensacola loaded with a cargo which the plaintiff had agreed with charterer to deliver to the defendant, a common carrier, for transportation. That delivery of same to defendant, for transportation over its road to points beyond the state of Florida, was commenced, when the defendant, for the period of ten days, refused to receive further of said cargo, whereby the plaintiff's said ship was detained for, to wit, ten days, at an expense to plaintiff of five hundred dollars. Wherefore the plaintiff claims damages in the sum of seven hundred and fifty dollars," etc.

The ground of the demurrer was that the declaration did not disclose a case fixing legal liability upon the defendant. The ruling of the court upon the demurrer appealed from was proper. The declaration discloses the fact that the plaintiff's ship, whose delay is the groundwork of the action, was under a charter party with a third person, a stranger to this suit, to deliver her cargo to the defendant at its terminal wharf, extending into the bay of Pensacola, for transportation over the defendant's road to points in the interior beyond the boundaries of Florida, and that the defendant was under contract with such charterer there to receive and transport such cargo. If these assertions of the plaintiff's declaration be true, then he has called the wrong party to court to answer for the damage sustained by him through the delay of his vessel. If the defendant company was under contract with the charterer of the plaintiff's ship to receive and transport such ship's cargo over its line of road, then, clearly, its delay to receive such cargo was due directly and primarily to such charterer, and for its breach thereof, by any unreasonable or wrongful delay, the charterer would be the party primarily injured by such breach of duty, and could alone sue for its redress. On the other hand, according to the allegations of this declaration, the plaintiff's contract with his ship's

charterer was fully performed when his chartered vessel arrived at the defendant's railway wharf, within her contract time, and stood there ready and willing to deliver her cargo to the defendant railway, as the employed carrying agency of the charterer; and for any wrongful delay to which his ship was subjected through the negligence of the charterer's agency there to receive such cargo the charterer is responsible primarily and directly to the plaintiff, and is the proper party for him to have sued for the damage sustained through such delay. *Hutch. Carr. (2d Ed.)* §§ 473, 103a; *Wordin v. Bemis*, 32 Conn. 268; *Davis v. Wallace*, 3 Cliff. 123; *Randall v. Lynch*, 12 East, 179; 1 Pars. Shipp. & Adm. 316. If, under the circumstances as disclosed by this declaration, the charterer of the plaintiff's ship was subjected to the payment of damages for the wrongful delay of such ship in discharging her cargo, resulting from the defendant railway company's unjustified refusal to receive such cargo, then the defendant railway company would be liable for such damages to the charterer. *Hutch. Carr. (2d Ed.)* § 328. What has been said applies to the first and third counts of the declaration. The second count thereof, upon which the appellant, in his last briefs filed, seems most strongly to rely, is insufficient and defective, in that it fails to allege that the temporary suspension by the defendant of the receipt of the cargo of plaintiff's ship was wrongful, nor are any facts alleged showing that such alleged temporary suspension in the receipt of such cargo was either tortious or inexcusable.

The judgment appealed from is affirmed.

(32 Fla. 409)

#### REDDICK v. MEEFFERT.

(Supreme Court of Florida. Oct. 9, 1893.)

DOWER—RES JUDICATA—RESTRAINING TRESPASS—POSSESSION TO MAINTAIN.

1. Where a husband sells and conveys his real estate during coverture, his wife not joining therein, and afterwards he dies, she may be entitled to dower, but not to a child's part, in such real estate.

2. A person holding land under a deed of conveyance made by a husband during coverture, and in which the wife did not join, is not concluded by proceedings, to which he is not a party, instituted by such wife, after the death of the husband, for setting apart to her a child's part in the land.

3. Actual possession, or *pedis possessio*, of the land, is not essential to maintain the equitable jurisdiction given by the act of June 4, 1889, (section 1469, Rev. St.) to persons claiming to own timber lands, to enjoin trespasses by cutting trees thereon, or removing logs therefrom, or other stated trespasses.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; Jesse J. Finley, Judge.

Bill by John M. Reddick against John M. Meffert to restrain trespass on land. From

a decree dismissing the bill, complainant appeals. Reversed.

W. S. Bullock, for appellant. Miller & Spencer, for appellee.

RANEY, C. J. The bill of complaint in this cause was filed by appellant against appellee, and alleges that the complainant is the owner and in possession of the described land, containing 94 acres, located in Marion county, and has been in constant and continuous possession of the same since September, A. D. 1876. That the property is chiefly and principally valuable for its timber, and is uncleared land, and not suitable for agricultural purposes, in its present condition. That the defendant, on several occasions, has entered upon said premises, during the absence of complainant and his agents, and cut therefrom the timber standing and growing on said land. That complainant has frequently given him notice not to cut said timber,—such notice being in writing,—warning and cautioning him not to enter thereon for said purpose; but defendant, very recently,—within the last few days,—notwithstanding the notice heretofore given him, has set his hands upon said premises, and is now either actually engaged in cutting the timber therefrom, or about to commence, and will, unless stopped, and declares it to be his intention to cut said timber, and to remove the same from the said premises; thereby destroying the value of said property, and greatly damaging complainant. \* \* \* That defendant has no right, authority, or permission from complainant, or "any agents or other authorized persons, to cut the timber from said land, but the said trespass is a willful trespass, maliciously and defiantly done." The prayer is for an injunction.

A temporary injunction was granted on the 23d day of October, 1891, and afterwards there was an answer to the bill. The defense set up by the answer, as amended, is that the land was granted by the United States to Thomas Harrison by patent dated May 1, 1855. That the said Harrison conveyed the lands in his lifetime, but Mary E. Harrison, his widow, never relinquished dower or child's portion in the same during the lifetime of said Thomas, or at any other time, and that said Thomas, at his death, left five children surviving him, and that after the death of Harrison, to wit, on May 16, 1891, in pursuance of the election of Mary E. Harrison, his widow, to take a child's part in the lands and real estate of said Thomas Harrison, the judge of probate confirmed, by his decree, an order setting off an allotment of the lands in the bill described to said Mary E. Harrison, made by five freeholders of Marion county, and that the said commissioners placed her in possession of said lands in March, 1891, and she has ever since main-

tained full, perfect, absolute, and unquestioned possession of the same; and while so in possession she sold to defendant the timber and trees growing on said land, and authorized him to cut and carry away the same for the use of his sawmill, and in pursuance thereof he was lawfully cutting said trees, until restrained by order of this honorable court. That, if complainant was ever in possession of said lands, defendant never knew it, or heard of it, and does not believe that he was ever in possession of the same. There is also a denial of any other fact or matter stated in the bill and not specifically denied or admitted by the answer. The answer also contains a demurrer to the bill on the ground that the complainant has an adequate remedy at law.

There was replication and testimony, and on final hearing the injunction granted was dissolved, and the bill dismissed.

The report of the testimony shows that it was agreed by the parties that Harrison obtained the land from the United States by patent dated May 1, 1855, and that on May 18, 1858, he conveyed the same to one A. W. Young by warranty deed, who conveyed to A. H. Young, and that Mary E. Harrison, being then the wife of said Thomas, did not join in the conveyance, or make any relinquishment of dower or child's part, and that afterwards, on December 20, 1880, the complainant acquired the same lands under a deed from John F. Dunn,—said Dunn "having obtained the land" under conveyances enumerated in the agreement,—and that Harrison died intestate on February 14, 1891; and afterwards, on the 16th day of May in the same year, proceedings were had before the county judge of Marion county, whereby the land in controversy was allotted to Mary E. Harrison, widow, as a child's part of the estate of the intestate. That Reddick was not a party to this proceeding, and that Harrison left, at his death, no other lands. That afterwards Meffert entered into possession of the lands under a license from Mary E. Harrison to cut timber on the same, and was so cutting under said license on the portion of said lands allotted to her as a child's part, when restrained by the injunction. It was also agreed that the complainant had had possession of different parts of the 440 acres of land, of which the 94 acres in controversy is a part, and occupied said portions, by tenants, to the day of the commencement of this suit, and that the 94 acres in controversy is woodland, and the complainant has never had any actual possession of said 94 acres; and it was further agreed that Meffert was first placed in possession of the land "under allotment of child's part appointed by commissioners to Mary E. Harrison, and that he found no trace of any former possession, and that he commenced cutting timber as agent of Mary E. Harrison

in March, 1891, and continued until he was restrained by the injunction."

The complainant, Reddick, testified in his own behalf that he had been, and was at the commencement of this suit, in possession by tenants—naming four—of the tract of 440 or 460 acres, of which about 120 acres were cleared and fenced, and that he had paid taxes on the land, and that he first heard of the allotment to Mrs. Harrison in 1891, but not till Meffert commenced cutting timber.

John A. Harrison testified for defendant that he was the son of Mrs. Mary E. Harrison, and that the commissioners placed him in possession of the land as the agent in fact for his mother. That it has never been cultivated, and is woodland. That the nearest settlement was on the south side. Remembers nobody else living near. That possession was given to Meffert by himself, as agent of his mother. That witness took possession of it as the property of his mother, and the right of selling it or disposing of it. When asked what acts of ownership he had exercised over the land, he replied: "I put Mr. Meffert on the property, by cutting timber, and with instructions to cut and use the timber," and that this was as soon as the court made the allotment.

The petition of Mrs. Harrison to the county judge shows that she elected to take a child's part of all the real estate "owned by Thomas Harrison in his lifetime, and to which she has not relinquished dower as provided by law," and in his personal property, and prayed that a child's part be set off to her in the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 22, and the S. E.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 23, and N. W.  $\frac{1}{4}$  of section 24, all in township 13 S., R. 21 E., containing 564.33 acres. The report allots her one-sixth thereof, being 94 acres, specially described in the report and the bill of complaint.

It is contended by appellee's counsel that there is no equity in the bill, as the case is one of mere trespass, and the complainant has a complete remedy at law. Counsel have overlooked the act of June 4, 1889, (section 1469, Rev. St.,) which provides that courts of chancery shall entertain suits by any person claiming to own any timbered lands in this state to enjoin trespasses on such lands by the cutting of trees thereon, or the removal of logs therefrom, or by boxing or scraping the said trees for the purpose of making turpentine, or by the removal of turpentine therefrom, and in such suits the said courts shall cause an account to be taken of the damage to the complainant from any of said trespasses before or after the institution of the suit, and decree the payment of the amounts shown to be due upon such accounting by the defendant or defendants, and may appoint receivers of logs or timbers claimed to have been cut

from said lands. This statute relieves us of any discussion of the question as to the equitable jurisdiction prior to it, as the case has arisen since June 4, 1889.

It is not contended that the title of Thomas Harrison had not become vested in Reddick prior to his death. In the absence of Mrs. Harrison's having relinquished dower in the land, Reddick took it subject to her dower right, but not subject to any rights of Harrison's children, or of Mrs. Harrison claiming, as widow, a child's part. She has not attempted to assert any right of dower in the land, and not until she does will it be necessary to decide as to the applicability of the summary statutory proceeding for the assignment of dower, where the land has been conveyed by the husband prior to his death, and is held adversely. *Henderson v. Chaires*, 25 Fla. 26, 37, 6 South. Rep. 164. The allowance of a child's part to Mrs. Harrison does not conclude Reddick, (*Henderson v. Chaires*, supra,) and was, as against him, altogether illegal and ineffectual. The interest of Harrison having passed from him by his conveyance, no child or other heir could inherit it from him, and the widow could not take a child's interest in the land through him, but only the interest which the law, of itself, gives her, as wife or widow, namely, dower. *Smith v. Hines*, 10 Fla. 258; *Sanderson v. Sanderson*, 17 Fla. 820; *Thomp. Dig. § 4*, p. 185, note; *McClel. Dig. § 1*, p. 468; *Id. § 3*, p. 476; *Id. § 33*, p. 85; *Rev. St. §§ 1820, 1832, 1833, 1938*.

It is entirely clear from the testimony that Mrs. Harrison and her son and Meffert were trespassers upon Reddick's property rights; they having no pretense of title, except the probate proceedings referred to. No actual possession is shown by Mrs. Harrison, or by her son for her, or by Meffert, except in the act of committing the trespass complained of; and, in our judgment, it was clearly the purpose of the statute that no actual physical possession, or *pedis possessio*, by the owner of timbered lands, should be necessary to maintain the equitable jurisdiction which it provides for his protection against the trespass mentioned in it. *Matthews v. Marks*, 44 Ark. 436; *Sloan v. Sloan*, 25 Fla. 53, 59, 5 South. Rep. 603, 606; *Patton v. Crumpler*, 29 Fla. 573, 577, 11 South. Rep. 225, 226. If we should require such possession, the protection intended to be given to the owners of our extensive and valuable forests would be sadly curtailed.

The decree will be reversed, and the cause remanded for proceedings not inconsistent with this opinion.

(32 Fla. 387)

#### SIMMONS v. STATE.

(Supreme Court of Florida. Oct. 9, 1893.)

MURDER—INDICTMENT—IMPEACHMENT OF WITNESS.

1. The general rule, that a witness cannot be impeached by proof of inconsistent state-

ments without first laying the proper foundation for the introduction of such evidence, applies to written statements, or testimony reduced to writing, and signed by a witness before a committing magistrate; but before such testimony can, for the purpose of impeachment, be read to the jury, it must be produced and shown to the witness, and his attention called to his contradictory statements contained in the written evidence and his oral testimony. Without showing the witness the written evidence and allowing him to read it, he cannot be cross-examined as to its contents with a view of impeachment.

2. In cases of murder, according to strict rule, it seems that the homicidal act, or the act which is the efficient cause of death, must be alleged to have been done with a premeditated design to effect the death of the deceased; and, where this is not done the indictment is defective.

(Syllabus by the Court.)

Error to circuit court, Volusia county; John D. Broome, Judge.

Charles Simmons, having been convicted of murder, brings error. Reversed.

J. D. Broome, Jr., for plaintiff in error.  
William B. Lamar, Atty. Gen., for the State.

MABRY, J. The plaintiff in error was indicted by a grand jury in Volusia county for the murder of one Blue Steel, and, after arraignment and trial, was found guilty by a petit jury of the offense for which he stood indicted.

Omitting the formal parts of the indictment, it charges that the defendant, Charles Simmons, on the 16th day of October, 1892, in Volusia county, Fla., "with force and arms, at and in the county of Volusia aforesaid, unlawfully, and from a premeditated design to effect the death of a man named Blue Steel, whose further name is to the grand jury unknown, in and upon said Blue Steel, whose further name is unknown to the grand jurors, an assault did make, and a certain pistol, loaded with gunpowder and one leaden bullet, and by the said Charles Simmons had and held in his hand, he, the said Charles Simmons, did then and there unlawfully and from a premeditated design to effect the death of the said Blue Steel, whose further name is to the jurors unknown, shoot off and discharge at and upon the said Blue Steel, whose further name is to the jurors unknown, thereby and by thus striking the said Blue Steel, whose further name is to the grand jury unknown, with the said leaden bullet, inflicting on and in the right side of the head of the said Blue Steel, whose further name is to the jurors unknown, one mortal wound of a depth and breadth to the jurors unknown, of which mortal wound the said Blue Steel, whose further name is to the grand jurors unknown, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Charles Simmons, in the manner and by the means and from a premeditated design to effect the death of the said Blue Steel," etc., "him, the said Blue

Steel, did kill and murder, against the form of the statute," etc.

After having a motion in arrest of judgment and for a new trial decided adversely to him, plaintiff in error sued out a writ of error from the final judgment entered, and brings the record before us.

To maintain her case the state introduced as a witness one Frank Battle, who detailed the circumstances of the death of the deceased, Blue Steel. The scene of the homicide was a railroad camp, and time, the early part of the night. The witness Battle did not stay in the camp, but was at the time on a visit to his brother, who had a tent there. The witness stated that there was a crowd of men about 100 yards from his brother's tent, and a man called Sunny White got shot in this crowd, and ran up to the tent, with blood coming from the side of his head. Another party, named Brown, from whose hands witness managed to jerk a shotgun, said, "Find out the right man; shoot in the crowd," and another man (Garner) said, "Must I shoot in the crowd?" and fired into the crowd. Garner and another man (Jackson) fell in the mouth of the tent, and at that time Simmons, the accused, came up with his pistol in his hand, waving it about. The deceased said to the accused: "Put your pistol in your pocket. Two men are shot down here. Put your pistol in your pocket." "He goes up to Charley, and catches hold of him, and tells him, 'Put your pistol in your pocket;' and Charley says, 'You son of a bitch, I will shoot your brains out,' and he shot him right through the head." On cross-examination the witness was asked if the deceased did not try to take the pistol out of the hands of the accused, and answered that he did not. He said that the deceased went up to the accused and told him to put the pistol in his pocket. The witness was then asked if he did not testify on a preliminary hearing of the case before Justice Nelson in New Smyrna, and answered that he did. He was then shown testimony taken on a preliminary hearing before Justice Nelson, and stated that it was the same testimony that he gave. He also said that he put his name to and swore to the testimony, and thought that the mark to the testimony shown him was his, but he could not read. The witness was then asked if he did not testify that the deceased tried to take the pistol from the hands of the accused, and was not able to do so, and answered: "No, sir; I testified that Blue Steel came up to Charley, and caught hold of him, and told him to put his pistol in his pocket, and Charley shot him." On being further asked, on cross-examination, if he did not swear on the preliminary examination that the deceased tried to take the pistol out of the hands of the accused, but was not able to do so, stated that if he did he had no recollection of it. No objection was made to the

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questions propounded to the witness as to what he did swear to on the preliminary examination before the justice.

When the time came for the accused to put in his testimony he offered as evidence the sworn statement of the witness, signed before the justice of the peace, on the preliminary trial of the accused, and the court ruled it out, to which ruling the accused excepted. This statement, sworn to and signed by the witness, recites that "Frank D. Battle, being duly sworn, says: \* \* \* On the night of the killing, Charles Simmons and Blue Steel were standing side by side. Blue Steel tried to take Simmons' pistol out of his hand, and was not able to do so. Simmons jerked the pistol away, and stepped back two steps, and said, 'You son of a bitch, I will blow your damned brains out,' and then fired at Blue Steel with the pistol, and killed him. All this occurred in Volusia county, on Sunday night, October 18, 1892." This testimony should not have been excluded by the court from the consideration of the jury. The witness says he could not read, but, as we understand the bill of exceptions, he identifies the written testimony as being the same that he swore to and signed before the justice of the peace. He recognizes the signature to it as being his, and we must consider the written statement shown to the witness as the one prepared by the justice of the peace, and signed and sworn to on the preliminary trial. The purpose of introducing this statement in evidence was, of course, to show the discrepancy between it and the statement of the witness on the trial, and thereby to discredit his evidence with the jury.

Where a witness does not distinctly admit on cross-examination that he has made a former statement inconsistent with his present evidence, our statute permits such statement to be put in evidence upon proof of the circumstances of the supposed inconsistent statement sufficient to designate the particular occasion, and the witness being asked whether or not he made such statement. Rev. St. § 1102. The general rule that a witness cannot be impeached by proof of inconsistent statements without first laying the proper foundation for the introduction of such evidence applies also to written statements or written testimony of witnesses taken down before a committing magistrate. Such testimony cannot, for the purpose of impeachment, be read to the jury, unless it be produced and shown to the witness, and his attention called to the contradictory statements, in order that he may explain them if he can. Where the testimony of a witness before a committing magistrate has been reduced to writing and signed by him, he cannot, of course, be cross-examined as to the contents of this testimony without showing him the evidence or allowing him to hear it read. The rule on this subject has been re-

garded as settled since the Queen's Case, 2 Brod. & B. 284. In the case before us the witness was shown the sworn statement, and, after admitting that it was the one that he had made and signed, was asked in reference to the statements he did make on the committing trial, he having stated that he could not read. The statement, we think, was clearly admissible under the rule, and the court should have permitted it to be read to the jury. *Floyd v. State*, 82 Ala. 16, 2 South. Rep. 688; *Gunter v. State*, 83 Ala. 96, 3 South. Rep. 600; *People v. Donovan*, 43 Cal. 162; *Gaffney v. People*, 50 N. Y. 416; *Ortiz v. State*, 30 Fla. 256, 11 South. Rep. 611. The contradiction contained in the two statements was entirely a question for the jury, and not for the court. We cannot say it was not material. *Payne v. State*, 60 Ala. 80.

After verdict and before sentence the accused made a motion in arrest of judgment on the ground that the indictment charges no crime, inasmuch as it charges no malice or intent to commit a crime, and this motion was overruled by the court. It cannot be said that the indictment charges no malice or intent to commit a crime, as the expression "premeditated design" includes malice and intent. There is, however, a defect about this indictment which on casual glance will appear highly technical, but which, when examined in the light of authority, becomes more real. We do not refer to the use of the statutory words "premeditated design" in alleging malice aforethought, as required in the common-law form of indictment for murder. The correctness of the departure from the old form, and the holding it to be insufficient, as was done in *Denham v. State*, 22 Fla. 664, is questionable, but that decision has been made, and we do not here call it in question. The present chief justice did not participate in the decision of the *Denham* Case. The objection to the indictment before us that is well founded, and which is urged by counsel for the plaintiff in error in the argument of the case here, is that the homicidal act is not alleged to have been done with a premeditated design to effect the death of the deceased. The common-law precedents all show that the act which is the efficient cause of the death must be charged to have been feloniously done, and there are authorities holding that such allegations are necessary, and without them an indictment will be bad. *State v. Feaster*, 25 Mo. 324; *State v. Herrell*, 97 Mo. 105, 10 S. W. Rep. 387; *Republia v. Honeyman*, 2 Dall. 228; *Sarah v. State*, 28 Miss. 267; *State v. Duvall*, 26 Wis. 415; *Maile v. Com.*, 9 Leigh, 661. Under the *Denham* Case it seems an allegation that the homicidal act was done with a premeditated design to effect the death would be sufficient under our statute. The indictment here does not come up to the requirement in this respect. Transposed and reduced to the fewest words necessary to con-

vey its meaning, it alleges as follows: That the accused, with force and arms, unlawfully, and from a premeditated design to effect the death of the deceased, made an assault upon him; and that the accused unlawfully, and with a premeditated design to effect the death of the deceased, shot off and discharged at and upon him a certain pistol, then in the hand of the accused, and loaded with gunpowder and leaden ball, thereby and by thus striking the deceased with said leaden ball inflicting on and in the right side of his head one mortal wound, the depth and breadth not known to the grand jurors, of which wound the said deceased then and there instantly died.

The homicidal act or efficient cause of the death—that is, the penetration of the leaden bullet and the infliction of the mortal wound—is not charged to have been done with a premeditated design to effect death. According to the view of the authorities cited, this would be necessary in an indictment for murder in the first degree. The state attorney can avoid this error in framing a new indictment.

The judgment is reversed, and the cause remanded, and the accused will remain in custody to await the further action of the court.

#### STRICKLIN v. STATE.

(Supreme Court of Mississippi. Nov. 27, 1893.)

##### JUSTIFIABLE HOMICIDE.

Defendant testified that, after an altercation in his house with deceased, he was struck at by him; that, to escape the blow, he jumped into a room, where he saw and seized a gun; that, seeing deceased go out of the door, he followed, to see if he had left the premises, taking along the gun, not intending to renew the difficulty, or to use the gun, except in self-defense; that, not seeing deceased, he turned to go into the stable, when deceased came at him in a furious manner; that deceased was much the stronger; that deceased made demonstration indicating a purpose to wrest from him the gun, and use it on him; and that, for no other purpose than to preserve his own life or limb, he shot deceased. *Held*, that the jury should have been instructed that if they believed this, and that it was necessary for defendant to have so acted in his own defense, they should acquit.

Appeal from circuit court, Yazoo county; J. B. Chrisman, Judge.

Albert M. Stricklin was convicted of homicide, and appeals. Reversed.

R. Bowman, Barnett & Thompson, Williams & Williams, and George & Smith, for appellant. Frank Johnston, Atty. Gen., for the State.

COOPER, J. We find no error in the action of the trial judge in impaneling the jury by which the appellant was tried. The developments made in the examination of the jurors on their voir dire demonstrated the necessity of the strict and careful scrutiny to which they were subjected. One of

the jurors, who was clearly of opinion that he was competent to impartially try the issue joined, admitted that, while he thought a negro ought not to be killed by a white man without good cause, he was nevertheless of opinion that an insult given by the negro would fully justify a white man in killing him. Many other jurors, while not going to that length, thought that different rules should be applied in the trial of a white man charged with killing a negro from those which should control under other conditions. Surely, it requires no argument to convince one whose moral qualities are those of the average man that jurors such as these were wholly unfitted to discharge impartially the duty which was involved in the issue to be tried.

Without examining in detail all the errors assigned, it is sufficient to say that the court erred in giving the third and fourth instructions asked by the state, and in refusing those asked by the appellant, notably the nineteenth and twentieth, by which the contrary rule was announced. The testimony for the state, if accepted as true by the jury, would have compelled a verdict of guilty of murder. But the appellant was introduced as a witness on his own behalf, and was entitled to have his version of the homicide passed on by the jury. By the third and fourth instructions asked by the state, a part of the facts testified to by the accused were stated hypothetically, and the jury were told that, if they believed such facts, then the killing was murder or manslaughter, as they should believe it proceeded from malice, or without it, but that in no event was it excusable or justifiable. These instructions the court gave, and refused all the instructions asked by the defendant, in which the circumstances testified to by him were invoked as excusing the killing. We have nothing to do with the credibility of the witnesses, nor the reasonableness of the story told by any one of them. These are for consideration and determination by the jury. If the jury believed the history of the homicide given by the appellant,—that he was lawfully in his house, and, after an altercation with deceased, was struck at by him with a chair, and to escape the blow jumped into his room, and there saw and seized a gun, and, seeing deceased go out of the door, followed, to see if he had left his premises, and took the gun along, not intending to renew the difficulty, and not intending to use the gun, except in necessary self-defense; and if, upon looking in the direction he supposed deceased had gone, and not seeing him, he turned to go into his stable, and was approached by deceased, who came upon him from an opposite direction, in a furious and threatening manner, and if deceased was a good deal stronger man than appellant, and was making such demonstrations as indicated a purpose on his part to

wrest from appellant the gun he held, and use it upon him, and if appellant, for no other purpose than to preserve his own life or limb, shot the deceased, and the jury believed it was necessary for him to have done so in his own defense,—we fail to perceive why a verdict of acquittal might not have been lawfully returned. The judgment is reversed, and a new trial awarded.

(71 Miss. 212)

## TRIBETTE v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississipp. Nov. 20, 1898.)

RAILROAD COMPANIES—FIRES—NEGLECT—  
QUESTION FOR JURY—EVIDENCE.

1. In an action to recover for the burning of plaintiff's buildings, it appeared that a drought prevailed, and that there was a strong wind at the time of the fire. About an hour before the fire was discovered, a locomotive stopped at a point on the main line from which the wind blew smoke from the engine directly towards some cotton bales on the station platform, where the fire originated. Another train followed shortly after, and its locomotive stopped at a point where its smoke was driven by the wind against the cotton. When the fire was discovered, it was found to proceed from the bottom of the bales, in which the fire had manifestly eaten its way, and the action of the fire was such as to characterize ignition by a spark of fire. About 3 miles distant from where the cotton was ignited, one of the locomotives ignited grass over 50 feet from the railroad track. *Held* sufficient evidence that the fire was ignited by one or the other of the locomotives.

2. There was evidence for defendant that the engines were in good order, had proper spark arresters, and were handled with due care; that the spark arresters were examined both before and after the accident, and were found to be in good condition. A witness for plaintiff testified that, 100 yards from the track, he saw "plenty of sparks" flying from one of the locomotives alleged to have caused the accident, and firing grass more than 50 feet from the track. *Held*, that the court erred in directing a verdict for defendant.

3. Evidence of a witness that he notified the station agent of the danger to adjacent buildings from the accumulating cotton was incompetent; whether there was a dangerous accumulation of cotton on defendant's premises being a fact to be proved like any other, and the witness' opinion being inadmissible.

4. Evidence of what other engines, handled by other drivers, on other occasions, did, was inadmissible; the controversy being as to the equipment and management of one of two locomotives only.

5. Where nearly half of the cotton on defendants' platform—186 bales, in all—had been received less than a day before the fire, and was handled and stored in the usual manner, the evidence was insufficient to charge defendant with negligence in allowing an unwonted quantity of cotton to accumulate on its premises.

6. The fact that the season was dry, beyond precedent, did not make it incumbent on defendant to procure and use tarpaulins, or to keep on hand appliances for the extinguishment of fire.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by W. H. Tribette against the Illinois Central Railroad Company. There was judgment for defendant, and plaintiff appeals. Reversed.

Calhoon & Green, Williamson & Potter, and Brame & Alexander, for appellant. James Fentress and Mayes & Harris, for appellee.

WOODS, J. This is a suit brought by the appellant for damages resulting from the destruction of buildings of appellant by fire communicated from the burning cotton stored upon appellee's railway platform; the allegation being that the cotton was ignited by sparks thrown out by appellee's locomotive, negligently. The declaration avers, with particularity, that the appellee negligently permitted the accumulation of a large lot of cotton, in bales, at its depot, on an open platform, with no inclosing walls, and with an inflammable roof of pine boards, and without any means or appliances provided for the extinguishment of fires. It is averred, also, with particularity of statement, that appellee negligently permitted several closed box cars to stand alongside said platform and cotton, thus preventing the throwing of the cotton from the platform after ignition; but it is charged that appellee, on the occasion in question, having an engine present, with capacity to have hauled said box cars away, and so made practicable the dumping of said cotton on the ground, negligently omitted to remove said cars, and in fact refused to do so; because of which, the fire spread over all the cotton there accumulated, and was communicated to appellant's property, which was wholly destroyed thereby. The general issue was pleaded by the railroad company, and on this three trials were had. The first trial resulted in a verdict for appellant, which was set aside by the court on motion of the counsel for appellee. The second hearing ended in a mistrial, the jury being unable to agree. The third trial resulted in a verdict for the railroad company, under a peremptory instruction from the court, and judgment was entered accordingly. From this action of the court below, appellant appeals, seeking a reversal of the last judgment, and the reinstatement of the first verdict.

The peremptory charge was not erroneous, if there was no evidence to warrant a verdict for the plaintiff, in any view of it which might be legally taken. In other words, if there was no evidence reasonably tending to establish plaintiff's contention, the peremptory charge was correct. If there was such evidence, then the charge was incorrect. The solution of the question presented will necessitate an examination of the evidence somewhat in detail. It was incumbent on the appellant to show that the fire was communicated from the engines of the railroad company. This was sought to be done, as it might be, by circumstantial evidence. This evidence was, substantially, this: A long-protracted drought prevailed, and inflammable substances were susceptible of ready ignition. A strong wind was prevailing at the

time of the fire. About an hour before the fire was discovered, a locomotive, pulling a south-bound passenger train, came in, and was stopped for a minute, and then started on its way from a point on the main line from which the wind blew the smoke from the engine directly to the spot where the fire originated. Another train—a freight train—followed the passenger, and went in on a side track, first stopping to cut a crossing, and then pulling up a short distance, and finally halting near the point where the passenger locomotive stood, and at a spot where the smoke from its engine, also, was driven by prevailing winds against the cotton, at the point where the fire broke out finally. The odor of burning cotton was perceived 10 or 15 minutes before the fire was discovered, by persons 200 yards distant, on the west side of the railroad tracks, and in the path of the wind. When the fire at length made itself known, it was found to proceed from holes in two bales in close proximity to each other, in which the fire was, and had been, manifestly, slowly eating its way, smolderingly. The cotton bales were standing on end, near the edge of the platform, and within about two feet of the box cars hereinbefore alluded to. The fire, when first seen, had burned a hole in each of the contiguous bales of the size of a peck measure, or larger. The holes exhibited a glowing surface, when the wind fanned them, and the blaze would, at such fanning, start out, and creep up to the top of the bales. These burning holes were six or eight inches from the bottom of the bales, and under one of the lower ties on each bale, and these burning holes were in the adjacent edges of the two bales, and just behind a post resting on the platform, and constituting one of the supports of the roof before referred to. The action of the fire was such as characterizes the ignition of cotton from a spark or coal. There was absence of any suggestion of any other means of communicating a fire of this character, than the railroad engines. Then, anticipating the evidence of the railroad company, that its locomotives were properly constructed and equipped, and carefully handled, the appellant introduced a witness who testified that about three miles north of Terry, where the fire occurred, and a few minutes, only, before the passenger locomotive passed the scene of the conflagration, sparks of such size were emitted from its smokestack as to be seen by him, at noon, on a clear, sunny day, and at a distance of 100 yards, and dry grass was thereby fired beyond the railroad right of way; that is, at a distance of more than 50 feet from the passing engine. It is not disputed that the spot on the platform, where the cotton was fired, was 65 to 75 feet from the point where the two locomotives stopped, and from which the passenger locomotive start-



ed, on that occasion. Affirmatively, the appellee undertook to show that a lad—Jake Terry, by name—was the originator of the fire. Grant all that the railroad's evidence on this point showed, or tended to show, and it is valueless, notwithstanding. By the appellee's witness, it is shown that Jake Terry set a fire, with a blazing match, a few minutes, only, before the alarm was given. The fire was found to have started near the bottom of the bales, and to have been slowly burrowing and eating its way for a very considerable period of time. It was set by, not a blaze, but a spark or coal. Concede the absolute verity of Johnnie Burnett's statement as to Jake Terry's conduct, and still not a ray of light will be turned upon the cause of the fire. We disincumber the case by laying out of view this affirmative defense, as absolutely worthless. Fully credited, it affords no help to one seeking the cause of the fire. Negatively, the appellee showed skill and care in the handling of its engines. This statement of the evidence will obviate the necessity for any argument on this branch of the case. By circumstances quite clear and convincing, all disinterested minds must agree that, with reasonable certainty, the fire was caused by one or the other of the locomotives at Terry on that day. It does not at all militate against this view that appellant is unable to say which of the two engines was the cause of the fire. It is not of vital importance to establish what engine did the work. The essential inquiry is, did an engine of appellee cause the conflagration? To this question there can be but one answer, as it appears to us.

This brings us to the other branch of the case, involved in the peremptory instruction given for the appellee in the court below; and, at this point, as has been very properly said by counsel for appellee, the railroad company is first required to speak. It was not required to show that Jake Terry, or any one else, set out the fire. It was appellant's duty to first establish the agency of one of the locomotives in the catastrophe. This having been done, in our opinion, with reasonable certainty, the appellee is now required to take up the burden of meeting the *prima facie* case made out against it. We think it may be fairly said that its evidence as to the construction and equipment of the two locomotives shown to have been in position to have caused the fire, and as to the skill and care of its servants in handling and managing them on that day, meets the requirements imposed on it. While the mere words employed by the two engineers who then had charge of the locomotives might have been substituted by others more precise and explicit, yet fairness constrains us to say that, from all the evidence of all the witnesses of appellee, the engines are shown to have been in good order, and with a prop-

er spark arrester, each, and were handled with due care. The spark arresters in both smokestacks were examined shortly before and shortly after the fire, and were found in good condition. It is shown by the witnesses for the railroad that all engines emit some sparks, when in motion; that an engine capable of performing its required work, which does not throw sparks, is an impossibility. It is said that all engines throw sparks, and, in working, must, from their very construction, throw them all the time; but they may emit more or less sparks, under varying conditions. The evil cannot be wholly prevented, but it may be, and is, in every properly constructed locomotive, reduced to comparative insignificance. With a proper spark arrester and cone, sparks which would otherwise fly out in large volume, and of very large size, are rendered almost powerless for hurt. Through the meshes of the arrester's netting, only very fine sparks or cinders can escape. They are beaten on the cone and in the arrester, and reduced, before escaping into the air, into minute particles. They are so small as to lose their power of ignition, quickly after emerging into the air. They fall harmless in the cab, and, though hot to the touch, have no life in them, and are incapable of igniting substances with which they come in contact. They ordinarily fall in 10 or 20 feet after escaping from the smokestack, though, with a strong wind, they might be carried 30 or 40 or 50 feet. This, in brief, is the defense of nonnegligence made by the appellee, and, if this stood unchallenged, we should not hesitate to affirm the judgment on the last trial. But there is in the record the anticipatory evidence to which we have already alluded. Lewis Harvey testifies to seeing, at high noon, on a clear, sunshiny day, and at a distance of a hundred yards, "plenty of sparks" flying from the engine of the passenger train, and firing grass beyond the right of way of appellee. That the minute particles of coke which only can escape through a proper spark arrester, as testified by appellee's witnesses, could have been so seen by Harvey, or that they could have set grass afire at the distance he describes, is incredible. But, in determining the rightfulness of the court's action in charging peremptorily for the appellee, we are bound to assume the absolute credibility of all the evidence of the plaintiff below. The right to withdraw the case from the jury rests upon that very assumption in favor of the plaintiff's evidence. In peremptorily instructing for the defendant below, the learned judge virtually said: "The absolute verity of Harvey's evidence is to be assumed; but, granting the assumption, it raises no issue,—it presents nothing for the jury's determination." But were there disputable facts? Was there only one inference to be drawn from all the evidence? Would all men of reason be shut up to one

inevitable conclusion? If not, the case should have been submitted to the jury. Whenever there is any reasonable ground for diversity of opinion, it is the judgment of 12 men that should be called on to decide, and not that of one. We cannot shut our eyes to Harvey's evidence. It may, in truth, be of little real worth, but that is not for us to say. We are driven to assume its perfect truth, in considering the point now in hand; and, thus assuming, we cannot affirm that it does not discredit, or reasonably tend to discredit, the testimony of the railroad company as to the construction and equipment of the locomotive, and reasonably tend to establish the appellee's negligence in that particular.

It remains now, to pass upon the action of the court in setting aside the first verdict. On the first trial, several exceptions were taken by appellee to the rulings of the court upon the introduction of the evidence of several witnesses. The admission of the evidence of Dr. Jones, in so far as it was sought to show that the witness had notified the station agent of the danger of the town from the accumulating cotton, was error. Whether there was a dangerous and unwarranted accumulation of cotton on the platform, was a fact to be proved like any other, and the witness' opinion was not admissible. Whether the railroad was derelict in duty in storing cotton on its platform, and was negligent, in such fashion as to impose liability, were questions of law, to be determined by the court, and not at all by the opinion of a witness; and this duty the court performed, in virtually withdrawing from the jury the consideration of any supposed negligence springing out of the accumulation of cotton on the platform. There was an utter failure to show negligence in this matter. The transportation of cotton in bales, at certain periods, is the chief business of appellee. The proofs show no undue accumulation,—no negligence in storing on the platform. The fire occurred Sunday, and on that day no cotton was ever shipped. Eighty-five of the 168 bales burned were delivered to the railroad late Saturday evening. The remainder had been there so short a time as to preclude thought of any misconduct. This, in effect, was what the court below properly held, in refusing to charge for appellant to the contrary, and any attempt to put the jury in possession of Dr. Jones' opinion was erroneous. The admission was erroneous, moreover, because the conversation was not in reference to the cotton destroyed, was some time prior to the fire, and did not touch the conditions existing at the date of the burning.

The evidence of Fitzhugh, Downing, and Hester should have been excluded. The controversy was as to the equipment and management of one of two locomotives, and not of others. What was the condition of these

engines on the occasion of the fire, was the subject of investigation. What other engines, handled by other drivers, on other occasions, did, could shed no light on the particular inquiry involved. The tendency of such evidence was to confuse and mislead the jury, and prejudice the appellee. But this would appear to be not an open question in this state. Said Ellett, J., in *Railroad Co. v. Miller*, 40 Miss. 45: "The witness then proceeded to state that he had often known the cars of defendant to pass over the public road, near his house, without ringing their bell or blowing their whistle, and that they sometimes went down about dark without headlights. Kelly, another witness for plaintiff, was also permitted, after like objection, to testify that he had known trains, sometimes, to run in the night without headlights, but he did not know as to this particular train. This evidence was inadmissible. The question at issue was whether the death of the mule resulted from the want of reasonable and proper care at that particular time, and by the agents in charge of that train. The affirmative of that proposition would not be established by showing that other agents of the defendant, at other times and places, had been guilty of misconduct which violated the law regulating the running of their trains." This principle was recognized and reaffirmed in the subsequent case of *Railroad Co. v. Kendrick*, Id. 374. The same principle is applicable in the present instance. It is founded in sound reason, and is settled by authority with us.

The evidence of Covington should have been excluded, likewise. From his testimony, it is more than uncertain whether either of the locomotives of which we have been speaking fired his field. It is equally uncertain whether any engine fired it negligently, or by sparks. The fire was spreading out from the tracks, and may just as well be supposed to have been set by a coal or spark from the ash box, or by a match thrown out by a passenger. In any aspect in which it may be regarded, this evidence should have been wholly excluded.

It may not be unnecessary to say directly what we have said by implication already,—that the evidence of Lewis Harvey was properly admitted. It was pertinent on an issue of fact, and that fact was as to the proper equipment of the passenger engine. It was an effort, not to establish the fact to be proved by piling presumption on presumption, as appellee's counsel contend. It was a perfectly legitimate method of showing by circumstantial evidence that the spark arrester of the particular locomotive was not in good condition, and, consequently, that appellee was negligent in using it in its unsafe state.

We are unable to understand why the cross-examination of Terry as to Conway's conversation with Jake Terry was admit-

ted. Conway was not a witness. He was not a party to the litigation. He seems to have had no interest in the matter. Is the effort made to impute his curiosity to the appellee? This evidence as to Conway was improperly admitted, we think, and may have been prejudicial.

In the rulings of the able court below on the instructions given and refused, we find a single error. The sixth instruction is open to the just criticism of appellee's counsel. It seems to require a decision by the jury on a preponderance of the evidence, even if insufficient to reasonably satisfy the mind. It left no room for the action of the mind unsatisfied by the evidence produced.

It may not be amiss to add that the views of the court below, involved in the refused charges asked by the appellant, seeking to fix liability on the railroad for supposed negligence in storing cotton on its platform, as it did, and in failing to cover the same with tarpaulins, and in not keeping appliances at hand for the extinguishment of fires, and in placing the box cars on the side track, were altogether correct. There was no such delay in shipping cotton as to excite comment. Eighty-five of the 186 bales were received less than a day before the fire, and we see no room for the assertion of negligence in accumulating cotton in large and dangerous quantities. The cotton was baled in the customary fashion of the country, and was received, handled, and stored in the usual manner. The menace to the town could not have been regarded as serious, we are constrained to believe, seeing this appellant and others had deliberately increased the menace by themselves enlarging the cotton platform at the station, in order that more cotton might be stored than the appellee's platform could hold.

The cases cited by counsel, where liability was imposed for keeping or permitting grass or other inflammable materials on the right of way, whereby fires were set out by coals from the ash box or sparks from the engine, and then communicated to fields or houses of adjoining property holders, are not applicable to the case at bar. It was the duty of the railroads, in those cases, to keep inflammable materials off its track and right of way, because of the almost certainty of dropping fire from the ash box, or sparks from the same source, as well as from the smokestack, in the ordinary and careful handling of locomotives in hauling trains, and so communicating fire to adjoining property. It was the duty of the railroad companies to remove these sources of constant danger. But the principle is not to be invoked in this case we are dealing with, for it is the duty of the carrier to receive and store the cotton offered it for shipment. That is one of the ends and aims of the railway's existence. That an unprecedented dry season required the appellee to procure and use tarpaulins—a thing never before thought necessary—is not

true. And this remark may be applied to the contention as to appellee's supposed negligence in likewise failing to procure and keep appliances for the extinguishment of fires. There was no negligence in having the box cars adjacent to the cotton on the platform. They had been placed there for convenient loading of this very cotton, on the morrow. It was a natural and proper thing to place them where they were. The entire case has received repeated and protracted consideration by us, with the result of reversing the judgment obtained under the peremptory instruction of the court, but with no reinstatement of the first verdict. Reversed and remanded.

(71 Miss. 361)

# MILLSAPS v. MERCHANTS' & PLANTERS' BANK.

(Supreme Court of Mississippi. Oct. 30, 1893.)

CONTRACTS—SALE—WARRANTY—NEGOTIABLE INSTRUMENTS—CORPORATIONS—CORPORATE LIABILITIES—EVIDENCE.

1. J., the sole owner of all the stock in three street-railway companies, made a contract with M., by which the latter was to buy a one-third interest, and J. warranted the assets of the companies to be a certain amount, and the liabilities not to exceed a certain sum. J., before the contract was entered into, and as a basis of negotiation, gave M. a memorandum of the assets and liabilities. *Held*, that the memorandum was admissible in evidence in an action against M. as tending to show that the debts so listed were corporate liabilities.

2. The rule excluding parol evidence to vary a written contract does not apply in such case, as the list simply attacks the consideration, for, by increasing the liabilities above the amount warranted, the margin between the assets and liabilities, which was the subject of the sale, is decreased.

3. When in a later contract reference is made to the prior one, and it is expressly stated that the later one is made in accordance with the prior one, the prior one is not abandoned.

4. In an action on a note by the assignee the admissions and representations of the assignor at the time of its execution are admissible against the assignee, as the common-law rule has been changed by the anticommercial statute.

5. Where, in a negotiation with the sole owner of the stock of a corporation for the sale of an interest therein, a list of the corporate liabilities is made out as a basis of negotiation, and in the list are placed debts contracted in the individual name of such sole owner for the benefit of the corporation, such debts, though not legal liabilities of the corporation, would, as against such purchaser, be considered binding on the corporation, and are to be considered in determining whether the corporate liabilities exceed the amount warranted.

6. Where property is listed as assets of a corporation in negotiating for a sale of an interest by the sole owner of the stock, though it is held in the name of such owner, a mortgage on the property given by him should be considered in determining the amount of the corporate liabilities.

7. When the sole owner of the stock of a corporation executes a corporate note for his individual indebtedness, no one but the creditors of the corporation can complain.

8. On the sale of an interest in a corpora-

tion by the sole owner of the stock, in which the liabilities of the corporation are warranted not to exceed a certain sum, the amount of liabilities should be computed as of the time specified in the contract, and no diminution after such time should be considered; and if the warranty is broken at the specified time the purchaser can repudiate the contract.

8. In an action on a note by the assignee thereof, the fact that it was executed for the purpose of having it negotiated, and that it was negotiated in pursuance of such intention, is not sufficient to estop the maker from setting up equitable defenses under the anticommercial statute, as there must be some fraudulent design on the part of the maker to work such an estoppel.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Action by the Merchants' & Planters' Bank against R. W. Millsaps on a note. There was a judgment for plaintiff, and defendant appeals. Reversed.

Nugent & McWille, for appellant. Calhoun & Green, for appellee.

MAYES, Special Judge. This is an action on a promissory note for \$2,916.67, executed by the appellant to the order of Harry K. Johnson, and by said Johnson indorsed in blank and transferred to the appellee before maturity. The note was given as part of a contract between the parties thereto, of date 20th September, 1890. That contract is set forth in full in the former opinion of this court, rendered on the former appeal in this case, and reported in 69 Miss. 918, 13 South. Rep. 837. Construing that contract, we held that, looking through the mere verbiage of the transaction to its real substance, what Johnson sold and Millsaps bought was one-third in a margin of value between the worth of all the property of all the street railways, placed at \$45,450, and the sum of all their debts, warranted not to exceed \$36,700, on the 20th of September, 1890; that the fifth plea of the defendant, which averred that the debts of the said companies in fact amounted at that time to \$44,825, and perhaps more, was good, because it in effect alleged the nonexistence of the very thing bought and sold, to wit, the margin. The case was therefore sent back for a new trial. On this second trial, the court below again gave a peremptory instruction for the plaintiff, and this appeal seeks a reversal of that action. The course of the trial was such as to render necessary herein a statement of all the material facts of the case.

In the town of Greenville were four distinct street railways,—the Greenville Street Railway, the Greenville Electric Street Railway & Power Company, the Star Line Street Railway, and the Suburban Street Railway. Johnson was sole owner of all these concerns, except that about one-tenth of the stock of the Greenville Street Railway was outstanding in other hands. No stock had been actually issued by any of

the companies, except the last named. On the 22d of July, 1890, Johnson and Millsaps made the following written contract: "This agreement witnesses that Harry K. Johnson sells to R. W. Millsaps a one-third interest in the stock of the Greenville Street Railway Company of Greenville, Mississippi, held by Harry K. Johnson, being twenty-two thousand six hundred dollars face value, a total capital stock of twenty-five thousand dollars; and also a one-third interest in the total capital stock of the Suburban Railway Company, and a one-third interest in the total capital stock of the Greenville Electric Street Railway and Power Company, and a one-third interest in the total capital stock of the Star Street Railway Company of Greenville, Mississippi, for a total price of fifteen thousand one hundred and fifty dollars; and the said Harry K. Johnson guarantees that the total indebtedness, of whatsoever kind, of all of said roads shall not exceed thirty-six thousand seven hundred dollars on the 20th day of September, 1890, and that he will deliver said stock on the 20th day of September, 1890; and the said R. W. Millsaps agrees to pay for said interest said sum of fifteen thousand one hundred and fifty dollars to said Harry K. Johnson on the 20th day of September, 1890; and said Johnson shall bear all expenses and take all profits from said roads up to said 20th day of September, 1890. The price above agreed to be paid by said Millsaps represents one-third of a total capitalization of all of said roads, of forty-seven thousand eight hundred and forty dollars; and from the price to be paid by him is to be deducted the one-third of the indebtedness of all of said roads above guaranteed not to exceed the first sum above named. Witness our signatures, this 22nd day of July, 1890. Harry K. Johnson. R. W. Millsaps." The plan was that the \$36,700 of debts were to be settled by placing a consolidated bonded mortgage on the entire property of the railways, which were also to be consolidated, and by taking up the debts with those bonds or their proceeds. While this bargain was negotiating, and, as is claimed by Millsaps, "as the basis for the negotiation," Johnson gave to Millsaps certain unsigned memoranda of assets and liabilities. In the list of assets appear these two items: "4 lots, Belle Air, \$8,000; 16 lots, Park Side, \$8,000." The list of liabilities aggregates \$38,700, and in it appear these three items: "Wilczinski note, \$4,000; Dr. Walker, \$1,000; Deaton & Skinner, \$1,000." These memoranda Millsaps retained.

It seems that the stock in the Greenville Street Railway had been purchased by Johnson, on a credit, from one Gunn; that Johnson still owed some \$19,000 of the purchase money, and the stock was held in pledge to secure the payment of that debt. For this reason, when the 20th day of September

arrived, Johnson, not having the stock certificates in possession, and not being able to pay the debt to Gunn, could not deliver the stock according to his contract. Millsaps waived that point, and the written supplementary contract which is set forth in the former opinion of this court was made. Millsaps executed the note sued on in purchase of one-third of the margin, making the same payable in 60 days, by which time it was understood that the bonds could be prepared, the mortgage executed, and all of the \$36,700 of liabilities, including the Gunn debt, which was listed as one of the debts, could thereby be liquidated, and the enterprise put on a substantial basis, and all of the roads be then consolidated. There is a controversy between the parties as to the motives which led Millsaps to execute the note instead of paying the money on the 20th of September. Millsaps claims that he did so for the reason that he saw that Johnson was not ready to deliver the stock as he had contracted to do, and, while willing to give him time to do so, he was determined not to pay for the stock until he got it. Johnson, on the other hand, says that Millsaps gave the note because he had other uses for his money, and that he, Johnson, granted him time for his accommodation, being moved to do so only because, on inquiry of the plaintiff, he found that the plaintiff would discount Millsaps' note, and that Millsaps knew this fact, and gave the note in order that the plaintiff might discount it accordingly. Millsaps claims to have known nothing of the assignment of the note to the plaintiff until the 15th of November, five days before its maturity, when he was notified. On the 20th of November, the day of the note's maturity, the bonds were still not quite ready, but on that day Mr. Gunn enjoined the mortgaging of the Greenville Street Railway, the sale of its property, or sale of the stock therein, except on condition that the proceeds of the mortgage should be paid to himself, etc. This injunction caused the whole negotiation to collapse,—“the bottom dropped out;” and Millsaps refused to pay the note unless the stock certificates accompanied it. This suit was brought by the assignee.

On the second trial, from which this appeal was taken, the condition of the pleadings was such that the principal issue of fact was on the question of whether the sum of all the corporate debts did or did not exceed \$36,700. It was finally admitted by the plaintiff that on the 20th of September the corporate debts, the items of which were specified, aggregated the sum of \$34,256.45; but defendant claims that, in addition, the following were debts of one or other of the railways within contemplation of the contract: Starling & Smith, barge item, \$35; Wilczinski note, \$3,800; Deaton & Skinner, \$1,500; Mrs. Blanton or Dr.

Walker, \$1,100; Miller, Alexander & Co., \$3,000; Campbell & Starling, \$250; Building & Savings debt, \$4,853.35. Of these items, the Wilczinski debt, the Blanton debt, and the Deaton & Skinner debt, were included in the list of liabilities made in July; but the others were not. The defendant offered in evidence, for the purpose of showing that those three items were corporate debts, the list of liabilities aforesaid; but the court excluded it, and this action is excepted to. The objections made by counsel, in their argument, to the admission of this memorandum rest upon five principal propositions.

First. It is said that the memorandum was not, in fact, a memorandum of the liabilities of the corporations, but was only a list of such debts as Johnson would require to be liquidated by the consolidated mortgage, and since he was the owner and the seller he had a right to place therein his own individual liabilities,—even his wash bills, if he chose,—without wrong to Millsaps. So far as the mention of right is concerned, this is no doubt correct; but is it a fact? The list of debts, whether those of Johnson or the corporations, or some of each class, is exactly \$36,700; the contract of July twice expressly speaks of a liability of the companies, guaranteed not to exceed that precise sum; and Mr. Starling stated that the memorandum was made for a basis of the negotiation between Millsaps and Johnson, as indicating liability to be discharged by the mortgage, as we understand it, and as counsel in their argument claim, thus negating the idea that it was an individual liability to be assumed by the companies in their consolidation. Looking to the entire testimony in the case, we are satisfied that the list was offered for the purpose of proving an admission by Johnson of corporate liabilities as of date July 22d; and we think it tended to do so. The weight of it was another question, but that was for the jury.

Secondly. It is said that the list was not a part of the contract of July, but was only part of the colloquium which preceded it, and was, therefore, merged in or displaced by it, the contract itself being the sole evidence admissible. Of course, we recognize the rule, insisted on in our previous decision, that parol contemporaneous testimony cannot be received to add to, alter, or vary the terms of a written instrument: but while that rule excludes evidence of the intention of the parties, it does not apply in this instance. Here the substantial question, although not presented in the simplest and most direct form by the pleadings, is one of consideration,—that is, of the existence of the margin bought and sold; and the case is fully within the rule declared by this court in *Cocke v. Blackburn*, 57 Miss. 689.

Thirdly. That the warranty in the contract of July looked to no specific debts, but only to the amount of the general sum, to

be computed on the 20th of September, and which might be composed of any corporate debts, whether existent on the 22d of July or not. We agree to that; but the question here is not whether the debts existing on the 22d of July were the same debts which existed on the 20th of September, but only whether a certain debt, or several certain debts, shown to have been owing both on the one day and the other, was or were corporate debts. The list was offered for that purpose, and not to show that the debts were different on one day from what they were on the other.

Fourthly. It is claimed that the contract of July was abandoned by the execution of that of September, and, therefore, that any basis of negotiation for the July contract fell with the contract itself. But we do not think that the July contract was so abandoned; on the contrary, the September contract expressly declares that "this sale is made in accordance with" the contract of July, and that "reference is hereby made to it."

Fifthly. It is also claimed that Johnson's admissions do not bind the plaintiff. It was an admission or representation made in inducing the contract, and, while it may not raise an estoppel, (on which point we do not pass,) it is competent against a subsequent assignee, the common-law rule being changed by our statute. *Brown v. McGraw*, 12 Smedes & M. 267.

The Wilczinski debt, that of Mrs. Blanton, (or Dr. Walker,) and that of Deaton & Skinner, were listed in July, in the memorandum aforesaid, as liabilities of the companies, or, at all events, as liabilities to be provided for in the proposed consolidated mortgage. We hold that they were clearly referred to by the contract of July; not, as we said above, that they were so specifically fixed upon as that, whenever the parties should come to execute the mortgage, Millsaps, in order to increase the margin purchased, could refuse to allow it to be given to the extent of \$36,700, in case Johnson had extinguished any or all of these debts, or refused to allow other and distinct liabilities, either of the corporations or of Johnson individually, to go in, on the ground that they had not been listed. He had no such right. But that is a proposition different from the true question, which is whether, if those debts continued to exist, as they did so continue, Millsaps had the right, when the mortgage should come to be issued, to object to their being brought within the mortgage, on the ground that they were not corporate debts, but were Johnson's individual liabilities, or on any other ground. Clearly he did not. He had bought the one-third interest in the property at a total fixed valuation, subject to a consolidated liability of \$36,700. That is what his purchase of a margin meant in substance. It is true that it was a matter indifferent to him what debts composed the

total of \$36,700, but also it was true that by the contract, and especially in view of this list in which these debts were expressly mentioned, Johnson had the right to put into the mortgage, as liabilities of the corporations, whether they were so in fact or not, the debts now under consideration. He himself, in his testimony, emphatically so asserts; and counsel for appellee are mistaken, so far as these debts are concerned, when they insist in their argument that Millsaps had, by the September contract, reserved the right to determine what were corporate debts, and in the execution of the mortgage to repudiate all that were not such technically. As between him and Johnson, he was quoad hoc, irrevocably bound to submit to these debts as if they were corporate liabilities; and so the matter was considered until the very end of the transaction. Neither Johnson nor his assignee can now, because of a change in circumstances, which makes a different disposition of the status of these listed debts desirable, take a different stand in this regard. There is another point of view. These debts were all incurred, as appears from the testimony, in Johnson's individual name, but for moneys actually used for the benefit of the respective corporations, and known by the creditors at the time to be intended for such use. Johnson was at that time, as well as at the time of his contract with Millsaps, the sole owner of those corporations. The fact that a single individual holds all the stock of a corporation does not, it is true, dissolve the corporation, or vest in him the legal title to its property. He may contract in the corporate name, and thereby bind the corporation as such. His contracts, made in his individual name, and where credit is extended to him in his individual capacity, may not impose a legal liability upon the corporation, even although the contract be for its benefit. Still, since every corporation is a trustee of its property, first for its creditors and afterwards for its stockholders, he has clearly an equitable title to the corporate property. He may charge it in equity even for his individual debts, (*Banking Co. v. Eisenman*, [Ky.] 21 S. W. Rep. 531, 40 Amer. & Eng. Corp. Cas. 243, and note;) and under our statute his equitable interest is vendible even by execution at law. Whatever, in the case of a settlement of the affairs of an insolvent corporation, a court of chancery into whose hands such matters may have come would do under its rules of administration, as between strictly corporate debts and the individual debts of a sole owner, by way of marshaling, no such question arises here. So long as the concern remains in the hands of the sole owner, and he holds all of the stock, the way is short and easy for the appropriation of all the so-called corporate property to the payment of his individual debts; and especially is it easy in a court of equity, to a creditor who can show that the

money which he furnished to the owner went into the creation of the corporate property pursued. If such sole owner shall transfer any of the stock to others, and thereby revive the status of associated effort contemplated by law in the creation of every corporation, the transferees would, of course, have their rights, and would be protected from all individual liabilities, except such as had been made fixed charges. So here, Millsaps, after receiving his stock, could, as a general rule, have successfully resisted any effort of Johnson's individual creditors to subject the corporate property to their debts. But he could not have so successfully resisted these debts. Their holders could have averred that he purchased with express notification that their debts were to be treated as corporate debts and were to be charged on the corporate property, and with a reduction made in the purchase price for that reason. And as to this claim he could have made no answer. The error which we think the court committed below was in confining the investigation to the question of technical and direct legal liabilities on the part of the corporations, as distinguished from the individual but sole owner, Johnson; whereas the true point was the sum of these debts which, by the entire contract, construed in the light of all the attendant circumstances, were assertable against Millsaps as liabilities to be liquidated by the mortgage. Nor do we think that, under the contract made, Johnson had any right to call upon Millsaps to enter into a situation so doubtful as that here presented, so incumbered by probabilities of litigation and losses, all the results of Johnson's own dealings with his own affairs; nor in this case particularly can he or his assignee cast upon Millsaps the onus of disproving those liabilities to be corporate debts. Under the circumstances, that burden fairly belongs to the plaintiff.

We hold that the debt to Campbell & Starling should have been taken into consideration. That firm was employed by the Greenville Street Railway, by a resolution spread upon the minutes, at a salary of \$250 per annum. This salary the consolidated company would have been liable to pay; and the fact that the attorneys have, at some time not fixed, and for some reason not given, written the charge off their books, does not alter the fact that it was a liability of the company on the 20th of September, if, indeed, it be not a liability now.

The debt to the Building & Savings Association, of \$4,853.35, was not a liability of any of the corporations, and cannot be taken into consideration unless it was a charge upon the property of the corporations, or of one of them. It is claimed by the appellee that, while it was secured by a mortgage executed by Johnson upon the Belle Air lots, those lots themselves were not the property of any of the companies, but were the indi-

vidual property of Johnson. They were first conveyed to one Negus, who was secretary of the Greenville Street Railway Company, for that company; but, since it was thought that the company was not authorized to take title to lands, they were conveyed to him individually. For the same reason, when Johnson acquired the road, they were conveyed to him individually; and, so holding them, he executed a mortgage on them to secure the debt in question. It seems, however, that in the negotiation for the sale to Millsaps these very lots were listed as assets of the company, or, at least, as items going into the total of assets which, being diminished by the \$36,700 of liabilities, left the margin bought and sold. Just as to exceed the \$36,700 limit of liabilities would destroy that margin, so to diminish the assets from which those liabilities were to be paid would destroy it equally as effectually. The record does not show that Johnson warranted the assets to include these lots, and it has been shown that the valuation of \$45,450, which was fixed by the parties, was fixed as the gross value of the stock sold, not of the specific items of property which constituted the companies' assets. But, also, the record shows that the defendant offered, in various forms, to prove that the lots in question were listed as assets forming the basis for the negotiation, and subjects of the "capitalisation" spoken of in the contract of July, and that the court excluded the testimony. If such was the fact, the proof was competent, and should have been admitted; that is to say, if the pleadings had been so framed as to present that view. They were not so framed, but to meet that difficulty, and pending the trial, the defendant offered a plea, numbered the ninth, which the court refused to allow filed, on the ground that it was too late. We hold that the plea should have been filed. This was necessary in order that the cause might be fairly tried on its merits. The court had ample power to impose such terms as should be just and equitable.

In respect to the debt of Miller, Alexander & Co., we hold that it was a corporate liability. Grant that the original consideration was extended to Johnson individually; still, in August, 1890, he had executed a corporation note for the debt. The road was his property solely. No stock, even, had been issued. No one had a right to complain, except perhaps a creditor, under circumstances which do not here exist; and it does not appear that any one does complain. The note was executed for a consideration of work done for the benefit of the road, and for other work which constituted a builder's lien on the Belle Air lots, in fact, although we do not think that here the nature of the consideration makes any difference. By Johnson's own act, therefore, he had, on the 30th of August, placed this \$3,000 note of the corporation in the hands of his cred-

itor, who had accepted it, and was holding it. The creditor could have asserted it as a debt whenever he saw fit, and doubtless would have done so whenever it should suit him. Nor do we think that the fact, if it be a fact, that the note was executed to the payees in order that they might raise money on it, and that they failed to do so, and laid it away, makes any difference. The note was not accommodation paper. It was given for a debt due, resting on a fully adequate consideration. The holder might neglect it or forget it; but he was armed with it, and it was a binding obligation. The court below, we gather from the argument here, allowed this debt, but scaled it down to about \$600, because of the admitted fact that after the 20th of September, and before the 20th of November,—the latter being the day appointed for the consolidation,—Johnson had made payments to the payees, which, being credited, would reduce the note to that sum. But we hold that the computation must be made as of the 20th day of September. That day was precisely fixed by the warranty. The parties selected their own time, and made their contract accordingly. In a case like this, the breach of the warranty cannot be subsequently repaired by him who broke it. Where goods are sold with warranty, if the warranty be broken, the purchaser has several methods of remedy. He may accept the goods, pay for them, and sue on the warranty for the difference in value; or he may, having accepted the goods, refuse to pay for them in full, and recoup his damages against the seller's demand; or he may reject the goods, stand on his right to have them as warranted, and sue for his damages; or he may repudiate the sale in toto, if he has not received the goods, or if he return them in a reasonable time. *Hare, Cont. p. 554.* These rights are the purchaser's. The seller cannot control them or affect them. It is very true that the purchaser may, by his own conduct, lose his right to repudiate the purchase absolutely. But in the case at bar we hold that he has not. On the 20th of September the appellant had received nothing under his contract, not even the stock certificates, which, when received, would have evidenced the right to one-third of such margin of value as there was. On that day, therefore, if it were true that no such margin as he bought existed, he had the right to choose his course; and we find nothing in the record which should deprive him of that option. His failure to examine the books cannot be imputed to him as a waiver, because he had the right to rely upon the express warranty. For the reasons just stated we hold that the replication numbered 16, filed in response to the fifth and eighth pleas, was bad, and that the demurrer of the defendant thereto should have been sustained.

The last point which we shall consider is the action of the court below upon the repli-

cation numbered 17. That replication asserts that the note sued on was executed by Millsaps "for the purpose of having the same negotiated by Johnson, who, in pursuance of said purpose, immediately on its execution" negotiated the note for value with the plaintiff. We hold that the replication was bad, and that the demurrer to it should have been sustained. Something more is needed to take a note from under the operation of our anticommercial statute than a mere purpose that it shall be negotiated by the payee when executed. There must be a sinister design, creating an equitable estoppel. Mere knowledge that the payee will immediately discount, or even an intent that he shall do so, does not constitute such an estoppel. If it did, then the statute can have no operation as to a note made payable to order; for the very reason why such terms are used in a note is to make it negotiable even as at common law; and every person who utters such a paper must be conclusively presumed to know that the same is put by his deliberate act in such shape as to be negotiable by the payee immediately. There can be no substantial difference between a present intent that such negotiation shall be made and an intent to put the paper in shape for negotiation, with knowledge that it may be immediately sold for value. The statute was enacted for the very purpose of covering such cases, and opening the paper to equitable defenses notwithstanding. The case of *Hawkins v. Neal*, 60 Miss. 256, does not militate against this view. There the note was accommodation paper. It was given as such, the maker well knowing at the time that there was no consideration for it as between himself and the payee, intending that it should be negotiable in the absence of such a consideration. It is well settled that paper of this class, well known in the commercial law and in the world of business, is not, in fact, executed until it is delivered to the discountor or purchaser, and that his purchase constitutes the consideration. The cases are not alike, for that reason. *Tilden v. Blair*, 21 Wall. 241. For the reasons stated, the judgment of the court below must be reversed.

(100 Ala. 312)

**ST. LOUIS BREWING ASS'N v. AUSTIN.  
HANCOCK et al. v. SAME.**

(Supreme Court of Alabama. Nov. 7, 1893.)

**CONSTRUCTIVE TRUSTS—FRAUD—NECESSITY OF  
TRACING FUNDS.**

Where a bank induced collections and deposits by false representations of solvency, creditors cannot have a trust declared in their favor in the assets of the bank in the hands of a receiver without showing that the receiver has or ever had collected them, or deposited money or property in which such money was invested.

Appeal from chancery court, Colbert county; Thomas Cobbs, Chancellor.

Bills by the St. Louis Brewing Associa-



tion and Hancock Bros. & Co., respectively, against R. W. Austin, as receiver of the First National Bank of Sheffield, to have a trust declared in favor of complainants in the assets of the bank. Dismissed. Complainants appeal. Affirmed.

Roulhao & Nathan, for appellants. D. D. Shelby, for appellee.

MCOLLELLAN, J. These cases involve substantially the same questions, and were submitted together. The bill in each of them seeks to have a trust declared in favor of the complainants upon the assets of the suspended First National Bank of Sheffield, which are now in the hands of, and being administered by, the respondent, as receiver of said bank, by appointment of the comptroller of the treasury. The facts in the brewing company's case are, or may be conceded to be, the following: During the month of November, 1889, said bank in various ways represented itself, for the purpose of inducing collections and deposits, to be solvent, in a perfectly sound condition, and to be doing a good and safe and paying business. These representations were made to the complainant for the purpose stated by its president and cashier, and were acted on by complainant by way of depositing in said bank the money which is now sought to be recovered. The representations were wholly false, and known to be so by the president and cashier when they were made. The bank was utterly insolvent, and these officers knew it. It was in a failing condition at the time, to the knowledge of these officers, and actually failed on the 29th day of the month. With full knowledge of this state of affairs, the bank officers named, and who were managing the concern, induced the complainant to make the deposit, and they received the deposit, and converted the money to the uses of the bank. These are also the facts of the case on this point of Hancock Bros. & Co., except that the bank made a collection for them, and converted the money to its own use, sending complainants a worthless check for the amount. We will concede that, so far as the right of the complainants to fasten a preference lien in the nature of a trust on the assets of the bank depends upon the fraud of the bank and its officials, their cases are made out on the facts we have stated; and if they had further shown that the identical money which was deposited by and collected for them respectively had come to the hands of the receiver, and was held by him in specie at the time of bills filed, or that their funds had been mingled with the funds of the bank which came to the receiver's hands, and constituted in part the gross sum held by him, or that their identical money had been invested by the bank in tangible property which came to the hands of the receiver, and was held by him, they

would have been entitled to the relief they seek. But just here is where the cases fail. It is not shown that the receiver has or ever had their funds either segregated from or as constituting in part the money of the bank in his hands, and it is not shown that any property in which their funds were invested is now held by the receiver, or ever came into his hands. To the contrary, it is made to appear very clearly that the money deposited by the brewing company, and collected for Hancock Bros. & Co., respectively, having been mingled with the funds of the bank, was paid out by the bank to depositors or other creditors before its suspension. No part of this money came to the hands of the receiver in any form, and no tangible property of the bank which had been acquired or paid for by it after the funds of complainant were received—no property into which this money could possibly have gone—is now, or ever has been, in the possession of the respondent. Indeed, only about \$110 in money was turned over to the receiver at all,—an amount about equal to the claim of Hancock Bros. & Co., and about one-seventh of the claim of the brewing company,—and this insignificant sum is in no wise identified as the money collected for the former, or as a part of the money deposited by the latter. There is, in short, an utter failure to identify complainants' money in the hands of the receiver, or to trace the money into property of the bank which came to his possession. On these facts no trust can be declared upon any money or property of the bank in the hands of the receiver in favor of the complainants, and they are not entitled to any preference over other creditors of the bank in the payment of their demands. This conclusion is so well grounded upon principle, and supported by texts and adjudged cases, that we need do no more than cite some of the authorities which are collated in appellees' brief: 2 Story, Eq. Jur. §§ 1258, 1259; 2 Pom. Eq. Jur. §§ 1051, 1058; Morse, Banks, §§ 590-596; Waite, Insolv. Corp. § 659; Bank v. Dowd, 38 Fed. Rep. 340; Case v. Beauregard, 1 Woods, 125; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 354; Bank v. Dowd, 38 Fed. Rep. 172; Illinois Trust & Sav. Bank v. First Nat. Bank of Buffalo, 15 Fed. Rep. 858; Maury v. Mason, 8 Port. (Ala.) 212; Goldsmith v. Stetson, 30 Ala. 164; Parker v. Jones, 67 Ala. 236; McCall v. Rogers, 77 Ala. 349. This conclusion has not been reached and is not rested upon any idea that the rights of the complainants in respect of effectuating their equitable titles to the funds in controversy against the receiver are any other than they would have been against the bank itself on the facts we have stated or conceded to be true had the failure of the bank not been followed by the appointment of a receiver. Though the suspended bank had continued in the posses-

sion of its assets, these complainants could no more have recovered their funds by the invocation of equity to the declaration and effectuation of their equitable titles than they could have sued in *detinue* had their titles been good at law, and for the same reason in neither case could it be maintained that the defendant bank had their property in its possession. The rulings on demurrers to the bills in these cases were without injury to the complainants, and neither those rulings nor other questions need be reviewed. The cases of the respective complainants were fully developed in the evidence. They were entitled to no relief upon the facts proved. The bills were properly dismissed, and the decrees of the chancellor are affirmed.

(100 Ala. 311)

**BYNUM v. MEMPHIS & C. R. CO.**

(Supreme Court of Alabama. Nov. 7, 1893.)

**LIMITATIONS—RUNNING OF STATUTE—INTERRUPTION BY LEGAL PROCEEDINGS—LEGAL REPRESENTATIVES.**

Code 1886, § 2623, permits plaintiff or his legal representative to commence suit again within a year after reversal of a judgment for plaintiff, though the statute of limitations has run against the cause of action. *Held* that, where a judgment for a wife for the loss of property has been reversed because the property belonged to her husband, he cannot, by styling himself trustee of his wife, begin a new suit and avoid the statute under such section.

Appeal from circuit court, Lawrence county; H. O. Speake, Judge.

Action by O. H. Bynum, as trustee of Sarah M. Bynum, against the Memphis & Charleston Railroad Company, for the burning of cotton. Judgment for defendant. Plaintiff appeals. Affirmed.

Mrs. Sarah M. Bynum brought suit to recover the value of certain bales of cotton, alleged to have been destroyed by fire in March, 1888, while in the possession of the Memphis & Charleston Railroad Company as a common carrier. The cotton was a part of the rents, incomes, and profits of certain lands which had been conveyed to Mrs. Bynum by her husband, O. H. Bynum, by antenuptial contract, executed in February, 1871. By the terms of the conveyance, O. H. Bynum reserved to himself the right to manage and control the property, and provided that it was to "be held, managed, and controlled by him as trustee, according to the terms and provisions of section 2372 of the Revised Code of Alabama." This suit of Mrs. Bynum was tried on its merits, judgment rendered for plaintiff, and appeal was taken to this court by the Memphis & Charleston Railroad Company, and the case was reversed, on the ground that Mrs. Bynum was not the owner of the cotton under the terms of the deed from O. H. Bynum to her, and that, therefore, she was not the proper party to bring the action. *Railroad Co. v. Bynum*, 92 Ala.

335, 9 South. Rep. 185. After this decision by the supreme court was rendered, a new suit was brought by O. H. Bynum, as trustee for the use and benefit of Mrs. Bynum, against appellee, for the recovery of the value of the same cotton. To this complaint the defendant (appellee) pleaded the statute of limitations of one year, under subdivision 6 of section 2619 of the Code of 1886. The plaintiff filed a replication to this plea of the statute of limitations, alleging the facts above set forth in reference to the suit by Mrs. Bynum, and averring that the plaintiff in the present suit, as trustee under said deed, is the legal representative of the said Sarah M. Bynum, and that as such legal representative, and as the trustee of her estate under said deed, the present suit was commenced by him within one year from the reversal of said judgment of the supreme court. The defendants demurred to the replication, on the grounds (1) that it appears from the allegations thereof that Mrs. Bynum was not entitled to maintain the suit, and that the suit could not be maintained by her legal representative; (2) that said replication fails to show that the plaintiff in this action is the legal representative of Sarah M. Bynum, within the meaning of section 2623 of the Code of 1886; (3) said replication does not show such a state of facts as entitles a legal representative of Mrs. Bynum to maintain this action. On the cause being submitted on the demurrer to the replication, the court sustained the demurrer, and, the plaintiff declining to plead further, judgment was rendered for the defendant.

Roulhac & Nathan and Jackson & Sawtelle, for appellant. Humes, Sheffey & Speake and C. M. Sherrod, for appellee.

**STONE, C. J.** The cause of action declared on in this suit is the same as that which was the foundation of the suit brought by Mrs. Sarah M. Bynum against the Memphis & Charleston Railroad Company, reported in 92 Ala. 335, 9 South. Rep. 185. It was decided by this court in that case that "the cotton belonged to the husband, and the wife cannot maintain this action." On the reversal of the case, another suit was brought, within a year from the date of the remandment, in the name of O. H. Bynum, as trustee for Mrs. Sarah M. Bynum. The question presented on this appeal is whether a suit thus brought within one year by the husband, styling himself trustee, takes the case without the influence of the statute, which prescribes one year as the limit within which actions of this character must be brought. We find no trouble in determining that the provisions of section 2623 of the Code of 1886 do not apply to a case like the present. We fail to see how this section can have any application to the case as presented on this appeal. As is stated above, this court decided that the cotton in contro-

versy was not the property of Mrs. Bynum, but belonged to the husband, not as trustee, but in his own right. He was the proper party plaintiff. Styling himself trustee of his wife cannot help his case. His trusteeship did not extend to this property. It was his own. The legal representative mentioned in section 2623 of the Code, as authorized to bring a second suit, is a legal representative proper,—the person in whom the law vests the title to personalty on the death of the owner. There is no error in the record. Affirmed.

(100 Ala. 266)

**TRAMMELL et al. v. CRADDOCK.**

(Supreme Court of Alabama. Nov. 7, 1893.)

**PAROL LEASE—EJECTMENT—EQUITABLE RELIEF—ACCOUNTING.**

1. Decedent made a parol lease of land to complainant, putting him in possession, taking the rent for the entire period, giving a receipt providing that, if either decedent or his wife desired, they might redeem from the lease by refunding the amount paid for the unexpired time. They having died without offering to redeem, decedent's administrator, in an action of ejectment, recovered the land, with damages for its detention. *Held*, that the complainant could maintain a suit in equity to be restored to possession for the unexpired term.

2. The administrator will also be compelled to account for the money collected of complainant in the ejectment suit, and also for the rents and profits after complainant's ouster.

Appeal from chancery court, Tallapoosa county; S. K. McSpadden, Chancellor.

Suit by A. M. Craddock against R. J. Trammell, administrator of D. U. Trammell, deceased, and others, for possession of land and an accounting. Defendants' demurrer to the bill, on the grounds that the complainant had an adequate remedy at law, that the contract of lease averred was not such a contract as could be specifically enforced, and that the facts alleged did not show that complainant was entitled to an accounting, was overruled. Defendants appeal. Affirmed.

S. O. Houston, E. M. Oliver, and J. W. Strother, for appellants. H. A. Garrett and John A. Terrell, for appellee.

COLEMAN, J. The averments of the bill show that about January 1, 1887, appellee, Craddock, leased from one D. U. Trammell a certain farm for a period of 10 years, for a consideration of \$500, to be paid cash in advance; that he paid the money in advance, and was put into possession of the farm, which is particularly described in the bill. The bill avers that the lessor, Trammell, executed a receipt for the payment of "the five hundred dollars for the rent of the above-described lands for said ten years, a copy of which is hereto attached, marked 'Exhibit A,' and prayed to be taken as a part of the bill." D. U. Trammell, the lessor, died during the summer of 1887, and his wife, Theodora Trammell, died the follow-

ing year, 1888. After the death of the lessor, his brother R. J. Trammell, appellant, qualified as his administrator. Exhibit A, denominated in the bill a receipt, is in the following language: "\$500.00. Received of A. M. Craddock five hundred dollars, for rent on farm for (10) years, at rate of (50) fifty dollars per year; but, in case I or my wife wants the farm at the end of any year during the (10) ten years, I or either of us has the right to redeem same from lease by refunding the (\$50) per year for the unexpired time, and by paying (15) fifteen per cent. on the same for the time the money was used by me, the time to be counted from Jany. 1st, 1887. [Signed] D. U. Trammell." The bill avers that neither D. U. Trammell nor his wife desired or offered to "redeem" the land from under the lease, but recognized it as a binding lease, so long as either lived. The bill then avers that R. J. Trammell, administrator of D. U. Trammell, brought suit in ejectment against him for the land, and in March, 1891, recovered the lands from him, together with \$475 damages for the detention thereof and cost of suit. The legal heirs of D. U. Trammell and his administrator are made parties defendant. The bill prays that the title for the unexpired term of the lease be divested out of the defendants; that complainant be restored to his possession; and that the administrator be made to account for rents, and be enjoined from the further collection of the judgment recovered in the ejectment suit. There is no written memorandum of the contract of lease other than that contained in the receipt, which we have copied. In this there is no description of the land leased, and no words of conveyance of title. The contract was in parol. Having paid the entire purchase price in advance, and having been placed in possession of the leased land, the contract is not within the operation of the statute of frauds, but is a valid contract. Neither the lessor, D. U. Trammell, nor his wife, during their respective lifetimes, offered to "redeem the land from the lease," but recognized its validity. The right to redeem was a personal privilege, reserved to the lessor and his wife, and, both having died without asserting this right, the lease became absolute and unconditional for the full term of 10 years.

In an action of ejectment in a court of law, the legal title must prevail. The lessee not having a legal title to the lease, but only an equity, he could not successfully defend the action at law. His equity, as shown by the averments of the bill, is perfect, and, upon proof, will be protected in a court of equity. A court of chancery, having jurisdiction to protect his equitable title, will retain the case, and settle all the questions involved in the litigation. The bill shows that complainant is entitled to an account, and the administrator (respondent) is accounta-

ble for all moneys collected by him in the ejectment suit, and the complainant is entitled to recover the rents and profits accruing since he was ousted under the writ of possession in the ejectment suit. The decree of the chancery court is affirmed.

(100 Ala. 238)

**SCHUEER et al. v. KING.**

(Supreme Court of Alabama. Nov. 8, 1893.)  
**HOMESTEAD EXEMPTION — CLAIM AFTER LEVY — FILING WITH SHERIFF.**

Under Code 1886, § 2521, providing that a claim of homestead exemption, if made after levy of execution, shall be made by "filing" with the officer making the levy a verified claim, it is not sufficient that the claim be merely handed to the officer, and then taken back, and filed with the judge of probate for registration, such registration being provided where claim of exemption is made before levy.

Appeal from circuit court, Barbour county; J. M. Carmichael, Judge.

Statutory action of ejectment by B. Scheuer & Bro. against J. W. King. Judgment for defendant, and plaintiffs appeal. Reversed.

Defendant made a motion to set aside, vacate, and annul the sheriff's sale and conveyance of the land in controversy to the plaintiffs. The plaintiffs moved to strike this motion from the motion docket, and duly excepted to the court's overruling said motion. The court granted the motion of the defendant to set aside, vacate, and annul the sale of the property by the sheriff, and, on the hearing of all the evidence, gave the general affirmative charge for the defendant, and refused to give the general affirmative charge requested by the plaintiffs, which is copied in the opinion. Plaintiffs separately excepted to each of these rulings, and assign the same as error.

S. H. Dent, Jr., for appellants. A. M. McLendon and A. H. Thomas, for appellee.

STONE, C. J. Scheuer & Bro. brought a statutory real action against King for the recovery of the land in controversy. Their title rested on a money judgment recovered by them against King and one H. W. Day, execution issued thereon, levy on the lands sued for, sale by the sheriff, and purchase by Scheuer & Bro. at the sheriff's sale. They produced also the sheriff's deed, conveying the title of the land to them. This constituted plaintiff's title. The defense was that the lands were the homestead of defendant, King, and that he had interposed his claim of homestead exemption before the lands were sold, which they claimed they had filed with the sheriff and that officer had disregarded. Before entering upon the trial of the ejectment suit, King entered a motion to quash, vacate, and set aside the sheriff's sale and conveyance, on the ground that he had, at the proper time, interposed his sworn claim of homestead exemption, which should have arrested the sale, but that

the sheriff had proceeded to sell and convey the lands, notwithstanding such claim. It is now objected by plaintiffs, Scheuer & Bro., that this motion, to entitle it to be entertained, should have been filed in the original suit against King & Day, and not in this action of ejectment against King. We do not think the facts bear out this objection. The motion refers directly to the judgment of Scheuer & Bro. under which the lands were levied on and sold, and, although Day's name is not mentioned in the motion, it is impossible to mistake the identity of the suit, the execution, and sale to which it has reference. If the sale and deed were properly set aside, of course it left plaintiffs without title to the land, and they could not possibly recover. That title, if left in force, would maintain their action. So the real question of merit in this case is the rightfulness vel non of the order setting aside the sheriff's sale. A claim of homestead exemption, if made after levy of execution upon it, is provided for in section 2521 of the Code of 1886. It provides that "the defendant, in person, or by his agent or attorney, may, at any time after the levy, and prior to a sale, file with the officer making the levy a claim in writing, verified by oath, to such property," etc. This being done, it becomes the duty of the sheriff to suspend the sale, and to give to the plaintiff, his agent or attorney, "written notice of the filing of the claim." Then follow directions for contesting the exemption, with a provision that, if contest be not instituted within 10 days, the levy must be discharged.

This case raises the single question whether the claim of exemption was properly "filed with the officer making the levy," for it is not pretended that any contest of the claim was interposed, or that any notice was given to plaintiffs that homestead exemption was claimed. The levy in this case was made April 2, 1891, and the sale was made May 4th, next afterwards. The affidavit of claim bears date April 29, 1891, and no question has been raised on its sufficiency. It is probably defective in one particular, but, under our decisions, it was amendable in the court below. *Block v. Bragg*, 68 Ala. 291; *Block v. George*, 83 Ala. 178, 4 South. Rep. 836; *McLaren v. Anderson*, 81 Ala. 106, 8 South. Rep. 188. A witness for defendant King testified "that, a few days prior to the sale of the lands under the execution, he gave to M. L. Passmore, sheriff of said county, [the officer who made the levy and sale,] the following paper, to wit, [here follows a copy of the sworn claim of homestead exemption.]" Continuing, he testified "that a short time after he had shown said above-stated claim of exemption to said M. L. Passmore, sheriff, as aforesaid, and before the sale of said lands under said above-mentioned execution, he took back from said M. L. Passmore the said claim of exemptions, and filed the same

in the office of the judge of probate of said county." On the paper which constituted a part of this witness' testimony, and which was itself the claim of exemption, the judge of probate made this indorsement: "I certify that the within declaration was filed in my office for record on the 29th day of April, 1891, at 2 o'clock P. M., and duly recorded on the 30th day of April, 1891, in Exemption Book A, page 175, and examined. A. H. Alston, Judge of Probate." This was all the testimony offered by movant on the question of filing the claim with the sheriff. It will be seen that on the very day on which the affidavit was made, at 2 o'clock P. M. on that day, the claim was filed with the judge of probate for registration. Giving to this testimony the most liberal interpretation, we think the most it tends to prove is that the claim of exemption was simply shown to Passmore, the sheriff, or handed to him for a brief time, and then carried away. Passmore, the sheriff, was himself examined in rebuttal. He testified "that the above-stated claim of exemptions was never filed with him at any time, and that he has no recollection of ever having seen the same." True, he testified that, before he made the sale, he was shown a written notice that the property was claimed as exempt, referring to the recorded affidavit of claim in the probate office. This, however, was of no service to defendant in this case. Registration is serviceable only when the claim is made and filed for record before the levy is made. *Wright v. Grabfelder*, 74 Ala. 460. In *Mitchell v. Corbin*, 91 Ala. 599, 8 South. Rep. 810, it was said by this court that "the right to an exemption is not waived or lost by the failure to make and file for record a declaration, claiming the same as exempt, before the levy of the process. The defendant in the process may, at any time after the levy and prior to the sale, claim the exemption; but, to constitute it valid and operative, he must file with the officer making the levy a claim in writing, describing the property, and verified by oath. \* \* \* When such claim is filed with the officer, it becomes his duty to notify plaintiff in the process, and, if he fail to institute a contest within 10 days, the levy must be discharged; but, if he institute a contest within the time prescribed, the statute provides that 'the property shall not be sold by the officer until the contest is decided, but the lien thereon under the process or levy shall not be destroyed or impaired by the pendency of the contest.' Code, § 2541." In *Block v. George*, 83 Ala. 178, 4 South. Rep. 836, the language of this court was that "the other mode of asserting the exemption applies in cases where levy of execution or other process has been made, and no declaration and claim of exemption has been filed for record under section 2828. [This, under the Code of 1876.] In such

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case the claimant may assert his claim in writing, under oath, as provided in said section, which shall be lodged with the officer making the levy, and which the plaintiff must successfully contest before the property can be sold." See, also, *Randolph v. Little*, 62 Ala. 396; *Block v. Bragg*, 68 Ala. 291; *McLaren v. Anderson*, 81 Ala. 106, 8 South. Rep. 188; *Martin v. Lille*, 63 Ala. 406; *Wright v. Grabfelder*, 74 Ala. 460; *Bryan v. Kelly*, 85 Ala. 569, 5 South. Rep. 346; *Block v. George*, 70 Ala. 409; *Clark v. Spencer*, 75 Ala. 49. When claim of exemption is made and filed for record before there is a levy, no execution can be levied upon the property so claimed to be exempt until a contesting affidavit has been made and filed with the clerk; and the fact of such contesting affidavit having been so made and filed must be indorsed upon the process, to authorize a levy by the sheriff. Code 1886, §§ 2515-2519, inclusive. The affidavit, and in certain cases the bond required to be made and filed with the officer, (Id. § 2520,) have a twofold effect,—they screen the officer from liability for damages for making the levy, (Id. § 2540,) and they are the institution of a contest of the claim of exemption; hence the policy of requiring them to be filed with the officer making the levy. He returns them to the court, and they become a part of the file. So, when no claim of exemption has been made and filed of record before the levy, but such claim is interposed afterwards, the policy and necessity of filing it with the officer is equally apparent. It is his excuse for suspending further proceedings under the execution until the contest is decided, for without such affidavit he would be officially responsible for not selling the property taken under the process. It becomes his excuse and authority for notifying the plaintiff that such claim has been interposed, and for discharging the levy, in the event no contest thereof is filed by plaintiff within the time prescribed by the statute. Id. § 2521. Lastly, if the claim be contested, the affidavit becomes the foundation of such contest; and to this end it is necessary that it be filed with the officer making the levy, that he may return it with the other papers to the court in which the issue is to be tried. In fact, if such affidavit be contested, it is the fundamental fact which gives rise to the issue to be formed. In 7 Amer. & Eng. Enc. Law, 960, is this language: "A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file." In *Pfirman v. Henkel*, 1 Ill. App. 145, it was said by the court that "filing a paper, *ex vi termini*, means placing and leaving it among the files." See, also, *Lamson v. Falls*, 6 Ind. 309. On the motion to set aside the sale, the inquiry whether the sworn claim of exemption had been filed with the sheriff before he made the sale

was submitted to a jury. We have stated above the substance of the whole of the testimony bearing on that question, and the record informs us it contains all the evidence. The plaintiffs, Scheuer & Bro., asked the court to charge: "If the jury believe from the evidence that the sworn affidavit of exemption introduced in evidence was given to the sheriff, and then, before the sale, taken from him, and filed in the office of the judge of probate, then they must find for B. Scheuer & Bro." This charge was refused, and they excepted. Interpreting it in the light of the testimony, the court erred in refusing to give it. Reversed and remanded.

(101 Ala. 250)

#### WHISENANT v. GORDON.

(Supreme Court of Alabama. Nov. 8, 1893.)

#### SPECIFIC PERFORMANCE—PAROL AGREEMENT—EVIDENCE.

A parol agreement for the reconveyance of land by a son to his mother, though denied by the son after his mother's death, is sufficiently shown to be specifically enforced in favor of the mother's vendee by evidence that the son returned to his mother the deed which he had received from her, and by the terms of which he was to support her for life in consideration of the conveyance to him; that she abandoned his house when the deed was returned; that he ceased from that time to support her; that she sold the land; that he did not assert a claim to the land for over six years after he returned the deed, or for over a year after her death; that she and her vendee claimed ownership during all such time; and that he had declared repeatedly that she "was bothersome;" that he "would not be bothered with her for two such places;" and that he "had about been paid for what he had done for her; and that, as she wanted the land to make a support out of or to sell, he had returned the deed, and did not intend to have anything more to do with the land."

Appeal from chancery court, Marshall county; S. K. McSpadden, Chancellor.

Bill by Bathsheba Gordon against George E. Whisenant for the specific performance of an alleged agreement. Decree for complainant. Defendant appeals. Reversed. Decree for complainant in lower court affirmed on rehearing.

T. H. Watts and John G. Winston, for appellant. Brown & Street and R. O. Brickell, for appellee.

**WALKER, J.** The parties to this suit claim the land in dispute under different conveyances from Mrs. Mary Whisenant. In October, 1877, she conveyed the land by deed to the appellant, who is her son. In October, 1881, she executed another conveyance of the same land to Mrs. Gordon, the appellee. It is not alleged or claimed that the appellant ever reconveyed the legal title to his mother. The claim is that by a parol agreement between them, made prior to the execution of the conveyance to Mrs. Gordon, the deed to the appellant

was canceled, and by him surrendered to his mother, who was restored to the possession of the property. Mrs. Gordon acquired possession of the land under the deed to her, and remained in possession for several years, and until after the death of Mrs. Whisenant. The appellant having recovered a judgment against the appellee in a statutory action of ejectment for the land, the bill in this case was filed by the appellee to restrain the execution of the judgment in favor of the appellant, and to compel him to convey the legal title to the appellee.

The legal title which was vested in the appellant by the execution and delivery of the conveyance to him has remained in him, as it could not be divested by the cancellation of that conveyance, and its redelivery to the grantor therein. *Bailey's Adm'r v. Campbell*, 82 Ala. 342, 2 South. Rep. 646; *Smith v. Cockrell*, 66 Ala. 64; *Kimball v. Greig*, 47 Ala. 230. The appellee insists that, though there has been no reconveyance of the legal title, yet there was a binding agreement for such reconveyance, under which Mrs. Whisenant was restored to possession of the land, and that this agreement should be specifically enforced in favor of the appellee as Mrs. Whisenant's vendee. The appellant denies that he consented to a cancellation of the conveyance to him, or that he agreed that the title to the land should be reinvested in his mother. There is no competent direct evidence of such consent or agreement. The most that can be said of the proof in support of the claim set up by the bill is that it establishes certain facts which point to the conclusion that the arrangement between Mrs. Whisenant and her son, which was evidenced by her deed to him, was not fully carried out, but was abandoned. The deed to the appellant recites as a consideration the payment by him of the sum of one dollar, and also the further consideration that he is to take care of the grantor, and furnish her house room, board, lodging, clothing, and medical attention when necessary during her lifetime. It appears from the evidence that Mrs. Whisenant removed from the land in dispute to the residence of the appellant about the time of the execution of her deed to him; that she lived with him between two and three years, when she left his residence, and thereafter lived elsewhere; that he redelivered the deed to her, and she had possession of it at the time of her execution of the conveyance to the appellee, when she delivered it to the latter; that after the appellant redelivered his deed to his mother, and she left his residence, he contributed but little towards her support; and that, with knowledge of the deed to the appellee, he permitted the latter to obtain and keep undisturbed possession of the land until after his mother's death. The facts here referred to indicate that Mrs. Whisenant

did not continue to receive from the appellant the care and support stipulated for in her deed to him, and that when he ceased to furnish her a home, and after she made a deed of the same land to another person, he abandoned possession of the land until after her death. One witness, who appears from his own statement not to be on friendly terms with the appellant, testifies to conversations in which the appellant said that he had returned the deed to his mother; that he was tired of her; that she was troublesome, and he would not be bothered with her for two such places; that he gave her back the deed, as she was wanting the land back to sell it or to make a support out of it herself. Another witness testified: "I have heard him [the defendant] say that he was not going to cultivate the land; that he had given her up the deed, and that he was not going to have anything more to do with it; and said also that he thought he had pay for all he did for her; that she was troublesome and aggravating, and that he would never have anything more to do with her. \* \* \* The defendant told me he had given back to his mother the deed because she was so much trouble that he did not want to be bothered with her. He stated to me that he intended never to have anything more to do with her or the land, and also stated that he would not be bothered with her for two such places, and that she might live five or six years longer, and that it would be worth more than the land to care for her if she did live that long. He thought he had about got pay for all he had done for her." Doubt is cast upon this testimony by the appellant's explicit denial that he had any such conversation, and by the testimony of several other witnesses to the effect that when this witness was examined in the unlawful detainer case between the same parties he gave a materially different version of the statements made by the appellant to him.

The evidence above referred to is what must be relied on to support the conclusion that when the appellant handed his deed back to his mother he abandoned his claim to the land, and that it was understood between them that she should be the owner of the land from that time. But there are several considerations in the way of accepting this conclusion with any confidence in its correctness. In the first place, even after rejecting a mass of incompetent evidence on both sides, we are still confronted with irreconcilable conflicts at every material point throughout the testimony. Furthermore, it appears that the appellant did not give up the land when he handed his deed back to his mother, but retained possession of it by his tenant for a considerable time thereafter. There is no competent evidence to show that he knew of or consented to the mutilation of his deed by tearing off the

signature and acknowledgment. There is evidence tending to show that before the conveyance was made to the appellee a message was sent to her by the appellant, warning her that if she bought the land from his mother she would buy a lawsuit; and it is plain that the appellee was informed of the prior conveyance to the appellant, and yet refrained from making any inquiry of him as to his alleged relinquishment of his claim; and also that she paid less than one-third of the value of the land, which is a circumstance tending to show that there was doubt as to the ability of the seller to convey a good title, and that it was not clearly understood that the appellant had abandoned his claim. The result of the examination of the record is that we find that the appellee relies upon an alleged agreement by the appellant that his mother should again become the owner of the land; that there is an entire absence of direct evidence of the terms of the alleged agreement or of the consideration to support it, and that the conclusion that there was any such agreement at all can be reached only by relying upon doubtful inferences from circumstances not established by clear and satisfactory proof. It cannot be said that it plainly appears from the evidence that the appellant's act in handing his deed back to his mother, and her act in removing from her son's residence, were done in the performance of a definite agreement between them that the son should cease to be the owner of the property which had been conveyed to him, and that the mother should be restored to the ownership. The utmost effect that can be given to the evidence as to the conduct of the mother and son is to concede that it suggests the probability that there was some such understanding between them. It was not incumbent on the appellee to show that in the making of the alleged agreement by the appellant to reinvest his mother with the title the requirements of the statute of frauds were conformed to. Any objection because of such nonconformity was waived by the failure to interpose a defense on that ground, either by demurrer or answer. *Shakespeare v. Alba*, 76 Ala. 351. But the failure to plead the statute of frauds did not relieve the appellee of the duty of furnishing the full measure of proof which is required to justify a decree for the specific enforcement of a contract for the sale or conveyance of land. The terms of the contract must be definitely alleged, and established as alleged by clear and satisfactory proof. If the evidence fails to prove the contract, or any of its terms are left in doubt or uncertainty, a specific performance will be refused. Courts will not, in such cases, grope their way on inconclusive probabilities, or grant relief on merely persuasive testimony. The evidence must be such as to produce a clear conviction of the existence and terms of the con-

tract as alleged. *Carlisle v. Carlisle*, 77 Ala. 339; *Derrick v. Monette*, 73 Ala. 75; *Pike v. Pettus*, 71 Ala. 98; *Daniel v. Collins*, 57 Ala. 625; *Aday v. Echols*, 18 Ala. 353; *Bogan v. Daughdrill*, 51 Ala. 312. Conveyances for the alienation of land are required to be in writing, and their execution must be accompanied by formalities the observance of which is calculated to remove all uncertainty as to the grantor's intention to divest himself of the title. The provision of the statute on this subject would fail in its purpose to prevent the divestiture of title to land by any act of equivocal meaning if the landowner could be charged with the duty to convey by evidence which leaves it in doubt or uncertainty whether or not he intended to bind himself by a contract to part with his title. The testimony in this case is so conflicting, and the claim that the appellant agreed that his mother should be reinvested with the title to the property in dispute is so dependent upon inferences from circumstances of doubtful import, that the evidence cannot be regarded as so clearly establishing an agreement for a conveyance as to justify a decree for its specific enforcement.

The appellee does not occupy the position of a bona fide purchaser without notice of the prior conveyance to the appellant, for, though that conveyance had not been recorded, yet it is plain from the evidence that the appellee was informed of its existence when the deed of later date was made to her. There is no evidence to show that the appellee in making her purchase was influenced by any representation or admission made by the appellant, or that she acted on any assurance from him that he no longer claimed the property. There is nothing upon which the appellee can rest a claim that the appellant estopped himself from asserting against her the title vested in him by the prior conveyance, unless such estoppel resulted from his act in redelivering that conveyance to his grantor, who thereafter undertook to convey the same land to the appellee. It is plain, as has been already stated, that the redelivery of the deed, and its destruction by the parties, are ineffectual to revest the estate in the grantor. It was not decided in *Reavis v. Reavis*, 50 Ala. 60, or in *Carithers v. Lay*, 51 Ala. 390, that the mere cancellation of a deed could operate as a divestiture of the title of the grantor therein, or to preclude him from asserting his title. Those cases merely recognize the equitable title of the real purchaser of land who had paid the purchase money and taken possession with the full consent of the person who was the grantee in the conveyance which had been destroyed. It was not held in either of those cases that the consent of the grantee to the cancellation of his deed would estop him from claiming title under it. But it has been held by some courts that a grantee may estop himself from claiming

title under his unrecorded deed by consenting to its cancellation, or by redelivering it to his grantor with the intention that the latter should reacquire the property. *Farrar v. Farrar*, 4 N. H. 191; *Trull v. Skinner*, 17 Pick. 213; 1 Devl. Deeds, § 302. The text writer just cited says: "These decisions, however, are confined to but a few states, and it is obvious that they must, in a measure, conflict with the provisions of the statute of frauds. If the rule that the cancellation of a deed or its redelivery to the grantor would operate to revest the title were adopted, it would permit the perpetration of the frauds which it was the design of the statute to prevent. The deed might be redelivered to the grantor for many other purposes than a transfer of the title. As in the cases cited in the following section, the deed might be returned for the purpose of correction or acknowledgment. Resort would have to be had to parol evidence in case of controversy, to determine the intention with which the redelivery was made. These decisions have frequently been referred to in other states, but always with disapproval. And as said by Mr. Justice Compton, in a case in Arkansas, [*Strawn v. Norris*, 21 Ark. 80, 82:] 'It would not be easy to maintain the soundness of these decisions upon principle.'" 1 Devl. Deeds, § 305. The contention in this case illustrates the unsatisfactory operation of such a rule of estoppel. Here only the bare fact of redelivery is clearly shown. That act was of equivocal import. It did not necessarily indicate that the grantor intended to give up the property. We now find the deed in a mutilated condition, but the evidence does not show that the grantor consented to the mutilation, or treated that act as a cancellation of the conveyance. We have only the testimony of the witnesses to look to for information as to the circumstances attending the redelivery and mutilation of the instrument, and as to the acts and expressions of the parties indicating the presence or absence of an intention that the grantor should be restored to the ownership of the property. The mere act of redelivering the deed was without effect upon the title. The accompanying agreement of the parties, and not the mere act of redelivery, is the feature of the transaction which must be relied upon as the basis of an estoppel. That agreement rests wholly in parol. As an agreement it is without effect upon the title to the land. The effort is to give it the same effect, by way of an estoppel upon the grantee to assert his legal title, as it would have had if it had been reduced to writing, and signed by the parties. If such a rule of estoppel is recognized, the result is that a change in the beneficial ownership of land may be effected by a mere parol agreement, proved only by the testimony of witnesses. We cannot recognize a rule of estoppel which would offer



such temptations for fraudulent evasions of the requirements of the law upon the subject of conveyances for the alienation of land. We may add, in this connection, that the impression made upon us by the testimony of the appellee is that she acted on the erroneous supposition that the effect of the prior unrecorded conveyance was destroyed by the mere acts of redelivery and mutilation, rather than that she was misled, in making the purchase of the land, by any declaration or conduct of the appellant indicating his disavowal of all claim to the property. She was simply mistaken as to the law when she supposed that the appellant was bound by a transaction which in reality had no legal effect. Certainly it does not satisfactorily appear that she was induced to make the purchase by anything said or done by the appellant, and for this additional reason she is not in a position to claim that he has estopped himself from asserting his legal title. *Morris v. Alston*, (Ala.) 9 South. Rep. 315; *Lein Kauf v. Munter*, 76 Ala. 194.

It is unnecessary to review the ruling made on the demurrer to the bill. Any want of proper allegations in the bill might be cured by amendment. Conceding the sufficiency of the bill, yet the evidence adduced does not warrant the granting of the relief prayed upon either of the grounds that the defendant had made a valid agreement to reconvey the land in dispute to the complainant's grantor, or that the defendant is estopped from asserting against the complainant the legal title vested in him by the prior conveyance. For the reason that the complainant's claim is not supported by sufficient evidence, the decree of the chancery court is reversed, and a decree will be here rendered dismissing the bill.

#### On Rehearing.

**MCOLLELLAN, J.** Upon a further examination of the evidence in this cause we have reached the conclusion that it was the intention of George E. Whisenant and his mother, Mary Whisenant, and their contract, cognizable in equity, though inoperative at law, to rescind the sale by the latter to the former of the land in controversy, and to re-vest the title in Mary Whisenant. We are now of the opinion that this purpose and parol contract are clearly shown by the redelivery of the deed to Mrs. Whisenant; her contemporaneous abandonment of the house of her son George, where, by the terms of the deed, he was to support her for life in consideration of her conveyance of the land to him; his ceasing from that time to yield this continuing consideration; his failure, certainly after the current year, during her life, and for more than a year after her death,—in all six or seven years,—to assert any claim to the land; the constant assertion during this time of ownership by Mrs.

Whisenant and her vendee, the complainant; and his repeated declarations, which we think the evidence satisfactorily establishes, that he was tired of his mother, that "she was bothersome," that he "would not be bothered with her for two such places," that he "had about been paid for what he had done for her, and that, as she wanted the land to make a support out of or to sell, he had returned the deed to her, and had or did not intend to have anything more to do with the land," etc. It is true that there is no direct, positive evidence of an express agreement of a rescission or to rescind, and that one party swears there was no such agreement, while the mouth of the other is sealed in death, but the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the defendant point with great emphasis to the conclusion that there was such an agreement, and that its terms involved an equitable reconveyance of the land to Mrs. Whisenant; and the facts adduced are not inexplicable upon any other hypothesis. That such an agreement may be thus shown by circumstances with requisite certainty cannot be questioned. *Wat. Spec. Perf. § 493*; *Fry, Spec. Perf. § 1003*. And that when the agreement is sufficiently shown,—as we now find in this case,—though relating to realty and resting in parol, equity will specifically enforce it is demonstrated in the opinion in chief. The members of this court when the case was originally decided were doubtful of the conclusion then reached on the facts, and none more so than the learned justice who delivered the opinion. We now reach a different conclusion, set aside the judgment of reversal heretofore entered, and affirm the decree of the chancery court.

(100 Ala. 368)

#### MOBILE & O. R. CO. v. SEALS.

(Supreme Court of Alabama. Nov. 8, 1893.)

**MASTER AND SERVANT—LIABILITY OF MASTER TO TRESPASSER—EXEMPLARY DAMAGES—WITNESS—PLEADING.**

1. A trespasser on a railroad train is entitled to recover for a wanton, wilful, or intentional wrong committed by a brakeman within the scope of his employment, and to have exemplary damages included in the verdict.

2. Where answers to interrogatories propounded to defendant corporation are not "made by an officer, agent or servant of the corporation cognizant of the fact" as required by Act Feb. 27, 1889, § 1, defendant may at the trial introduce as a witness a servant who is cognizant of the fact; and error in excluding such servant is not rendered harmless by the fact that the trial court might have rendered judgment by default against the corporation, under Code, § 2820, for having failed to answer the interrogatories by such servant.

3. Where a master, in an action against him for the tort of his servant, pleaded that the act was not in the scope of servant's employment, a replication was demurrable which did not allege that the act was in the scope of the servant's employment.

Appeal from circuit court, Mobile county; James T. Jones, Judge.

Action by Thomas Seals against the Mobile & Ohio Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint, as amended, was in the following language: "The plaintiff claims of the defendant the sum of fifty thousand dollars, (\$50,000,) for that heretofore, on, to wit, the 17th day of February, 1892, the defendant, being then and there a corporation doing business as a railroad company, did operate a certain train of cars along a railroad track in the county of Mobile, state of Alabama, and the plaintiff avers that, while he was upon a truck of one of the cars composing said train, the defendant, or one of its servants or employes (whose name is unknown, and which he has diligently inquired for from the defendant) upon said train, did willfully, recklessly, or wantonly fire a pistol at him, or did cause or allow a pistol to be fired at the plaintiff, so as to cause him to fall beneath the said train, and to be run over, and thereby crushed, so that it became necessary, by reason of his said injuries, to amputate both of his legs; and plaintiff avers that by reason of said injuries he has been permanently disabled for work, and that he has been put to much expense in and about his said cure, and to great suffering, both of body and mind, all to his great damage, to wit, the sum of fifty thousand dollars, (\$50,000,) wherefore he sues." To this complaint the defendant pleaded the general issue and two special pleas, numbered 2 and 3. The third plea was stricken out, by motion of the plaintiff, as unnecessarily prolix, irrelevant, and frivolous. The second plea was in the following language: "(2) And the defendant, for further plea in this behalf, says, *actio non*, because it says that the firing of said pistol at the plaintiff by its said agents and servants, while plaintiff was riding on a truck of a coach or car of the defendant, did not pertain to the business of the defendant, and was not done within the scope or range of the authority conferred by the defendant upon its said agents and servants in its service or employ. And defendant further avers that its said agents and servants had no express orders from it to fire said pistol at the plaintiff, and neither has the defendant ratified the same. All of which this defendant is ready and willing to verify," etc. After the demurrers to this second plea were overruled, the plaintiff filed several replications, the fourth and sixth being as follows: "(4) For further reply to each plea by the defendant pleaded, the plaintiff, by leave of the court first had, says that the person who fired said pistol at him was the brakeman upon the train of the defendant upon which the plaintiff then was." "(6) For further reply to each of said several pleas, plaintiff says that the per-

son who fired at the plaintiff was an employe of the defendant, and acted bona fide in the preservation and furtherance of the defendant's interest." To the fourth replication, the defendant demurred upon the following grounds: First, because the facts alleged therein did not present a legal defense to the matters alleged in said pleas; and, second, because there was no allegation in said replication that the brakeman was acting within the capacity or range of his authority, in firing a pistol at the plaintiff. To the sixth replication the defendant demurred on the following grounds: "(1) Because the bona fides or intention of the alleged employe of the defendant has no legal influence upon the question of defendant's liability; (2) because the mere intention with which the act was done by the alleged employe of the defendant does not render defendant liable in this action; (3) because said sixth replication fails to aver that said alleged employe of the defendant, in firing at the plaintiff, was acting within the scope or range of the authority conferred upon him by the defendant." The demurrers to these replications were each overruled, and the rulings thereon constitute the basis of some of the assignments of error on this appeal.

So far as is material to the consideration of the questions presented by this record, the testimony was substantially as follows: The plaintiff was a trespasser riding upon the trucks of one of the cars of the defendant, which left Whistler, Ala., on the night of the injury. Thomas Boltz was a brakeman on this train, and was instructed by the conductor to put the plaintiff off of the train, whereupon he took a pistol, and went to the side of the car, and waited until the movement of the train brought the plaintiff close to where he was standing, and then fired the pistol. The plaintiff and one witness testified that this brakeman, Thomas Boltz, pointed the pistol directly at the plaintiff, and fired; and the plaintiff further testified that he was shot by said Boltz, which caused him to fall from the trucks. On the other hand, one Humphries, a witness for the defendant, testified that, at the time the pistol was fired, it was pointed towards the ground. Instantly upon the firing of the pistol, the plaintiff fell from the trucks, under the cars, was run over, and both legs were so mangled and mashed that they had to be amputated. The physician who attended the plaintiff testified that plaintiff's legs were so mutilated that he could not tell by examination whether the plaintiff was shot or not.

Prior to the trial, the plaintiff propounded certain interrogatories to the defendant, which were headed as follows: "Interrogatories Propounded by the Plaintiff in the Above-Entitled Cause to the Defendant, Which the Defendant is Required to Answer under Section 2816, and under the Act of the General Assembly Approved February 27,

1889." The act approved February 27, 1889, was in the following language: "Section 1. Be it enacted by the general assembly of Alabama. That whenever interrogatories shall be propounded to a corporation, under the provisions of section 2816 of the Code, the answer thereto shall be made by such officer, agent or servant of the corporation as shall be cognizant of the fact." The interrogatories propounded by the plaintiff sought to discover the name of the person who fired the pistol in question, and in what capacity he was employed. The defendant answered these interrogatories by one Swetman, who was the conductor on the train which injured the plaintiff, and he simply testified that he did not know anything in regard to the firing of the pistol. The plaintiff propounded additional interrogatories under the same section and act, and, from the answers to these interrogatories by the said Swetman, it appeared that Thomas Boltz was at the time in the employment of the company, and that he had continued in the employment of the company from the time of the accident up to the time of the trial. Under such circumstances, the witness Thomas Boltz, who was the same person who had actually fired the pistol, and who knew the facts, and who was in the employment of the company at the time the interrogatories were propounded and answered, was called as a witness upon the trial. The plaintiff's counsel objected to the examination of said witness Thomas Boltz, upon the ground that the evidence showed that he was a servant or agent of the defendant, and the defendant had failed to answer the interrogatories propounded to it through said servant Boltz. The court sustained this objection, and the defendant excepted thereto.

Among other things, in its general charge, the court instructed the jury as follows: "Then, again, if you find from the evidence this act was wanton, or if it was reckless, or if any employe of the company fired at him, and thereby he fell off and was run over; that if it was done wantonly, recklessly, or willfully,—you can look to that, in giving what is called 'punitive' or 'vindictive' damages. I cannot tell you any rule to go by, about that. It is for you, entirely. You can look to the pain and the agony the man suffered from the injury. You have a right to look to his anguish of mind, and these different things growing out of this, not included in the actual damages; and it is for you, entirely, to say what you will give, not to exceed the amount sued for." The defendant duly excepted to this portion of the court's general charge to the jury.

E. L. Russell and B. B. Boone, for appellant. Gregory L. & H. T. Smith and Thomas H. Smith, for appellee.

McOLELLAN, J. Railway corporations have time and time again been held re-

sponsible by this court for injuries to passengers, employes, and strangers, resulting from or inflicted through the wantonness or willfulness of servants not above the grade of brakemen and flagmen. In many instances, recoveries on account of the willfulness or wantonness of such employes have been had at the suit of persons who were themselves guilty of causal contributory negligence, and the judgments have been sustained here. In not a few instances, all this is true in respect of injuries thus caused to and suffered by pure trespassers. Not only so, but, in both classes of cases, recoveries have frequently been allowed in nisi prius courts, and sustained here, where punitive and exemplary, as well as actual and compensatory, damages have been awarded on account of the wantonness, willfulness, and the like, of this class of employes; and in at least one case the question was distinctly made in the form it is now presented, and expressly decided. *Railroad Co. v. Frazier*, 93 Ala. 45, 9 South. Rep. 303. The right of trespassers and contributorily negligent persons to recover for the wanton, willful, or intentional wrongs of brakemen, flagmen, and other employes of similar grade,—committed, of course, within the scope of their employment, and in the accomplishment of objects within the line of their duties,—and to have the jury embrace in the verdict both exemplary and punitive damages, if they see fit to do so, is no longer open to question in this state. We are not disposed to reopen it; and, if it were a new question with us, we should be much more inclined to the conclusion at which this court has arrived than the view taken by some courts of marked ability, namely, that, while corporations cannot be mulcted in punitive damages for the willfulness of such inferior employes as trainmen, they are responsible in such damages for the willful misconduct of such general executive officers as their presidents, general managers, etc. We do not conceive that there is any sound reason for the distinction. The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the very much smaller circle of a brakeman's duties; and, e converso, a brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office. It can no more be said that the corporation has impliedly authorized or sanctioned the willful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity. There is just the same and no more reason, in our opinion, for inflicting punishment on the corporation

for the willful misconduct of the one as of the other, and such punishment is no more vicarious in the one case than in the other. That punishment may be imposed on corporations for the willful or wanton misconduct, within the general scope of their duties, of their chief executive officers, is well established, and not questioned in this case. We feel that we stand upon the same principles, and are moved by the same considerations to the same conclusion, in respect of the willfulness, wantonness, and the like of brakemen and flagmen, while acting within the scope of their employment, and to the accomplishment of the legitimate ends thereof. On the facts of this case, the trial court properly submitted it to the jury to determine whether, and, if any, what, exemplary damages should be assessed against the defendant.

The court erred, we think, in refusing to allow the defendant to introduce and examine Boltz as a witness. It was clearly defendant's duty to have answered the interrogatories propounded to it by the plaintiff by this man Boltz, as he was its officer, agent, or servant, who knew the facts inquired about, under section 2816 of the Code, as amended by the act of 1889, (Acts 1888-89, p. 121.) Having failed in this duty, and answered by another agent or servant, who was not cognizant of the facts, the trial court was authorized to either attach the defendant, and cause its answers by the proper servant to be made in open court, to continue the cause until the answers were made as required by the statute, or to direct a judgment by default against the defendant, Code, § 2820. But there is no authorization in the statute for the exclusion of the officer, agent, or servant by whom the answers should have been made, when offered as a witness by the recalcitrant party; and, the whole proceeding being statutory, we must look alone to the terms of the statute for justification of any action taken under it. It is said, however, that the defendant was not prejudiced by the action under consideration, and that reversal should not, therefore, be had upon it, since the court might have directed a judgment by default, etc. The question here is not what the court might have done, but what it did. It was discretionary with the trial judge to enter a judgment by default, and we cannot know that such judgment would have been entered but for the court's assumption, and attempted exercise, of the supposed right to exclude this witness. We cannot know, to put it differently, that but for this action an equally or more injurious thing would have happened to the defendant. Indeed, it cannot be said even that a judgment by default would have been as prejudicial to the defendant as the exclusion of this witness, because, upon the rendition of such judgment, it would have been defend-

ant's right to go to the jury on the writ of inquiry; and it may well be the testimony of this witness, bearing upon the assessment of damages, would have been of greater benefit to the company than the omission of the court to direct a judgment by default. The action was erroneous and injurious, and must operate a reversal of the judgment.

Considered abstractly, plaintiff's fourth and sixth replications to defendant's second plea were bad, in that they did not aver that the person who fired the pistol was a brakeman, etc., and acting within the scope of his employment, etc. Whether the rulings of the court on defendant's demurrers to these replications involve injury to the defendant, we need not decide. Reversed and remanded.

(32 Fla. 408)

STATE ex rel. SHRADER v. PHILLIPS,  
Circuit Judge, et al.

(Supreme Court of Florida. Sept. 7, 1893.)

PROHIBITION—WHEN GRANTED—STAY PENDING  
APPEAL.

A bill in chancery to vacate a decree of divorce was demurred to as being insufficient to require an answer, and the circuit judge overruled the demurrer; and thereupon the defendant appealed, and the circuit judge made an order that the appeal should operate as a supersedeas until the hearing by the appellate court,—a supersedeas bond being given. After such appeal and supersedeas were perfected, the circuit judge, upon a petition and affidavit filed by the complainant, made an order of reference for inquiry and report as to what would be a reasonable sum to allow her for her support and maintenance pending the suit, and to enable her to prosecute her suit, and defray the necessary expenses and costs thereof, and to inquire whether or not she was worthy. Held that, pending the appeal and supersedeas, the circuit court was without power or jurisdiction to entertain such proceedings for alimony and suit money.

(Syllabus by the Court.)

Original action, by suggestion, in the name of the state, at the relation of Norman J. C. Shrader, against Barron Phillips, circuit judge, and others, for a writ of prohibition. Heard on demurrer to the suggestion. Demurrer overruled.

J. W. Brady, for plaintiff.

RANEY, C. J. Norman J. C. Shrader filed a suggestion stating that he is a defendant to a certain bill filed in De Soto circuit court by Aurelia Shrader to set aside a decree of divorce which he had obtained against her, and that to such bill he filed a demurrer, and that the demurrer was overruled, and he appealed to this court from the order overruling the demurrer, and that such appeal is now pending here; that his appeal was taken from the order, and he gave good and sufficient bond, and the circuit judge made an order that the appeal should operate as a supersedeas until the hearing by this court;

that, since the granting of the supersedeas order and the perfecting of the appeal, the circuit judge has, upon petition and affidavit filed by said Aurelia, made an order of reference, requiring the clerk of the court to inquire and report what would be a reasonable sum to be allowed her for her support and maintenance pending this suit, and to inquire whether or not she "is worthy," and what would be a reasonable sum to be allowed her to enable her to prosecute her suit, and defray the necessary expenses and costs thereof. It prays a writ of prohibition.

To this suggestion, Judge Phillips has demurred, and filed a brief in support of the demurrer.

The appeal has transferred the cause to this court for a hearing here on the demurrer, or, in other words, a rehearing in this court as to the sufficiency of the bill to require an answer from the defendant. *Trust Co. v. Cole*, 4 Fla. 359. The order appealed from adjudged the sufficiency of the bill, and required the defendant to plead within 20 days, and the purpose of the supersedeas was to stay any further proceedings in the cause under this order until this court should decide and remand the cause. Section 1458, Rev. St. Should we find there was no cause of action stated in the bill, we could do no more for the complainant than remand the case, with leave to complainant to amend, and for a dismissal of the bill in default of amendment within due time. The circuit judge, obviously, has concluded that alimony and suit money are allowable to the female party to the suit, in a case like this, as in ordinary suits for divorce. The prohibition proceeding now before us is not the one in which to decide this point. The following authorities will be found relevant to the question, when it shall come properly before us: *Wilson v. Wilson*, 49 Iowa, 544; *McFarland v. McFarland*, 51 Iowa, 585, 2 N. W. Rep. 269; *Smith v. Smith*, 3 Or. 363; 2 Bish. Mar. & Div. §§ 386, 393, note 3; *Id.* § 402. We decide nothing as to it now. The question for decision is whether or not the circuit judge had the power or jurisdiction to entertain the proceedings for alimony and suit money after the appeal and supersedeas. In our judgment, he did not have it. The order of reference complained of is based upon the theory of the sufficiency of the bill to support further proceedings in the cause, while the purpose and the effect of the supersedeas are to arrest all further proceedings in the circuit court on the bill until this court has adjudicated its sufficiency, notwithstanding the adjudication of its sufficiency in the lower court. In *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 201, it was held, as to a supersedeas of an interlocutory order, that it suspends the action and power of the inferior court in the matter appealed from; and in *Holland v. State*, *Id.* 549, where the judgment appealed from was final, the decision

was that, where an appeal and supersedeas have been effected, the jurisdiction of the appellate court attaches, and its jurisdiction is then exclusive, and that the appellee (plaintiff below) could not, pending the appeal, dismiss his case in the lower court, and thereby dismiss the appeal. In *Jenkins v. Jenkins*, 91 Ill. 167, it is said that, but for a statutory provision expressly giving the power, there would be no hesitation in holding that the trial court had no power after the consummation of the appeal to allow the wife solicitor's fees for service in the appellate court. The following authorities are of value, as to the effect of appeals on the powers of the inferior court: *Cralle v. Cralle*, 81 Va. 773; *Lewis v. Lewis*, 20 Mo. App. 546; *Bronson v. Railroad Co.*, 1 Wall. 405; *Commissioners v. Gorman*, 19 Wall. 661; *Enslinger v. Powers*, 108 U. S. 292, 2 Sup. Ct. Rep. 643; *Spraul v. State of Louisiana*, 123 U. S. 516, 8 Sup. Ct. Rep. 253; *Allen v. Allen*, 80 Ala. 154; *Boynton v. Foster*, 7 Metc. (Mass.) 415; *Helm v. Boone*, 6 J. J. Marsh. 351; *Lumber Co. v. Langman*, 23 Ill. App. 250; *State v. Judge*, 41 La. Ann. 958, 8 South. Rep. 541; *Elliott's App. Proc.* § 541, note 1.

The power of the circuit court as to the equities and rights of the complainant, dependent upon the sufficiency of the bill, has been suspended by the supersedeas until this court shall pass upon the question of its sufficiency to entitle her to any relief. The proceeding for alimony and suit money is not distinct from, or independent of, the sufficiency of the bill. 2 Bish. Mar. & Div. § 423; *Worden v. Worden*, 3 Edw. Ch. 387; *Ballentine v. Ballentine*, 5 N. J. Eq. 471; *Krause v. Krause*, 23 Wis. 354; *Walling v. Walling*, 16 N. J. Eq. 389; *Weishaupt v. Weihaupt*, 27 Wis. 621; *Wood v. Wood*, 2 Paige, 108; *Rose v. Rose*, 11 Paige, 166; *Goldsmith v. Goldsmith*, 6 Mich. 235.

The cases relied on by Judge Phillips are: *Ex parte King*, 27 Ala. 387; *Miller v. Miller*, 43 Iowa, 325; *Chaffee v. Chaffee*, 14 Mich. 463; *Moe v. Moe*, 39 Wis. 308; *Reilly v. Reilly*, 60 Cal. 624; *Hunter v. Hunter*, 100 Ill. 477. In the Alabama case, there was an order allowing temporary alimony to be paid quarterly, and of suit money, and subsequently there was a decree of divorce a vinculo, in favor of the wife, "and an allowance out of the estate of the defendant," and a reference to ascertain the value of the husband's estate, and a further provision of the decree "ordered that this case be retained in court for further orders." Before any report was made, an appeal was taken by the husband from the decree, and pending the appeal the wife filed a petition asking that the husband be required to pay certain of the quarterly allowances as to which the husband was in default, and to pay suit money for services already rendered, and to enable her to defend the appeal. The chancellor re-

fused the application, but the supreme court, on mandamus, directed him, not only to entertain the application, but to grant relief in accordance with the views announced in the opinion. It is sufficient to say of this case that it does not appear there was any supersedeas, and that the retention clause of the decree is an exceptional feature in the case, distinguishing it from the one before us. In the Iowa case, the decree provided, *inter alia*, that, in the event an appeal should be taken by the husband, he should pay a stated sum monthly until the decision of the appeal; and the supreme court held that as the wife, in view of a settlement made on her, was not without means, there was no ground for the allowance pending the appeal; and the allowance made for attorney's fees was reduced because it was not known that there would be an appeal, and hence an allowance for such purpose could only be made for the trial of the cause in the lower court. The Michigan case is one in which the application for an allowance for suit money in the appellate court, and temporary alimony, was made to the appellate court, and granted by that court; it refusing to consider on such application the question of the sufficiency of the bill, which had not been demurred to, but had been answered and testimony taken on the issues made by the pleadings. Here the bill is demurred to. *Goldsmith v. Goldsmith*, 6 Mich. 285; *Lake v. Lake*, 16 Nev. 363, 17 Nev. 230, 30 Pac. Rep. 878; *Phillips v. Phillips*, 27 Wis. 252; *Kranse v. Krause*, 23 Wis. 354; *Helden v. Helden*, 9 Wis. 557; *Coad v. Coad*, 40 Wis. 392; 2 Bish. Mar. & Div. §§ 393, 418. We fail to find in the Wisconsin decision, (*Moe v. Moe*), cited by the respondent, anything bearing on the question of jurisdiction now before us. The California case is one in which motion was made in the appellate court for alimony and counsel fees pending an appeal from a decree of divorce, and the decision was that the jurisdiction invoked was original in its nature, whereas that court had only appellate jurisdiction, and on this ground the motion was denied. It was, however, observed in the opinion that the power over this matter is vested in the superior court even pending an appeal; that the appeal did not take away its jurisdiction, as the matter is not affected by the judgment appealed from, (citing Code Civil Proc. § 946;) and that the cause was still pending in the superior court for the purposes sought to be obtained by the motion. The section of the Code of Civil Procedure here referred to is not at our command, except that we find in the case of *Lake v. Lake*, 17 Nev. 230, 242, 30 Pac. Rep. 878, a statutory provision which is there stated to be similar to that of California, it being: "Whenever an appeal is perfected, as provided by the preceding sections in this chapter, it shall stay all further proceedings in the court below upon the judg-

ment or order appealed from or upon matter embraced therein; but the court below may proceed upon any other matter included in the action not affected by the judgment or order appealed from." The Nevada court holds the California view—that the matter is not affected by the judgment appealed from—to be incorrect, and our conclusion is the same as that reached in Nevada. We cannot admit that the right to alimony or suit money is not affected by the question of the sufficiency of the bill, which has been transferred to us for decision. In the Illinois case, the application was to the supreme court "for alimony to enable her to prosecute her appeal," and the decision, as it appears in the report, is simply that it has not been the practice, at least for many years, for that court to entertain an application for alimony, but that it is left to the court from which the cause comes. The statute referred to in *Jenkins v. Jenkins*, supra, is, in all probability, the basis of the decision, accounting for the absence from the opinion of all discussion of the question of jurisdiction.

We see nothing in the authorities relied on that impresses us with the correctness of the position taken by the respondent. The demurrer will be overruled.

(23 Fla. 387)

ECKMAN et al. v. MUNNERLYN.

(Supreme Court of Florida. Oct. 9, 1893.)

ATTACHMENT—WHEN AUTHORIZED—FRAUDULENT MORTGAGE—EVIDENCE.

1. A mortgage covering a stock of merchandise, under which the mortgagor is permitted, by agreement or understanding of the mortgagee, to sell the goods at discretion, or in the usual course of business, is fraudulent and void as to existing creditors of the mortgagor, and it makes no difference whether the agreement or understanding in reference to the sale of the goods be expressed in the mortgage itself, or not. If it was so agreed or understood at the time the mortgage was executed, whether in writing or parol, the security is thereby rendered void as to the creditors of the mortgagor.

2. Where the mortgagor of a stock of merchandise is permitted by the mortgagee to sell the same in the usual course of trade, without accounting for the proceeds, it will justify the creditors of the mortgagor in suing out an attachment against him, on the ground that they have reason to believe that he will fraudulently part with his property before they can obtain judgment against him; the issue in such case being not that an intentional fraud existed, but whether or not the affiant in the attachment proceedings had reason to believe that the defendant would fraudulently part with his property before judgment could be obtained against him.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. Hanson, Judge.

Action on attachment by Eckman & Vetsburg against James K. Munnerlyn. From a judgment for defendant, dissolving the attachment, plaintiffs appeal. Reversed.

Phillips & Carter, for appellants. R. H. Liggett, for appellee.

MABRY, J. Samuel H. Eckman and Abraham Vetsburg, as copartners doing business in the firm name of Eckman & Vetsburg, commenced, in the circuit court for Hillsborough county, Fla., on the 10th day of December, A. D. 1888, a suit of attachment, returnable rule day in January, 1889, against James K. Munnerlyn. The affidavit upon which the attachment is based was made by an agent of the plaintiffs, and, after reciting that fact, states "that James K. Munnerlyn, of the county of Hillsborough, is justly indebted to the said Eckman & Vetsburg in the sum of nine hundred and forty-five and 60-100 dollars, and that the said amount is actually due, and affiant has reason to believe that the said James K. Munnerlyn will fraudulently part with his property before judgment can be recovered against him." On the day of the issuance of the attachment writ, it was levied upon certain real estate situated in Hillsborough county, as the property of the defendant in attachment, and on the 28th day of the same month it was further levied upon a part of a stock of goods belonging to defendant, being in a certain storehouse in Clear Water Harbor, an inventory of the same being referred to in the sheriff's return. The defendant, Munnerlyn, entered a motion on rule day in January, 1889, to dissolve the attachment, and filed an affidavit traversing the ground upon which it had issued. An additional motion to dissolve the attachment was made on the 16th day of January, 1889, on the grounds (1) that the bond of attachment was not executed by plaintiffs; (2) that said attachment bond is executed in the firm name of Eckman & Vetsburg, and not by the individual members of the copartnership. A jury was waived, and the cause submitted to the court, and the following judgment entered, viz.: "This cause coming on to be heard upon traverse of the plaintiffs' affidavit, and upon motion to dissolve the attachment herein, the court having heard and examined the evidence and testimony, and listened to the argument of counsel, and being fully advised in the premises, the court being satisfied that there is not sufficient evidence presented to sustain the allegations in the plaintiffs' affidavit for attachment, it is therefore ordered that said attachment be, and the same is hereby, dissolved, and the property held by the sheriff thereunder be released, and restored to the defendant herein."

The bill of exceptions recites that the objections to the execution of the bond were overruled by the court, but that the attachment was dissolved, and the property held by the sheriff thereunder was released, and restored to the defendant. Plaintiffs below appealed from the judgment of the court,

and the assignment of error here is that the court erred in granting the order dissolving the attachment. On the issue made by the traverse of the ground alleged in the affidavit for attachment, plaintiffs read, without objection, the said affidavit, and introduced P. S. Coggins, who testified that he was the agent for plaintiffs, and had been for 8½ years, and made the affidavit on which the attachment was based. Two day before the attachment was sued out, witness presented statement of plaintiffs' account to Munnerlyn, and he admitted it to be correct. Witness asked Munnerlyn to pay the account, but he said he could not do so, and did not have the money. Munnerlyn was then asked to pay a part of the account, and he said he could not do it. He was then asked to secure the debt in some way, but said he could not do that, and told witness that O. B. Rogers & Co. had a mortgage on his property. Witness afterwards told Munnerlyn that he (witness) was out of traveling money, and needed some, and Munnerlyn agreed to let witness have it on his own account. Munnerlyn paid nothing on the account, and owed plaintiffs about \$1,600. Witness heard other drummers say that they could get nothing from Munnerlyn, and some were going to sue, and others attach. Ed. Clark said he would only sell Munnerlyn goods for cash. Tunno told witness that Munnerlyn was in falling circumstances. No one told witness that Munnerlyn was trying to dispose of his property fraudulently. Munnerlyn said he had about \$300 belonging to other parties, but it was placed with him on deposit. Witness and Munnerlyn went together to Duneden, and on the way Munnerlyn consulted his lawyer. Sommerville, of Duneden, told witness that Munnerlyn had been down there to get title to some land from Douglass & Sommerville put in himself, (Munnerlyn.)

Plaintiffs introduced in evidence three mortgages executed by Munnerlyn and wife to C. B. Rogers & Co. to secure an alleged indebtedness therein. The first one was executed and acknowledged on the 19th day of December, 1885, to secure the payment of four promissory notes bearing date November 12, 1885, each for \$1,000, with interest at 8 per cent. until paid, and due, respectively, 6, 12, 18, and 24 months from date. The property described in this mortgage is certain real estate situated in Clear Water Harbor, Hillsborough county, and also a "stock of merchandise" situated in a mentioned store building in the said town of Clear Water Harbor. This mortgage was not admitted to record until the 20th day of September, 1888. The second mortgage, executed by J. K. Munnerlyn, alone, to C. B. Rogers & Co., bears date December 15, 1888, and was filed for record, and recorded, the 18th day of December, 1888. This mortgage recites that the said Munnerlyn "is justly in-

debted to the said party of the second part [C. B. Rogers & Co.] in the sum of \$4,320, which indebtedness is now witnessed by 4 certain promissory notes for \$1,080 each, dated December 13th, 1888, and due, respectively, at 6, 12, 18 months, and 2 years from date, the payment thereof being secured by a mortgage executed December 13th, 1888, by said James K. Munnerlyn and Sarah J. Munnerlyn, his wife, to said parties of the second part herein. And whereas, the said parties of the second part consider that said mortgage upon said property therein described is not sufficient to secure them for the amount due upon said notes, now, therefore, in consideration of the indebtedness above described, and the further consideration of one dollar in hand paid," and to further secure said indebtedness, the mortgagor conveys all the stock in trade, in goods, wares, and merchandise, in a store on Cleveland street, Clear Water Harbor, upon condition of defeasance upon the payment of said notes. This mortgage contains a clause that the said mortgagor shall retain possession of said granted property, but on default of payment of said notes, or any attempt on his part "to sell said goods, except in the usual retail way, and that he will pay over the money received therefrom to the said parties of the second part as the goods are sold, or to remove them from the county of their present location, or upon any seizure of them by any process of law, then the said parties of the second part" may take possession of said property. The third mortgage, being executed by Munnerlyn and wife to C. B. Rogers & Co., bears date the 21st day of December, 1888, and purports to convey four lots in Clear Water Harbor, additional to what is conveyed in the first-mentioned mortgage, and for the purpose of securing the payment of \$4,320. It contains the following clause, viz: "This mortgage being given to further secure the payment of the notes for the above amount given by the parties of the first part herein on December 13th, 1888, and secured by a mortgage of even date herewith, said notes being for \$1,080 each, and due, respectively, six, (6,) twelve, (12,) eighteen (18) months, and 2 years from date, with 8 per cent. interest until paid." It is the usual mortgage, in other respects, and was admitted to record the 31st day of December, 1888. It was admitted that Munnerlyn made an assignment on December 29, 1888, of all his property, preferring certain of his creditors,—first among them, C. B. Rogers & Co., for \$4,320. The assignment is not before us, and all we know of it is from the admission above stated. This was the testimony for plaintiffs.

Munnerlyn, in his own behalf, testified that he executed to C. B. Rogers & Co. the mortgage bearing date December 19, 1885, and that he owed said firm the \$4,000 in this way: When he (Munnerlyn) bought the

property on which the mortgage was given. C. B. Rogers & Co. held a mortgage on the same, given by Mr. Turner, the owner, and that he (Munnerlyn) assumed this mortgage. The stock at that time was worth about \$2,500. He had never paid any of the principal of the mortgage debt, but had paid the interest up to the last time, and, in making the new mortgage, had included the last year's interest. The wife of C. B. Rogers was the sister of Munnerlyn's wife. He (Munnerlyn) had continued in possession of the store and goods from the time of giving the mortgage up to the time of the levy of the attachment, and had sold the goods in the usual course of business; had sold out part of the original stock, and purchased new goods. He had tried to raise the money to meet these claims, and another party named had been trying to raise money for him on some property, and he had asked his creditors for time. When he and Coggins went to Duneden, he (Munnerlyn) consulted with his attorney as to what was best to be done, and discussed making an assignment, but concluded it would do no good. Did make an assignment December 29, 1888, of all his property, except his constitutional exemptions, for the benefit of his creditors; preferring certain of them, and C. B. Rogers & Co., first, for \$4,320. He had been offered \$3,500 for a part of the property mortgaged in 1885, but had refused it. At the time of testifying, his stock was worth about \$4,000.

On the testimony, substantially as above given, the decision of the court was adverse to the plaintiffs. There is no controversy as to the indebtedness, and the question for our consideration is whether or not the court was correct in holding that the affiant in the attachment affidavit did not have good reason to believe, when the writ was sued out, that the defendant would fraudulently part with his property before judgment could be recovered against him. *Meinhardt v. Lillenthal*, 17 Fla. 501. It has been decided in this state that a mortgage of a stock of goods by the owner, under which the mortgagor is permitted by the mortgagee to sell the goods at his discretion, or in the usual course of business, is fraudulent and void as to the creditors of the mortgagor. *Logan v. Logan*, 22 Fla. 561. This has been a vexed question in the courts of this country, and many able decisions are to be found, on both sides of it. In the case of *Robinson v. Elliott*, 22 Wall. 513, the supreme court of the United States unanimously held that a mortgage providing for the retention of the mortgaged goods, wares, and merchandise by the mortgagor until after default in the payment of some portion of the debt attempted to be secured, with power to sell the same in the usual course of trade, and to supply their places with other goods, to be subjected, when bought, to the lien of the mortgage, was



void, in law, upon its face, as to creditors of the mortgagor. In recent decisions of the same court, there are expressions of judges indicating that if the question was an open one a different view would be preferred. Vide *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. Rep. 565. The decision in our own court (*Logan v. Logan*, supra) is sustained by many decisions, and, so far as it has gone, is the law here. In this case it appeared that, by the terms of the mortgage, the mortgagor had the right to dispose of the merchandise at will; but the opinion quotes the views of *Pierce on Mortgages of Merchandise*, to the effect that the same result follows whether, by the terms of the mortgage, the mortgagee permits the goods to be sold in the usual course of trade, or where such agreement or understanding of the parties appears by proof aliunde the mortgage.

In *Southard v. Benner*, 72 N. Y. 424, it is said: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference, in principle. Its effect, as characterizing the transaction, would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact, and render it harmless. If it be satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made, and acted upon, that, in law, condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol, or in some other way." The conclusion of the court in *Freeman v. Rawson*, 5 Ohio St. 1, is summed up as follows, viz.: "From the considerations and authorities we have adduced, we are of opinion that these conclusions necessarily follow: That a mortgage of personal property, with possession and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors. If the power of disposition appear upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so appear, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject-matter of the mortgage, and other circumstances, as in other cases. And that, in either case, where the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties." There are many decisions sustaining this view. *Barnet v. Fergus*, 51 Ill. 352; *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390; *Orton v. Orton*, 7 Or. 478; *Bank v. Goodrich*, 3 Colo. 139; *Putnam v. Osgood*, 52 N. H. 148; *Steinart v. Deuster*, 23 Wis. 136; *Cheatham v.*

*Hawkins*, 80 N. C. 161; *Harman v. Hoskins*, 56 Miss. 142; *Googins v. Gilmore*, 47 Me. 9. The case of *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. Rep. 985, cited by counsel for appellee, belongs to that class of decisions holding that a clause in the mortgage giving the mortgagor a right to sell is not fraudulent in law. Where the agreement to sell is contained in the mortgage, it is settled here that it is fraudulent in law, as to the mortgagor's creditors, and it is the duty of the court to so declare. If such agreement or understanding of the mortgagor and mortgagee be not found in the mortgage itself, some decisions maintain that the question of whether there is any such understanding, as well as what are the inferences of fraud arising from it, is one for the jury. *Williston v. Jones*, 6 Duer, 504; *Smith v. Acker*, 23 Wend. 653; *Kavanagh v. Beckwith*, 44 Barb. 192. In the case before us, a jury was waived, and the court decided the issue. The conclusion from the evidence is irresistible that from the time of executing the mortgage, in December, 1885, up to the levy of the attachment, Munnerlyn continued to sell and dispose of the stock of goods therein mentioned in the usual course of business, and that this was done with the understanding and consent of the mortgagees. There was no attempt to perfect the lien of the mortgage, so far as the stock of goods is concerned, by its record, until a short time before the attachment suit was commenced, and after its record the same course of business was pursued by the mortgagee until the levy of the writ. Two days before the levy, when demand for payment was made by appellants' agent, he was informed by Munnerlyn that C. B. Rogers & Co. had a mortgage on his (Munnerlyn's) property. The validity of the mortgages, as between C. B. Rogers & Co. and appellants, or as between said firm and Munnerlyn, is not involved in the question now before us. Considering the mortgages executed by Munnerlyn to C. B. Rogers & Co. subsequent to the suing out of the attachment only as explanatory of conduct prior to that date, the one on merchandise indicates that the parties thereto desired a better security than that already existing on the stock, and to change the legal effect of the past security, by reason of the permissive sales thereunder, by requiring the proceeds to be paid to the mortgagees as the goods were disposed of under the subsequent mortgage. We do not say that the subsequent chattel mortgage, of December 15, 1888, by reason of the clauses therein in reference to possession and disposition of the goods, is fraudulent, in law, upon its face. But, conceding its validity here, it tends to strengthen the conclusion that under the former mortgage the mortgagor had the right to dispose of the goods at will, in the usual course of trade, without any agreement as to the disposition of the proceeds. We think it is at least

prima facie shown by the evidence before us, without anything to rebut it, that, by the understanding and agreement of the parties, Munnerlyn was permitted to sell the stock of goods described in the mortgage executed in 1885, and recorded in September, 1888, in the usual course of trade, without any agreement as to what he would do with the proceeds; and whether we hold such sales under such an understanding to be fraudulent in law, as against Munnerlyn's creditors, or as proof of such fact, the conclusion here will be the same. Such an understanding between mortgagor and mortgagee, if not conclusively fraudulent in law, is at least prima facie evidence of fraud. Vide authorities supra. A conclusion, on the evidence in this record, that there was no such understanding or agreement, would be against the evidence. Munnerlyn himself says that he had continued in possession of the store and goods from the time of executing the mortgage, in 1885, up to the time of the levy of the attachment, and that he had continued during all this time to sell the goods in the usual course of trade. There is no evidence rebutting the conclusion that such an understanding did exist. The disposition of the merchandise under such an understanding and arrangement is inconsistent with the rights of creditors, and, if sustained, would afford an effectual shield of the debtor's property from liability to seizure, while he retained, not only the use of it, but an absolute power of disposition, without accounting to either the mortgagees or other creditors for the proceeds. "The effect is, of course, that the property thus shut up from the reach of general creditors may be entirely disposed of without the proceeds going either to the outside creditors, or to the beneficiaries in the deed. The only party certainly benefited by it is the debtor or grantor, who has the power to convert every portion of the property to his own use. The deed, if sustained, would serve the purpose of protecting the property against the grantor's creditors, and at the same time authorize him to convert it to his own use by an absolute sale." *State v. Tasker*, 31 Mo. 445; *Leser v. Glaser*, 32 Kan. 546, 4 Pac. Rep. 1026.

There are certain acts which, under particular circumstances, the law pronounces fraudulent. They may be innocently intended, so far as the idea of moral turpitude goes, yet their inevitable tendency is so uniformly against fair dealing that they are stamped with a fraudulent character, regardless of the honesty of the particular transaction. Wade says: "The class of cases in which this question has been most earnestly discussed, and in respect to which the most pronounced difference of opinion seems to exist, is that embracing mortgages of stocks in trade. On the one hand, it has been maintained that the mere fact that the mortgagor is permitted to remain in posses-

sion of the goods, and continue to sell and dispose of them in the ordinary course, does not necessarily render the mortgage fraudulent as against creditors. On the other, it is claimed that such an incumbrance amounts to a conveyance to the use of the grantor, and is fraudulent per se, even when the act is entirely disconnected with any intentional fraud. Where the former view is supported, it is claimed that the question of fraud is one of fact, to be proved by showing an intention to hinder, delay, or defraud other creditors than the mortgagee. Those holding to the latter view condemn the transaction, not because it is, in fact and intention, fraudulent, but for the reason that it is such a convenient cover for active fraud, where exposure is made to depend upon testimony of those who are participants and beneficiaries. The latter view is, of the two, better supported on both principle and authority." 1 Wade, *Attachm.* § 96, p. 205.

The execution of the mortgage on the stock of goods, and the continued disposal of them in the usual course of business, with the consent and understanding of the mortgagees, amounted to a fraud upon the other creditors of the mortgagor, and they had a right to so regard it. Munnerlyn, when payment was demanded by the agent of appellants, stated that he could not meet the demand, and gave as a reason that C. B. Rogers & Co. had a mortgage on his property; thereby affording good grounds for such agent to believe that, as between Munnerlyn and said mortgagees, all of the former's property was then subject to the mortgage, under which he was then selling the goods in the usual course of trade. The agent had a right to rely upon the statement of Munnerlyn himself that the mortgage referred to covered all of his stock of goods at that time, although it did not, in terms, embrace subsequent additions to the stock. Such conduct will sustain an attachment on the ground that plaintiffs have good ground to believe that defendant will fraudulently part with his property before judgment can be recovered against him. The decision of the court, on the record before us, was therefore erroneous, in the traverse of the attachment affidavit, and should be reversed.

(33 Fla. 331)

EINSTEIN et al. v. MUNNERLYN.

(Supreme Court of Florida. Oct. 9, 1893.)

TRIAL—RIGHT TO OPEN AND CLOSE—ATTACHMENT—FRAUDULENT MORTGAGES—EVIDENCE.

1. On the issue made by a traverse of an attachment affidavit, the burden of proof is on the plaintiff, and he is entitled to the opening and conclusion.

2. In connection with testimony tending to show that the defendant in attachment proceedings had mortgaged his property in order to protect certain of his creditors in the event other creditors would not wait on him, plaintiff offered in evidence four mortgages

from defendant to one firm; three of them bearing dates within a few days of each other, and but a short time before the attachment suit was commenced. On objection that the mortgages were irrelevant, the court excluded them from the consideration of the jury. *Held*, that the ruling was erroneous, and that the mortgages should have been submitted to the consideration of the jury on the question of fraudulent intent in fact.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. Hanson, Judge.

Action in attachment by Einstein & Lehman against James K. Munnerlyn. From a judgment for defendant, plaintiffs appeal. Reversed.

Phillips & Carter, for appellants. Wall & Wall, for appellee.

**MABRY, J.** This is an attachment proceeding instituted by appellants, Jacob R. Einstein and Adolph Lehman, doing business in the firm name of Einstein & Lehman, against the appellee, in the circuit court for Hillsborough county, on the 26th day of December, A. D. 1888, returnable rule day in January, 1889. The affidavit for the attachment was made by an attorney for plaintiffs, and, after a recital of this fact, it states that "James K. Munnerlyn is indebted to said firm of Einstein & Lehman in the sum of four hundred and fifty-two and 5-100 dollars; that the amount of said debt is actually due; and also that he [affiant] has good reason to believe that said James K. Munnerlyn will fraudulently part with his property before judgment can be recovered against him." An attachment bond was given, and the writ levied upon real estate and a stock of merchandise, as the property of the defendant in the attachment. On rule day in January, 1889, defendant Munnerlyn traversed the ground of attachment stated in the affidavit, and moved to dissolve the attachment. This issue was subsequently submitted to a jury, and a verdict rendered for the defendant, and judgment entered on this verdict, dissolving the attachment. From this judgment, plaintiffs below appealed.

On the trial of the traverse, plaintiffs offered in evidence four mortgages executed by defendant, Munnerlyn, to C. B. Rogers & Co. to secure certain indebtedness therein mentioned. The first one was executed and acknowledged on the 19th day of December, 1885, to secure the payment of four promissory notes bearing date November 12, 1885, each for \$1,000, with interest at 8 per cent. per annum until paid, and due, respectively, 6, 12, 18, and 24 months from date. The property embraced in this mortgage is certain real estate in Hillsborough county, and a "stock of merchandise" situated in a certain store building in the town of Clear Water Harbor, in said county. This mortgage was admitted to record on the 20th day of

September, A. D. 1888. The second mortgage bears date December 13, 1888, and covers an additional lot of land situated in Hillsborough county, Fla. It is executed to secure four promissory notes, each for \$1,080, and due 6, 12, 18, and 24 months from date, with 8 per cent. interest per annum until paid. There is a recital in this mortgage that it was "made as a pro tanto correction and confirmation of, and to secure the payment of, the same indebtedness mentioned in the mortgage deed made by the said parties of the first part to C. B. Rogers & Co., dated December 19, 1885, and recorded in Book G, p. 335, in the records of said county, which mortgage deed was defective, in that it failed to properly describe the mortgagees, who were described by their firm name, and not as individuals." This mortgage was admitted to record December 18, 1888. The third mortgage offered in evidence bears date December 15, 1888, and was recorded on the 18th day of that month. It recites that "James K. Munnerlyn is justly indebted to said party of the second part [C. B. Rogers & Co.] in the sum of \$4,320, which indebtedness is now witnessed by four certain promissory notes for \$1,080 each, dated December 13th, 1888, and due, respectively, at six, twelve, eighteen months, and two years from date; the payment thereof being secured by a mortgage executed December 13th, 1888, by said James K. Munnerlyn and Sarah J. Munnerlyn, his wife, to said parties of the second part. And whereas, the said parties of the second part consider that said mortgage upon said property therein described is not sufficient to secure them for the amount due upon said notes, now, therefore, in consideration of the indebtedness above described, and the further consideration of one dollar in hand paid," and to further secure said indebtedness, the mortgagor Munnerlyn conveys all the stock in trade, of goods, wares, and merchandise, in a store on Cleveland street, Clear Water Harbor, upon condition of defeasance upon the payment of said notes. It is also recited in this mortgage that the mortgagor shall retain possession of said granted property, but on default of payment of said notes, or any attempt on his part "to sell said goods, except in the usual retail way, and that he will pay over the money received therefrom to the said parties of the second part as the goods are sold, or to remove them from the county of their present location, or upon any seizure of them by any process of law, then the said parties of the second part" may take possession of said property. The other mortgage offered in evidence is dated the 21st day of December, 1888, and conveys four lots of land other than those mentioned in the preceding mortgages, and to secure the payment of \$4,320. In it the following recital appears, viz.: "This mortgage being given to further se-

cure the payment of the notes for the above amount given by the parties of the first part herein on December 13th, 1888, and secured by a mortgage of even date herewith, said notes being for \$1,080 each, and dated respectively, six, (6,) twelve, (12,) eighteen (18) months, and two (2) years from date, with 8 per cent. interest until paid."

Objection was made to the introduction in evidence of the foregoing mortgages, on the ground that they were irrelevant. The court sustained the objection, and plaintiffs excepted.

Plaintiffs then examined the defendant, Munnerlyn, who testified, in substance, that he owed Einstein & Lehman the amount for which suit was brought. He made the mortgage dated December 19, 1885, to C. B. Rogers & Co., to secure \$4,000. Wife of C. B. Rogers is sister of witness' wife. Rogers not his confidential friend. Witness borrowed money from him to start business. The four thousand dollars was contracted when witness bought the property upon which mortgage was given. The property was bought from A. C. Turner, and C. B. Rogers & Co. had a mortgage on it for \$4,500. Witness assumed this debt, and the Turner mortgage was released. All the mortgages given by witness to C. B. Rogers & Co., and offered to be read in evidence, were given to secure the same debt. None of the principal paid, but interest paid up to the last time. Stock in store at the time mortgage was given had been largely sold out, and new stock purchased, but some of the old stock still on hand. Witness used money arising from sales of goods in usual course of business. Replenished goods from time to time, and continued to sell. Had no communication from C. B. Rogers & Co., when mortgage was given, about recording it, and expected it to be recorded. Witness was trying to mortgage all of his property to pay his creditors, if they would give him time, but, if not, would have to look out for himself and other creditors. Went to Duneden with P. S. Coggins, and on the way consulted with an attorney about an assignment. A member of the firm of C. B. Rogers & Co. told witness that first mortgage given to the firm had some legal defects in it, and witness made a new mortgage, correcting defects in the old one. Coggins informed witness that Eckman & Vetsburg were going to sue, and he (Munnerlyn) thought it best to look out for himself. He had always intended to protect C. B. Rogers & Co., as they had befriended him, had set him up in business, and he owed them. Witness had made mortgage to Bank of Tarpon Springs for \$300, and a mortgage to some other parties, on the 21st day of December, 1888, and had paid two small claims—one, \$50, and the other, \$109—in the fall previous. Had four lots and five acres of land, and homestead and exemptions, at the time of giving the mortgage dated December 21, 1888. The five

acres were worth about \$25 per acre. The title was in witness. Had bought goods from C. B. Rogers & Co. from time to time since, giving the first mortgage in 1885, and had paid for them, and had remained in possession of the goods, and sold in the usual course of business, after giving the mortgages, up to levy of the attachment. He had made, December 31, 1888, an assignment of all his property, except his exemptions, for the benefit of his creditors, preferring first C. B. Rogers & Co., for \$4,320.

Plaintiffs again offered the mortgages in evidence in connection with the foregoing testimony, and, on objection of defendant, they were again ruled out by the court as irrelevant. This ruling was clearly erroneous. On the issue before the jury, the mortgages should have been submitted to them for consideration. Vide *Eckman v. Munnerlyn*, 13 South Rep. 922. On the question of a fraudulent intent, as a matter of fact, they were proper for the consideration of the jury.

Errors are assigned on the charges given by the court to the jury, but, as the record fails to show any proper exceptions in the trial court to the charges, they are not properly before us. On the issue of the traverse of the affidavit, the burden of proof is on the plaintiffs, and hence they have the opening and conclusion.

The exclusion of the mortgages from the consideration of the jury was error, for which the case must be reversed. The other assignments of error it is not deemed necessary to consider. The judgment is reversed, and a new trial awarded.

(32 Fla. 481)

**STATE ex rel. PENSACOLA & A. R. CO.**  
et al. v. WALKER, Circuit Judge.

(Supreme Court of Florida. Oct. 9, 1893.)

**MANDAMUS — JURISDICTION OF DEFENDANT — CERTIORARI TO JUSTICE'S COURT — TIME OF TAKING.**

1. A peremptory writ of mandamus will not be granted against the defendant named in the alternative writ when he has not appeared in the action, and there is no evidence of legal service of the alternative writ on him.

2. The act of June 2, 1887, limited the time for taking appeals to the circuit court from judgments of justices of the peace to 30 days, and no review of such judgments could be had by a writ of error taken after the expiration of the thirty days.

(Syllabus by the Court.)

Original action in the name of the state, at the relation of the Pensacola & Atlantic Railroad Company, against David S. Walker, circuit judge, for mandamus requiring defendant to entertain a writ of error to a judgment of a justice of the peace. Judgment for defendant.

John H. Carter, for relators.

RANEY, C. J. The alternative writ of mandamus was issued December 2, 1889.

The indorsement of service is as follows: "Executed this 5th day of December, 1889, by serving a true copy of the within mandamus on David S. Walker, circuit judge. Joseph Wilkins, Sheriff Es. Co., Fla."

The sheriff of Escambia county was not at the time of the service of the writ the sheriff of this court, nor even ex officio a deputy of our sheriff, as he is now, under section 1324, Rev. St., nor is there any evidence that he was ever deputized by our sheriff to make the service. Therefore there is no legal evidence of service of the writ, (Williams v. Hutchinson, 26 Fla. 513, 7 South. Rep. 852; Gibbens v. Pickett, 31 Fla. 147, 12 South. Rep. 17; Tapp. Mand. p. 349, marg. p. 300.) even if it be that such a writ can be lawfully served by a private person in this state, as it seems can be done in some jurisdictions, (High, Extr. Rem. § 517.) Consequently, and in view of the fact that the defendant never appeared, there has not been a legal basis for proceeding against him. It will be ordered accordingly.

#### On Motion to Amend Return.

Subsequently to the filing of the above opinion, the relators moved to amend the return of service of the alternative writ so as to show that it was in fact made by a proper officer, whereupon the court rendered the following opinion:

RANEY, O. J. The relators have moved to amend the return. Waiving the manifest insufficiency of the motion and the question of the abatement of the proceeding, in view of the death of Judge Walker, the motion must be denied, for the reason that a writ of error does not lie from the circuit court to review the judgment of a justice of the peace. The constitution of 1868, as amended in 1875, (section 8, art. 6.) gave the circuit courts final appellate jurisdiction in all civil cases arising in a court of a justice of the peace where the amount or value of the property involved was \$25 and upwards. An act of February 10, 1877, (section 105, p. 650, McClell. Dig.) provided that any party dissatisfied with a judgment of a justice of the peace might, within 10 days after the entry of the judgment, appeal to the circuit court of the county; but, to make his appeal effectual, he or his agent or attorney should make and file with the justice an affidavit that he appeals in good faith, and not for the purpose of delay, and also file a specified agreement, signed by one or more sureties, and conditioned, if the appeal should be dismissed or judgment be rendered against the appellant, to pay the amount of the judgment, with interest and all costs, and guarantying that the appellant would comply with the final judgment and order of the court. In 1882 this court, in *State v. Baker*, 19 Fla. 19, decided that this jurisdiction of the circuit court was merely appellate, and did not extend to the trial of the cause de novo, but

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that such an appeal had the effect of a common-law writ of error, and that upon it any errors apparent upon the record were examinable. See, also, *State v. Vann*, Id. 29. In 1885, by an act approved February 16th, it was provided that "appeals by bill of exceptions" are authorized to be taken from the courts of justices of the peace to the circuit courts, "as is now provided for in appeals from the circuit courts to the supreme court." In 1885 the constitution was revised, the revision taking effect January 1, 1887, and, as revised, it (section 11, art. 5) gives the circuit courts final appellate jurisdiction in all civil cases arising before justices of the peace in counties in which there is no county court; and subsequently, in the last stated year, by a statute approved June 2d, it was enacted that any person should have the right to "appeal" from any judgment entered by any justice of the peace in this state in all civil actions or proceedings, and that "such appeals should be taken to the circuit courts by bill of exceptions in the same manner and within the same time as now prescribed by law for appeals from the circuit courts to the supreme court;" such statute not to apply in counties where county courts are organized under section 18 of article 5 of the constitution.

In our judgment, it was the intention of the legislature of 1877, and up to the act of 1885, if not to that of 1887, to limit the time for taking proceedings to review the judgment of a justice of the peace to 10 days. Such appeal, as we have seen, had the effect of a common-law writ of error. The "appeal" or "appeals" from the circuit to the supreme court, referred to in the act of 1887, are statutory appeals in cases at law, and not writs of error, and such appeals had to be taken within 30 days after the entry of judgment. Much more than this period had elapsed after the entry of the judgment of the justice of the peace when the writ of error, which Judge Walker refused to entertain, was taken, and we think he did not err in his action. We do not mean to concede that our practice has at any time, either under the old law of appeals from justices of the peace, as it is to be found in Thomp. Dig. p. 474, § 5, or since, recognized a writ of error as the proper mode of reviewing a judgment of a justice of the peace.

The motion is denied.

(71 Miss. 330)

NAGLE et al. v. BALL et al.

(Supreme Court of Mississippi. Nov. 20, 1893.)

ADMINISTRATORS—CLAIMS AGAINST ESTATE—NECESSITY OF PROOF—BREACH OF ADMINISTRATOR'S BOND.

1. The bar of Code 1880, §§ 2026, 2028, against claims against the estate of a decedent which have not been proved within the prescribed time, cannot be waived by conduct of the administrator, however misleading or designing.

2. The owner of a claim which has not

been proved against decedent's estate within the prescribed time cannot present the claim after the personality is exhausted, and compel a sale of land, under the proviso of Code 1880, § 2028, which allows the owner of an unregistered claim to be paid from any surplus remaining after the payment of registered debts. *Ales v. Plant*, 61 Miss. 259, followed.

3. It is necessary to prove a claim against the estate of deceased within the prescribed time, though the claim is for a debt due by a firm of which deceased was a member.

4. An administrator who writes misleading and designing letters to creditors of the estate that it is unnecessary to prove their claims in the time prescribed by law, is not guilty of a breach of the conditions of his administrator's bond.

Appeal from chancery court, Lauderdale county; W. T. Houston, Chancellor.

Bill by T. M. Nagle and others against A. H. Ball, as administrator of John T. Ball, deceased, and others, for the payment of claims against deceased. Decree for defendants. Plaintiffs appeal. Affirmed.

Cochran & Bozeman, for appellants. Miller & Baskin, for appellees.

WOODS, J. We fail to discover the fraud supposed by counsel for appellants to have been practiced by A. H. Ball, administrator, on complainants, in inducing them not to probate their claims until barred by sections 2026, 2028, Code 1880. In a single instance, only, in all the letters filed in the record, is there any reference to the propriety or necessity of probating any claim against any person. In the letter of September 1, 1890, from A. H. Ball to James Ohlen & Sons, that solitary reference is found, and in these words: "It will not be necessary for you to probate any a/c against Jno. T. Ball & Co., as I, as the surviving partner, have a right to settle anything against the firm." It is manifest that this was an expression of opinion by a surviving partner as to his power to liquidate the firm debt, without the necessity of the same being probated in order to his so doing. But if the letters were of the character which counsel suppose, their rights would not in any manner be affected thereby. The opinions of the administrator are of no value when opposed to an express rule of law. The administrator cannot waive the absolute bar created by statute for the protection of estates of decedents. He cannot abrogate a positive rule of law requiring probate of claims within the prescribed period by conduct of his own, however misleading or designing. The creditors are bound to obey the plain requirements of the statute. They, as all others, were supposed to know the law prescribed for their guidance. But, if they did not, and the administrator advised or induced them to omit to probate their claims, (though he did not in the case at bar,) where is the authority to be found for exempting them from the operation of a positive statute, which is universal in its application?

The prayer of the petitioners for a sale of the lands belonging to the estate of John T.

Ball, deceased, was properly denied by the decree of the court below sustaining the demurrer to this part of the petition. This contention must be regarded as being now definitely settled in this state. This very question was determined in the case of *Ales v. Plant*, 61 Miss. 259,<sup>1</sup> which counsel asks us to overrule. The request is not to be complied with. The rule announced in that case has been accepted and acted upon for 10 years, and during that period a revision of our Code of laws has been made, and the sections of the Code of 1880, interpreted in the case referred to, have been bodily brought forward into the later Code, without change or modification. We are bound to suppose that they were brought forward unaltered in the later Code with the full knowledge of the legislature that they had received the construction placed upon them in *Ales v. Plant*. The door to further controversy on this subject is now closed. The belated creditors cannot have sale of the lands of the estate of the decedent.

The idea advanced by counsel as to the nonnecessity for the probate of a claim against the estate of a decedent, because of its being for a debt due by a firm of which the deceased was a member, has the charm of novelty, at least. We do not see, however, why an individual creditor must probate his claim, and a firm creditor need not. In the former case the claim is barred unless probated in 12 months; in the latter case the claim is not barred, though not probated. The distinction is purely arbitrary and imaginary. The case of *Corson v. Berson*, 86 Cal. 433, 25 Pac. 7, gives no countenance to this contention. The counsel misconceives the issues involved in that case, and the decision of the court upon them. Said the court: "The claim of A. Benson & Son was not a claim against the estate of O'Brien, but against the firm of which he had been a member; and consequently did not come within the purview of that section," (one requiring presentation of claims on contracts against estates of deceased persons within a specified time.) And, again: "As there was no claim made against the estate of the deceased partner, the executors of his will were not necessary parties to the cross action; and the same end could have been attained by proceeding against the two surviving partners alone." Plainly, the court means that, as the claim was against the firm of which the deceased was a member, and not against his estate, there was no necessity for requiring presentation of the demand to the personal representatives of the deceased.

<sup>1</sup> In *Ales v. Plant* the court held that, under the proviso of Code 1880, § 2028, which allows the owner of an unregistered claim to be paid out of any surplus remaining after the payment of the registered debts, he cannot, by presenting his claim after the personality is exhausted, compel the sale of land.

The contention of appellants' counsel as to liability on the part of Robinson and Harris, the sureties on the administrator's bond, cannot be seriously considered. That the administrator was guilty of a breach of the conditions of his bond in that he wrote misleading and designing letters to creditors, whereby they were beguiled into a sense of false security, and that his sureties are thus made amenable to the penalties of a breach of the bond, is utterly unsound. It is purely fanciful. The petition, as a bill to cancel a conveyance in trust from A. H. Ball to his wife, alleged to be fraudulent, and praying subjection of the lands conveyed thereby to complainants' demands, was retained by the chancellor, and properly. This was the extent of the right of the complainants to invoke the aid of a court of equity, and this right the learned court preserved to complainants. In every respect the decree of the court below is approved by us. Affirmed.

#### PATTY v. JONES et al.

(Supreme Court of Mississippi. Oct. 16, 1893.)

##### PROMISSORY NOTES—TRANSFER.

Plaintiff's intestate, who was trustee for several minors, and had loaned out the trust funds, declared his intention of creating a trust fund for the payment of his trust indebtedness out of Chattanooga property and two notes owned by him, and executed a conveyance of the property to B. Plaintiff thereafter purchased of B. the Chattanooga property and notes, which were transferred to her by B. By mistake, no mention of the notes was made in either the conveyance to the trustee or the conveyance to plaintiff. *Held*, that plaintiff acquired no title to the notes, and must account for them as property of intestate's estate.

Appeal from chancery court, Noxubee county; T. B. Graham, Chancellor.

Settlement of the estate of R. C. Patty, deceased. J. H. Jones and others, creditors, excepted to the inventory filed by Ella H. Patty, administratrix. From a judgment sustaining the exceptions, and directing her to inventory and account for certain notes, the administratrix appeals. Affirmed.

R. C. Patty died December 31, 1890, intestate. For many years prior to his death he had been chancery clerk of Noxubee county, Miss., and, as such, guardian of a number of minors, and of persons non compos, and had been commissioner in a number of cases. In the fall of 1890 he became sick, and gradually grew worse. His term of office expired on January 1, 1891. Knowing that he would have to account and settle up his guardianships and other matters as chancery clerk, and apprehending that he would not live, he sent for one W. H. Bogle and some other friends, and explained to them that he did not know exactly how his trust matters stood, and that he desired to make provision for meeting any balances that might be due by him on a settlement with any of his wards, and also for debts due to

two widow ladies. He explained that he had loaned the trust funds that were in his hands, and held the notes of the various borrowers, and that he desired to turn over all these notes to provide a common fund out of which to pay the various trust indebtedness. He also explained that he had for a number of years been jointly interested with several others in various investments and speculations in the city of Chattanooga, Tenn., buying and selling various properties and stocks. Among other property thus held by him jointly with other parties were two unpaid notes of \$4,750 each. Mr. Patty desired to turn over all his Chattanooga interests in the same way, to provide a fund for meeting his trust indebtedness. It was finally agreed that all Mr. Patty's interest in the Chattanooga property, including the two notes referred to, should be turned over to W. H. Bogle as trustee, and the notes taken from the parties at home should be turned over to B. J. Allen as trustee, all the trusts being for the purpose of providing for a fund to meet any balances that might be found due to any of his wards, or to the two ladies. A paper was drawn up conveying the aforesaid property to Bogle and Allen, respectively. Mrs. Ella H. Patty afterwards purchased all the Chattanooga property, including the two notes, and they were transferred to her by Bogle, the trustee. In drawing the paper for Mr. Patty to sign, and in making the transfer to Mrs. Patty, by inadvertence and mistake no mention was made of the two notes. Mrs. E. H. Patty was appointed administratrix of her husband's (R. C. Patty's) estate, and in making out her inventory did not include as belonging to R. C. Patty's estate the two notes, thinking she had bought them. The appellees, as creditors of R. C. Patty, filed exceptions to the inventory, alleging, among other exceptions, that the administratrix had failed to inventory all the notes and accounts belonging to the estate. On the hearing, the chancellor sustained the exceptions, and directed the administratrix to inventory and account for R. C. Patty's interest in the two notes. The appellees also excepted to the report, in that it did not include several horses and other personal property belonging to the estate. This exception was sustained to the extent of requiring the administratrix to account for two mules, two wagons, and a horse, and some household furniture. The horse required to be inventoried was claimed by W. B. Patty, a son of R. C. Patty. The administratrix appealed from the decree requiring her to inventory the interest of R. C. Patty in the two notes and the horse claimed by W. B. Patty.

A. C. Bogle, for appellant. Rives & Rives, for appellees.

COOPER, J. It is not to be doubted, on the evidence, that Mr. Patty intended to assign his interest in the notes in controversy

to Mr. Bogle; but by mistake they were not mentioned in the writing he executed, and there is no hint of any other act by which they were transferred. It is unfortunate that the appellant has acted upon the assumption that Bogle had authority to transfer to her that interest, but the consequence of her mistake cannot be relieved against in this proceeding. On the evidence, we think the horse claimed by the son of the intestate was properly directed to be returned as the property of the intestate. The decree is affirmed.

**ADAMS, State Revenue Agent, v. LOUISVILLE, N. O. & T. RY. CO.**

(Supreme Court of Mississippi. Oct. 30, 1893.)

**TELEGRAPH COMPANIES—TAXATION.**

A railroad company operating a telegraph line for its trains, and not for profit, is not a "telegraph company operating \* \* \* miles of wire," and therefore subject to taxation, as such, under Acts 1888, c. 3.

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

This action was brought by Wirt Adams, state revenue agent, against the Louisville, New Orleans & Texas Railway Company to recover privilege taxes alleged to be due and in arrears by the company as a telegraph company. The first count in the declaration demands the sum of \$3,600, as due the state, being for \$1 per mile on 600 miles of wire, for each of the six years from 1886 to 1891, inclusive, under Acts 1886, c. 2, p. 12. The second count demanded the sum of \$900 as due the Yazoo-Mississippi delta levee board, being \$150 per annum for each of the same years, under Acts 1886, p. 102. Judgment for defendant. Plaintiff appeals. Affirmed.

Defendant's pleas were as follows: To the first plea: (1) A general denial that the defendant exercised its franchise as a telegraph company. (2) An exemption from taxation, under section 21 of the charter of the Mobile & Northwestern Railroad Company, extended to the defendant company; and, further, that the telegraph lines mentioned were used by the defendant as an indispensable part of its machinery for the safe and expeditious moving of its trains; and that the affidavits required by the statute had been made, and the receipts delivered to the defendant. (3) Payment. To the second count: (1) A general denial that the defendant exercised its franchise as a telegraph company in business for profit. (2) Payment. (3) As to the taxes of 1886, 1887, 1888, and 1889, the three-years statute of limitation. (4) As to the taxes of 1886, the six-years statute of limitation.

Calhoun & Green, for appellant. Mayes & Harris, for appellee.

CAMPBELL, C. J. The appellee, during the time in which it is alleged that the claim

sued for arose, was not a "telegraph company operating \* \* \* miles of wire," within the meaning of chapter 3 of the Acts of 1888, and therefore was not liable to the tax imposed on such companies. Affirmed.

(71 Miss. 141)

**O. C. KELLY BANKING CO. v. HOLLINGSWORTH et al., (ROBINSON et al., Interveners.)**

(Supreme Court of Mississippi. Oct. 30, 1893.)

**ATTACHMENT—GARNISHMENT—ALIAS WRITS—ISSUANCE—CLERKS—SHERIFFS.**

1. Code 1892, § 2131, provides that, if at the time of issuing a writ of attachment the attaching creditors shall suggest that any person is indebted to the debtor, the officer issuing the writ of attachment shall insert a command to summon such person to appear. Section 134, prescribing the form of an attachment writ, requires certain things to be done if it is issued by a clerk, and provides that on demand of plaintiff it may embody a garnishment. Section 135 provides that, where plaintiff desires to garnish other persons, the clerk of the court to which the attachment writ is returnable may issue alias writs. *Held*, that the functions of the clerk were not limited to inserting in a writ of attachment a command to summon the person suggested as garnishee, but that he can issue a writ of garnishment as part of an alias writ of attachment, the provision of section 136 authorizing the officer receiving the writ of attachment to "summon, as garnishees, by writs of garnishment, to be issued and served by himself," being confined to cases where the officer receiving a writ of attachment with no suggestion contained in it of any garnishment, may be requested to summon as garnishees persons then suggested to him.

2. Where the clerk applied to for an alias writ issues a writ of garnishment omitting the alias writ of attachment, it will be defective, but not void.

Appeal from circuit court, Attala county; O. H. Campbell, Judge.

Action by the O. C. Kelly Banking Company against Hollingsworth & Son. On motion of plaintiff for judgment against garnishees, J. M. Robinson, Norton & Co. intervened. There was judgment for interveners, and plaintiff appeals. Reversed.

On August 16, 1893, the O. C. Kelly Banking Company sued out an attachment against Hollingsworth & Son, merchants, and levied it on their stock of merchandise, book accounts, etc. The affidavit was made before the circuit court of Attala county, and the writ of attachment was issued by said clerk, and was executed by the sheriff of said county. The merchandise, etc., levied on by plaintiff not being sufficient to satisfy its demand, its attorneys selected a number of names from the books of said Hollingsworth & Son, who appeared by said books to be indebted to Hollingsworth & Son, and gave the list to the circuit court, who, by the direction of said attorneys, filled out the blank for suggestion for a writ of garnishment attached to the original affidavit in the attachment suit on file in his office, by inserting the words, "the names hereto attached on separate sheet," and attached to said affidavit and suggestion a sheet containing the names



obtained from the said attached books, and attached said sheet to a writ of garnishment, which was at that time issued by the said clerk. There was no alias writ of attachment. This writ was placed in the hand of the sheriff, by whom it was executed as directed. One Henry Miller, who had been thus garnished, answered, admitting an indebtedness to said Hollingsworth & Son of \$73. J. M. Robinson, Norton & Co. subsequently obtained a judgment in attachment against Hollingsworth & Son, and had a writ of garnishment served on said Miller. This writ was issued and executed by the sheriff of said county. On the hearing of a motion by plaintiff for a first judgment against the garnishees in attachment for the amounts admitted by them to be due Hollingsworth & Son and against said Henry Miller, who had admitted in open court an indebtedness of \$73 to the defendants in attachment, J. M. Robinson, Norton & Co. were admitted to intervene—and contest the said motion. The interveners claimed that they should be permitted to take first and absolute judgment against Miller, notwithstanding the alleged prior service on said garnishee of a writ of garnishment in the attachment suit of the C. C. Kelly Banking Company against Hollingsworth & Son, because their writ of garnishment in their attachment suit was issued and served by the sheriff of Attala county in the regular form prescribed by the statute, and because the writ of garnishment served on Miller in the attachment suit of C. C. Kelly Banking Co. v. Hollingsworth & Son was not issued by the sheriff, but was issued by the circuit clerk, and executed by the sheriff, and because of the manner in which the writ of garnishment in the attachment suit of C. C. Kelly Banking Co. v. Hollingsworth & Son was issued and executed; contending that the writ was for the reasons aforesaid void. The court overruled plaintiff's motion for a first and absolute judgment, and quashed the writ of garnishment issued by the circuit clerk, and quashed the return of the sheriff on said writ, holding it to be void, and that no other officer than the sheriff could issue a writ of garnishment under the Code of 1892. The court gave the interveners a first and absolute judgment against Henry Miller.

Dodd & Armistead, for appellant. Calhoon & Green, for appellees.

WOODS, J. The contention of appellees is that the clerk of a circuit court is absolutely powerless to issue a writ of garnishment, under the various provisions of the Code of 1892 on that subject. His functions are limited, it is said, to inserting in a writ of attachment a command to summon the person suggested as garnishee, but this he can do only at the time of issuing a writ of attachment. Under section 136 of the Code of 1892, according to this view, the sheriff alone

can issue writs of garnishment. This interpretation is too literal and narrow. Every attachment writ is a writ of garnishment also. It may not be completed so as to embody the names of those to be summoned as garnishees, but immemorially it has served the purposes of, and been held and treated as, a writ of garnishment. Section 2131<sup>1</sup> clearly authorizes the clerk to issue a writ of garnishment as part of the writ of attachment, and this has been the only writ of garnishment authorized or known to our law prior to the adoption of the Code of 1892. This section 2131, Code 1892, is a literal transcript of the law long prevailing in this state, and found in section 2422, Code 1880. The same statute, in the same words, is found in section 1430, Code 1871, and substantially in the Code of 1857, and Hutchinson's Code of 1848. We will not be authorized to give section 136, Code 1892, which authorizes the officer receiving the writ of attachment to "summon, as garnishees, by writs of garnishment, to be issued and served by himself," such rigid and literal construction as will destroy the force and effect of the language of sections 2131, 134,<sup>2</sup> 135,<sup>3</sup> Code 1892, as the same have been understood and acted upon in the courts of the country for a half century or more. The writ of the C. C. Kelly Banking Company, which is thought to be void by the interveners herein, was an imperfect alias writ of attachment and garnishment. Property insufficient to satisfy the Kelly Banking Company's debt having been levied on under a first writ, under section 135, Code 1892, the attaching creditor applied to the clerk who issued his first writ for an alias writ, and the clerk issued what he mistakenly

<sup>1</sup> Code 1892, § 2131, provides: "If, at the time of issuing a writ of attachment, the attaching creditor shall suggest that any person is indebted to the debtor, or has property of the debtor in his hands, or knows of any other person so indebted or who has effects or property of the debtor in his hands, the officer issuing the writ of attachment shall insert therein a command to summon such person to appear on the return day of the attachment, to answer accordingly."

<sup>2</sup> Section 134, after prescribing the form of the writ of attachment, provides: "The writ shall be signed by the officer granting the same, or, if issued by a clerk or his deputy, shall be dated, signed, and sealed as other writs; and an attachment shall not be quashed or abated for want of form if the substantial matters expressed in the foregoing precedent be contained therein; and, on the demand of the plaintiff, said writ may embody a garnishment."

<sup>3</sup> Section 135 provides: "The officer granting an attachment may issue duplicate writs to any other county in which the defendant may have property or debts due him, which writs shall be returnable to the court to which the original is returnable, and shall be executed and returned in like manner; and where the attachment has not been executed, or where no property has been found, or not sufficient to satisfy the debt, or where the plaintiff desires to garnish other persons, the clerk of the court to which the same is returnable may issue alias writs to the same or other counties without a renewal of the bond or affidavit."

supposed to be the proper writ. He issued a writ of garnishment, and omitted the alias writ of attachment. The writ issued was defective, but not void. It might have been amended on motion. To make the new provision found in section 136, Code 1892, harmonious with sections 134, 135, and 2131, we must confine the operation of section 136 to those cases where the officer receiving a writ of attachment, with no suggestion contained in it of any garnishment, may be requested to summon as garnishees persons who may be then suggested to him. His action in issuing writs of garnishment in such cases will harmonize with the long understood and applied meaning of the other sections touching the issue of writs of attachment and garnishment. His action will thus supplement, rather than supersede, the never before assailed power of the clerk of the circuit court to issue attachment and garnishment writs. He will issue writs of garnishment when the clerk has not. Reversed and remanded.

(71 Miss. 26)

NEWMAN et al. v. TILLMAN et al.

(Supreme Court of Mississippi. Oct. 30, 1893.)  
AGENT OF ADMINISTRATOR—COLLECTION OF NOTE  
DUE ESTATE—LIABILITY TO HEIRS.

An administrator and deceased's widow, who was guardian of his minor heirs, were partners. The administrator sent for collection to nonresidents, with whom his firm did business, a note of which deceased was payee. It was not indorsed by the payee or administrator. When collected, such nonresidents, in the course of business, accounted for the proceeds to such firm, which misappropriated them. *Held*, that such nonresidents were chargeable with notice of the true ownership of the note, and were liable to such minor heirs for two-thirds of such proceeds.

Appeal from chancery court, Washington county; W. R. Trigg, Chancellor.

Action by James W. Tillman and J. F. Tillman, minor heirs of J. F. Tillman, deceased, by their next friend, against H. & C. Newman and others, to recover two-thirds of the amount collected by defendants on a certain note belonging to deceased's estate. From a judgment for plaintiffs, defendants appeal. Affirmed.

Defendants are residents of New Orleans, in the state of Louisiana, and collected a certain promissory note executed by J. T. and E. H. Manor on the 17th day of January, 1883, payable to J. F. Tillman, the father of plaintiffs, who died in 1884, intestate, leaving surviving him, as his only heirs, plaintiffs and their mother, Mrs. Amanda Tillman. The latter qualified as guardian of plaintiffs. William Woods qualified as administrator of the estate of J. F. Tillman, deceased, in 1884, and was discharged by final decree in 1888. The said guardian and administrator composed the firm of William Woods & Co., and defendants were their commission merchants. Some time during the year 1887, William Woods delivered the note to defendants, un-

indorsed by the payee or the administrator, for collection. For the purpose of paying the note, J. T. Manor, who had a credit with defendants, drew his drafts successively on them, by which they were directed to pay to themselves, for account or credit of William Woods & Co., the sums specified therein; and, when the sums drawn for equaled the amount called for in the note, it was surrendered to Manor. The sums paid by the drafts were accounted for to the said guardian and administrator, being placed to the credit of William Woods & Co., and a statement of the account showing said credits was sent to Woods & Co.

F. E. Larkin, for appellants. Yerger & Percy, for appellees.

WOODS, J. The only question thought to be debatable is a very narrow one, and readily resolvable. The note left with the Newmans for collection was on its face payable to the order of J. F. Tillman. It was unindorsed by the payee or by his personal representatives. These facts were sufficient to have put the Newmans on inquiry, and any inquiry would have shown that J. F. Tillman was dead, and his estate in process of administration, and that William Woods & Co. were not entitled to the proceeds of the note when collected. No matter what William Woods directed, or did not direct, as to the disposition of the collection. The Newmans had notice which was ample to put them on inquiry, and they failed to make it, and are fairly chargeable with participation, beneficially, in the disposition of this trust fund. William Woods' supposed assumption of ownership of the note, and William Woods' supposed authorization and direction to the Newmans to collect and place to his credit, cannot avail the Newmans. They knew, or could and should have known, that the money to be collected was a trust fund, and its misappropriation was beneficially participated in by them. By settled law, they must respond to the true owner. Affirmed.

CONNER v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)  
ASSAULT WITH INTENT TO KILL—SELF-DEFENSE—  
INSTRUCTION.

On a trial for an assault with a deadly weapon with intent to kill H., the evidence showed that a dispute arose between H. and defendant, when the former went into defendant's field, and threatened to whip defendant, who was much smaller than H.; that defendant suggested that they settle their dispute at law; that after H. had turned as if to go away, he returned, and finally slapped defendant's face; that defendant then struck H. on the head with his knife; and that H. then retreated to a wagon, and attempted to get the breast yoke, and, while stooping over in such attempt, defendant ran up to him, and stabbed him in the back. Defendant asked the court to charge that if the difficulty was brought on by H., and defendant avoided it; and H. was armed

and assaulted defendant; and the latter had reasonable ground to believe that H. was armed with a deadly weapon, intending to use it if necessary,—then defendant had the right to resist H. with such force and weapon as were necessary to protect himself, even if resort was had to a deadly weapon, and if H. retired from the assault on defendant, and attempted to get a dangerous weapon to renew it, defendant was not bound to flee, but might pursue H., so long as it was apparently necessary to prevent personal injury. *Held*, that the instruction was proper, and it was error to modify it by inserting, after the words "if necessary," the words, "if defendant had not, before that time, assaulted H. with his knife."

Appeal from circuit court, Leflore county; R. W. Williamson, Judge.

Oliver Conner was convicted of an assault, and appeals. Reversed.

Defendant was indicted for an assault with a deadly weapon, with an intent to kill W. R. Holly. On the trial the evidence showed that in December, 1892, defendant, with several others, was at work in his field, gathering peas. While thus engaged, Holly rode up, and engaged defendant in conversation about the peas. That there had been a misunderstanding between them, at a prior date, as to the payment for the seed peas; Holly claiming to have bought and paid for them, and defendant denying it. Holly asked defendant if he did not intend to let him have the peas, saying defendant knew that he had paid for them. Defendant replied that he could not let him have them, because he had paid for them. Holly then became very much enraged, and climbed over the fence where defendant was, and denounced him as a liar, and threatened to whip him. Defendant did not resent the insult, but suggested that, instead of having a difficulty, they try their rights of property at law. After again denouncing defendant, Holly turned as if to leave. Defendant again denied that Holly had paid for the peas, when Holly immediately turned, and went up to defendant, who was a much smaller man than Holly, shook his fist in defendant's face, used the most indecent and vulgar language, and slapped him in the face. Defendant immediately struck him with his knife, inflicting a severe wound on his head. Holly then retreated to a wagon near by, and attempted to get the breast yoke, and, while stooping over in this attempt, defendant ran up to him, and stabbed him in the back. The fight continued, and Holly was cut twice more,—once in the hand, and once in the side. There was no conflict in the evidence as to how the difficulty began, and as to who was the provoking party. Defendant asked the following instruction: (2) "That if the jury believe from the evidence that the difficulty between Holly and Oliver Conner was provoked and brought on by Holly, and that Conner avoided it, and that Holly was armed, and assaulted Conner, and that Conner, by the acts and threats of Holly, had reasonable ground to believe that Holly was armed with

a deadly weapon, intending to use it, if necessary, then the defendant had the right to resist Holly with such force and weapon as were necessary to protect himself against such assault, even if resort was had to a deadly weapon; and if the jury further believe from the evidence that Holly retired from the assault on Conner, and attempted to get a dangerous or deadly weapon to renew his assault with, then Conner, in law, was not bound to flee, but might pursue Holly, so long as it were apparently necessary to prevent personal injury to himself." This instruction was modified by the court, over the objection of the defendant, by adding after the words "if necessary" the following: "If the jury further believe from the evidence that Conner had not before that time assaulted Holly with his knife." To which action of the court, defendant excepted.

B. G. Humphreys and A. H. Longino, for appellant. Frank Johnston, Atty. Gen., for the State.

COOPER, J. The second instruction asked by appellant was correct, as prayed, and should not have been modified by the court. Judgment reversed, and a new trial awarded.

#### JACKSON v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)

ENTICING SERVANTS—CRIMINAL PROSECUTION—PLEADING.

Under Code 1892, § 1068, providing that one who shall willfully entice away, knowingly employ, or induce a laborer who has contracted with another for a specified time to leave his employer before the expiration of his contract, without the consent of his employer, shall be liable to fine, an affidavit alleging the enticing away and employment of a person who had contracted with another fails to charge an offense where it omits to state that the person enticed away was a laborer, or that the matter complained of was without the consent of the employer.

Appeal from circuit court, Holmes county; C. H. Campbell, Judge.

"Not to be officially reported."

Jesse L. Jackson was convicted under the statute against enticing away servants, and appeals. Reversed.

On March 27, 1893, the following affidavit was made against Jackson: "State of Mississippi, Holmes county. Personally appeared before me, W. S. Pierce, a J. P. in and for the said county, S. J. Brown, who makes oath that on or about the 25th day of March, 1893, Jesse L. Jackson did willfully interfere with and entice away and knowingly employ Monroe Lacy, who had contracted with him for six months beginning on the sixth day of Feb., 1893, and ending on the sixth day of Aug., 1893, against the peace and dignity of the state of Mississippi." On this affidavit Jackson was arrested, tried, and convicted in the said jus-

tice of the peace court, and fined \$25 and costs. From this judgment he appealed to the circuit court. On the trial in the circuit court a jury was waived, and trial was had before the court. He was again convicted, and fined \$25 and costs, and his motion for a new trial was overruled.

Code 1892, § 1068, provides: "If any person shall willfully interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises before the expiration of his contract, without the consent of the employer or landlord, he shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars, and, in addition, shall be liable to the employer or landlord for double the amount of damage which he may have sustained by reason thereof."

E. F. Noel, for appellant. Frank Johnston, Atty. Gen., for the State.

CAMPBELL, C. J. As there was no motion to quash or in arrest of judgment, and only a motion to set aside the verdict, it is not improbable that the fatal insufficiency of the affidavit escaped the attention of the court below. If attention had been directed to the matter at the proper time, the defects might have been, and no doubt would have been, remedied; but, inasmuch as the affidavit does not charge an offense, no judgment can be rendered. The affidavit does not show that the person employed was a laborer, or that what is complained of was without the consent of the employer. It ought also to show that the offense was committed in the district of the justice, or that there was no such officer in the district, in which it was committed. Reversed, and remanded to the circuit court for further proceedings there, and defendant held to answer in said court.

(71 Miss. 204)

#### WARE et al. v. STATE.

(Supreme Court of Mississippi. Nov. 6, 1893.)

##### INTOXICATING LIQUORS—UNLAWFUL SALE.

On a prosecution for the unlawful sale of liquor, evidence of sales other than that charged in the indictment is inadmissible.

Appeal from circuit court, Copiah county; J. B. Chrisman, Judge.

G. L. Ware and T. P. Ware were convicted of unlawfully retailing intoxicating liquors, and appeal. Reversed.

At the April, 1893, term of the circuit court of Copiah county appellants were jointly indicted for a joint sale of intoxicating liquors in violation of the act of February 29, 1888, (Acts 1888, p. 170,) prohibiting the sale of intoxicating liquors in supervisor's district No. 1 of Copiah county. The following is the charge contained in the indictment: The grand jury "upon their oaths present that G.

L. Ware and T. P. Ware, late of the county aforesaid, in supervisor's district No. 1, state of Mississippi, did then and there unlawfully sell intoxicating liquors without any legal authority so to do, contrary to the form of the statute," etc. The opinion contains a statement of the proceedings at the trial material to the issue. The court gave the following instructions for the state: "(1) Any sale of liquors in this district in which the party owns an interest makes that party guilty, whether sold by himself or another; and any sale of liquor made directly or indirectly by any person is a violation of the law. Therefore, if you believe from the evidence that liquor was sold by Norton to McLemore, as Norton states, for the defendant G. L. Ware, he is guilty; and if they believe from the evidence that liquor was sold to Davis by T. P. Ware, directly or indirectly, he is guilty. (2) The court instructs the jury, if they believe from the evidence that G. L. Ware sold liquor to McLemore in which G. L. Ware had an interest, he is guilty, even though you may believe that Norton did all the selling, and testified before the grand jury one way and before this court another as to liquor selling. (3) The court instructs the jury that if they believe from the evidence, as testified to by the witness Davis, that Davis came to G. L. Ware, and gave to Ware one dollar for a bottle of liquor, and witness Davis went out into the back yard of the store, and got the bottle from the negro, he is guilty." All these instructions were excepted to by defendants. Both the defendants were convicted, and sentenced to six months in the county jail, and to pay a fine of \$100 and costs. A motion for a new trial was overruled, and defendants appealed.

Cassedy & Cassedy and A. C. McNair, for appellants. Frank Johnston, Atty. Gen., for the State.

WOODS, J. The appellants were jointly indicted for unlawful retailing. They were charged necessarily with a single offense. Evidence of numerous sales, said to have been made by the one or the other of the appellants, was introduced over their objection. At the conclusion of the introduction of the state's testimony the court required the district attorney to elect the sales he would rely on, and thereupon he elected to rely upon two sales claimed to have been made, one by G. L. Ware to McLemore, and the other by T. P. Ware to Davis; and the court instructed the jury that those two sales, and those only, were charged in the indictment, and for those only were the defendants to be tried. All this was erroneous. Evidence of any sales other than the one said by the witness Norton to have been made to the negro, Joe Jeff, should have been excluded. The state should have been required to confine its evidence to that first sale, so proved by the witness Norton to have been made. The

defendants were charged with the commission of one offense, and not a dozen, and not two, even, as the court below at length determined. It results from this view that the action of the court in giving the three instructions asked by the state was error. See *King v. State*, 66 Miss. 502, 6 South. 188; *Bailey v. State*, 67 Miss. 333, 7 South. 348; and *Naul v. State*, 70 Miss. —, 12 South. 903.

Reversed and remanded.

(100 Ala. 208)

POLLOCK et al. v. McNEIL et ux.

(Supreme Court of Alabama. Nov. 16, 1893.)

HOMESTEAD—CONVEYANCE BY JUDGMENT DEBTOR  
—SELECTION.

1. An insolvent judgment debtor may sell and convey his homestead unaffected by such judgment.

2. It is immaterial that the purchaser of a homestead from a judgment debtor knew, at the time of the purchase, that the grantor was insolvent.

3. Where the area and value of a homestead does not exceed the limit allowed by law as exempt, and the homestead is not a part of a larger tract of land, a selection of a homestead by the owner is unnecessary.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action by J. Pollock & Co. against Daniel McNeil and wife to recover possession of certain real estate. From a judgment entered on the verdict of a jury directed by the court in favor of defendants, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by HARALSON, J.:

The facts of this case are that J. Pollock & Co., plaintiffs below, appellants here, recovered a judgment against J. H. Tate in the circuit court of Henry county on the 7th March, 1888, for the sum of \$716.23; that a transcript of the judgment, duly certified by the clerk of the court, was registered in the office of the judge of probate of said county on the 24th of March, 1888; that an execution was issued out of said circuit court on said judgment on the 20th day of November, 1891, which was placed in the hands of the sheriff of said county, and by him levied, on the 24th November, 1891, on a lot in the town of Columbia, in said county, of about three-fourths of an acre, which is described in the levy, and which is the lot for the possession of which this action is brought; that proceedings were duly and regularly taken under the statute by the sheriff to make sale of said lot for the satisfaction of said execution, and on the 4th January, 1891, he made public sale of the same for that purpose, and the plaintiffs became the purchasers thereof at and for the sum of \$50, in consideration of which purchase, and of the payment of the sum so bid by them, the sheriff executed and delivered to the plaintiffs a deed conveying to them "all the legal rights, title, interest,

and claim which the said J. H. Tate held in and to the foregoing described premises," the same as levied on and sold, and described in the complaint in this suit. After proving these facts, and the value of the rent and possession by defendants, plaintiffs rested. The defendants, Daniel McNeil and wife, introduced in evidence a deed duly executed by J. H. Tate and wife to said lot, executed in manner to convey the homestead exemption to Mrs. Pauline McNeil, one of the defendants, dated May 26, 1888, conveying to her, in consideration of \$700, acknowledged to be paid by her, the lot sued for, which deed was filed for record and recorded in the probate office of said county on the 4th of June, 1892. The defendants further proved that at the time said deed was made, and prior to the 7th day of March, 1888, the date of plaintiffs' judgment against said J. H. Tate, the premises sued for were occupied by said J. H. Tate and family as a homestead, and was the property of said J. H. Tate; that the area and value of the same did not exceed the limits allowed by the constitution and laws of the state for a homestead exemption; that immediately upon said Tate's removal from said premises the defendants moved thereon, and have ever since occupied the same, under the defendant's (Pauline McNeil's) purchase from said Tate; that the defendant Pauline McNeil paid said Tate \$700 for said property. It was admitted that no declaration of claim was ever filed in the office of the judge of probate of Henry county by said Tate, claiming said property as his homestead. The plaintiffs offered to prove in rebuttal that said Tate was insolvent at the time of the sale to defendant Mrs. McNeil, of which fact she had notice; that said sale was made upon a cash consideration; which, upon the objection of defendants, was not allowed to be shown, and plaintiffs excepted. This being all the evidence, the court, at the request of defendants, gave the general charge in their favor, and refused a like charge requested by plaintiffs. The errors assigned are the refusal of the court to admit said evidence offered by plaintiffs, the giving of the general charge for defendants, and the refusal to charge as requested by plaintiffs.

A. E. Pace, for appellants. T. M. Espy and R. H. Walker, for appellees.

HARALSON, J. 1. The question presented for our consideration is whether a party who owns and occupies a homestead within the limits allowed by the laws of this state may sell and convey the same. We have so repeatedly decided this question affirmatively, we have no disposition to discuss it further, or review our rulings on it, as we have been invited in the well-considered argument of appellants' counsel to do. The question must be regarded as settled in this state. *Kennedy v. Bank*, 12 South. 618; *Shubert v. Winston*, 11 South. 200; *Cald-*

well v. Pollak, 91 Ala. 357, 8 South. 546; Alley v. Daniel, 75 Ala. 406; McWilliams v. Jenkins, 72 Ala. 487; Shirley v. Teal, 67 Ala. 449; Lehman v. Bryan, 67 Ala. 558; Wright v. Smith, 66 Ala. 514; Fellows v. Lewis, 65 Ala. 343; Alabama Conference v. Vaughan, 54 Ala. 445.

2. There was no error in the exclusion of the evidence offered that said Tate was insolvent, of which fact Mrs. McNeill had notice, and that she paid cash for the land. It was irrelevant. Tate had the right to sell his homestead whether he was solvent or insolvent, and his deed conveyed to the grantee the right of exemption secured to him under the statute. Authorities, *supra*.

3. Where the area and value of the homestead do not exceed the limit allowed by law as exempt, and it is not a part or parcel of a larger portion of land, a selection is unnecessary. The law intervenes and attaches the right of exemption without any act on the part of the exemptioner, as if the particular property were especially claimed and designated as exempt. Alley v. Daniel, *supra*; Nance v. Nance, 84 Ala. 375, 4 South. 690; Jarrell v. Payne, 75 Ala. 579; Hardin v. Pulley, 79 Ala. 387; Chandler v. Chandler, 87 Ala. 303, 6 South. 153. The court committed no error in giving the general charge for the defendants. Affirmed.

(100 Ala. 223)

**KANSAS CITY, M. & B. R. CO. v. COBB.**

(Supreme Court of Alabama. Nov. 8, 1893.)

**DOCUMENTARY EVIDENCE—PROOF OF EXECUTION—ACTION ON COUPON—PARTIES—VARIANCE.**

1. A coupon reciting that at a certain time and place defendant will pay to bearer, "unless this bond be drawn for the sinking fund, \$25.00, being 6 months' interest on bond No. 916 (9)" and signed by defendant's treasurer, is a written instrument, within Code, § 2770, providing that every written instrument, the foundation of the suit, signed by defendant or his agent, must be received in evidence without proof of execution, unless execution is denied by plea verified by affidavit.

2. Since Code, § 2504, provides that actions on contracts for the payment of money must be prosecuted in the name of the party in interest, whether he has the legal title or not, plaintiff is the proper party to sue on the coupon, though it has passed to him by delivery without indorsement, and though there is a condition on its face which destroys its character as commercial paper.

3. An instrument made payable at a designated place may be given in evidence under a complaint counting on an instrument as if made payable generally. Puckett v. King, 2 Ala. 570, overruled.

Appeal from city court of Birmingham; H. A. Thorpe, Judge.

Assumpsit by Elizabeth Cobb against the Kansas City, Memphis & Birmingham Railroad Company to recover on certain interest coupons on the bonds of defendant. There was judgment for plaintiff, and defendant appeals. Affirmed.

The only evidence introduced in the cause was the coupons themselves, which were in-

troduced against the objection and exception of the defendant. The objections of the defendant are sufficiently stated in the opinion. These coupons were in the following language: "On the first day of September, 1891, the Kansas City, Memphis and Birmingham Railroad Company will pay to the bearer in the city of Boston, Massachusetts, unless this bond be drawn for the sinking fund, twenty-five dollars, being six months' interest on bond No. 916 (9.) Chas. Merriam, Treasurer." There was also introduced in evidence the deposition of Charles Merriam, who, after testifying that he was the secretary and treasurer of the defendant, also testified that none of the coupons sued on in this case, nor any of the bonds to which the coupons were attached, had been drawn for the sinking fund. The defendant separately objected and duly excepted to each separate portion of Merriam's testimony. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the following written charge: "If the jury believe the evidence they must find the issue in favor of the plaintiff, and assess her damage at the face value of the coupons introduced in evidence, and interest thereon at the rate of six per cent. per annum from the 1st day of September, 1891." The defendant duly excepted to the giving of said charge, and, upon a verdict being rendered for the plaintiff, the defendant moved in arrest of judgment upon the following ground: "The complaint in said cause does not disclose a substantial cause of action in this: because it relies for recovery on coupons alleged to have been executed by defendant, and there is no description in said complaint of such coupons, and a coupon is not such an instrument as implies by its name a legal obligation to pay money when executed by defendant, without further description." The court overruled this motion, and the defendant duly excepted.

Hewitt, Walker & Porter, for appellant. Lane & White, for appellee.

COLEMAN, J. The suit was to recover upon coupons of bonds of the appellant. It would have been better pleading for the complaint to have specified the number of coupons, and the respective amounts of the coupons sued upon. No objection, however, was taken to the form of the complaint. There was no plea denying the ownership of the coupons, or their due execution. The case was tried upon the general issue. The coupons are signed "Charles Merriam, Treasurer," and "are payable to bearer in the city of Boston, Mass." The complaint is in common form of a declaration as upon a promissory note, averring generally the execution of the coupons, and that they were payable on the 1st of September, 1891, without any reference in the complaint to the place of payment. An objection was interposed to the introduction, in evidence of the cou-

pons, based (1) upon the grounds that there was no proper proof of the execution of the coupons by the defendant; (2) that they were not indorsed, and showed upon their face the legal title was not in plaintiff, and the suit should be in the name of the person from whom the consideration moved, for the use of the holder; (3) that the coupons, being made payable at a particular place, were not admissible under a complaint which described them as payable generally.

As to the first ground of objection, rule 29, p. 810, of the Code, and sections 2876 and 2770, are a complete answer to the objection, there being no plea in, except that of the general issue. A coupon of a bond, as described in the complaint, is a written instrument, within the meaning of section 2770, *supra*.<sup>1</sup>

As to the second objection. The general law is, and is so recognized in this state, that, unless changed by statute, coupons made payable to bearer in legal effect possess all the attributes of negotiable promissory notes governed by the law merchant. See authorities collated in 4 Amer. & Eng. Enc. Law, pp. 430-432, notes. The coupons under consideration are "payable to bearer," and are made "payable in Boston, Mass." The statute of this state, as construed in *Blackman v. Lehman*, 63 Ala. 547, has no application to the instruments, the foundation of this litigation. The distinction was recognized in the subsequent cases of *In re Tallassee Manuf'g Co.*, 64 Ala. 507, and very clearly declared in *Reld v. Bank*, 70 Ala. 199. See, also, Act Feb. 28, 1889, amending section 1761 of the Code. If the coupons passed by delivery, plaintiff became the owner of the legal title without an indorsement, and, conceding the contention of appellant for the argument, that there was a condition in the face of the coupons that destroyed their character as commercial paper, then, under section 2594 of the Code,<sup>2</sup> the party really interested or the beneficial owner must sue, whether he has the legal title or not. *Cobb v. Bryant*, 86 Ala. 318, 5 South. 586.

The last ground of objection presents a question of more difficulty, because of a want of harmony in our own decisions, and that is whether an instrument made payable at a designated place may be given in evidence under a complaint counting on an instrument as if made payable generally. The precise question came before this court at a very early day, in the case of *Puckett v. King*, 2 Ala. 570, and it was held that "a note which, on its face, is made negotiable and payable at the Branch Bank of the

State of Alabama, at Mobile, cannot be given in evidence under a declaration describing a note as payable generally." The principle here declared was fully recognized in the case of *Clancy v. Hilliard*, 39 Ala. 713. This rule was departed from in the subsequent cases of *Clark v. Moses*, 50 Ala. 326, and *Morris v. Poillon*, Id. 408. The question has not arisen since. The reason given for the rule in the case of *Puckett v. King*, *supra*, is that there is a distinction between the contracts evidenced by the notes, in that, as to the note payable at a particular place and day, the maker is authorized to show this fact in his defense in a plea of tender. His contract, therefore, is not the same as when he contracts to pay absolutely, and wherever the note may be presented for payment. We are not satisfied with the reason here assigned: A plea setting up that the instrument sued upon was made payable at a certain time and place, and that defendant had funds at the time and place to meet the demand, and had kept the money ready at all times, and now brings it into court, etc., would have been a good plea of tender to the present suit. The fact of having funds to satisfy the claim is defensive matter, and must be pleaded by the defendant. Where the instrument offered in evidence showed a different liability from the one declared upon, when the amounts recoverable are different, then there is such a variance as to exclude the instrument. But no such result follows in the present case. The liability is the same, and the amount recoverable the same. The same defense, under a plea of payment or tender, could be made whether declared upon as payable generally or whether the place of payment had been described in the complaint. Some other questions are discussed in the brief of appellant, but are without any merit. There was no error in the ruling of the court, and the judgment must be affirmed.

(100 Ala. 280)

GAY et al. v. BANKSTEN.

(Supreme Court of Alabama. Nov. 9, 1893.)

SCHOOLS AND SCHOOL DISTRICTS—DUTY OF SUPERINTENDENT—TEACHER'S CONTRACT—ACTION FOR BREACH—PLEADING—EVIDENCE.

1. Act Feb. 28, 1889, provides that, to fix the amount of poll tax available each scholastic year for school purposes, the amount of poll tax paid into the state treasury, to the credit of the school fund of any race in any township or other school district, during each school year, shall be the amount of poll tax that may be contracted and used for school purposes the following year. *Held*, that a complaint in an action against a county superintendent of education, to recover money due under a contract to teach school in a designated township, is not demurrable for failure to allege that defendant had the money in his hands with which to pay plaintiff, as, if, by reason of any deficiency, there was not money enough to pay plaintiff, such fact would be defensive matter, to be pleaded.

2. In such action, the contract mentioned in the complaint, made with the trustees, and

<sup>1</sup> Code, § 2770, provides that every written instrument, the foundation of the suit, signed by defendant or his agent, must be received in evidence without proof of execution, unless execution is denied by plea verified by affidavit.

<sup>2</sup> Code, § 2594, provides that actions on bonds or other contracts for the payment of money must be prosecuted in the name of the party really interested, whether he has the legal title or not.

approved by defendant, and plaintiff's quarterly report made to defendant as required by law, were admissible.

3. In support of a plea that he had no funds with which to pay plaintiff's claim, defendant introduced a statement showing the amount of money received by him for the township in which plaintiff taught, and the expenditures, from which statement it appeared that he had paid plaintiff \$5.31, and on the same day paid R., a teacher for the same township, \$24. Held, that it was competent for plaintiff to show that R. was paid more than he was entitled to, since it was not sufficient for defendant to show that he had disbursed all the funds in his hands, but he should have further shown that they had been paid out according to law.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by J. C. Banksten against W. T. Gay, superintendent of education of Etowah county, and the sureties on his official bond, to recover for the breach of the conditions of the bond by Gay. There was judgment for plaintiff, and defendants appeal. Affirmed.

James Aiken, for appellants. Geo. D. Motley, for appellee.

**HARALSON, J.** The law contemplates that the public school fund shall be apportioned to the several townships and districts at the beginning of the scholastic year, and that school officers be informed of the amount apportioned to their district before they are required to enter into contracts with teachers. On the 1st day of October, or as soon thereafter as practicable, the auditor is required to certify to the superintendent of education the amount of money that has accrued and been placed to the credit of the school fund for the scholastic year, beginning on that day, whereupon it is made the duty of the superintendent of education, after deducting certain amounts for expenses of the department, etc., to apportion all the balance of such fund to the various townships and school districts according to the entire number of children of school age; to record the same in his office, and send a certified copy thereof to each county superintendent, showing the dividends of the educational fund to each township or district under his supervision. Code, §§ 1004, 1005, 1009; Acts 1890-91, p. 554. The county superintendent is then required to notify the township trustees of the amount thus apportioned to their respective townships, whereupon it becomes the duty of the township trustees to fix the number and location of the public schools, and to apportion to each school so established such an amount of the public school revenue "as they may deem just and equitable, for the equal benefit of all the children thereof, between the ages of seven and twenty-one years," all of which they are required to report to the county superintendent. Code, §§ 968, 969, 974; Acts 1890-91, p. 554. The apportionment here referred to is the amount appropriated by the state, and not the poll-tax

fund. Code, § 1009. The latter is an uncertain element, and the amount thereof cannot be definitely known until the tax collector has made his first report for the fiscal year. The several amounts apportioned to the several schools of the district out of the general fund are subject to be increased to the extent of the poll tax which may be realized for the scholastic year; that raised from white persons to be applied to white schools, and that from colored persons to schools for colored pupils. Code, §§ 1009-1011. To relieve in some measure the embarrassment of making contracts based on an uncertain fund, the act of February 23, 1889, "To determine and fix the amount of poll tax available each scholastic year for school purposes," (Acts 1888-89, p. 80,) provides "that the amount of poll-tax paid into the state treasury to the credit of the school fund of any race in any township or other school district, during each scholastic year, shall be the amount of poll tax that may be contracted and used for school purposes the following year." This merely furnishes the basis for contracts with respect to the poll-tax fund; the authorized assumption being, that the poll-tax fund of the current year, for a given district and race, will be at least equal to that of the preceding year. Officers are authorized to act upon this assumption in making contracts with teachers, and a teacher who contracts with respect to this fund does so knowing that it may fall short of the amount for the previous year, and that he may have to suffer his pro rata share of the loss. As to such deficiency, there is no personal or official liability on the county superintendent, he being without fault in the premises. If this be a grievance, the legislature alone can remedy it.

The appellee, Banksten, brought suit against appellant Gay as superintendent of education of Etowah county, and against the other appellants as the sureties on his official bond, seeking to recover a sum of money alleged to be due the plaintiff under a contract to teach a public school for the white race in a given township. The breach alleged is the making of the contract by the plaintiff with the township trustees, its approval by the said Gay as such county superintendent of education, performance on the part of plaintiff, and refusal by defendant Gay, on demand, to pay the stipulated compensation. To the complaint a demurrer was interposed. The grounds insisted on assume that it was necessary for the complaint to allege that the defendant Gay had the money in his hands with which to pay plaintiff's claim. The position is not tenable. Public officers are presumed to do their duty, and every reasonable intentment is indulged in favor of this presumption. 3 Brick. Dig. p. 408, § 33; Throop, Pub. Off. § 558. From the making and approval of the contract with plaintiff, it would be reasonable to presume that the officers had done their duty, that they had



apportioned a proper share of the public school money to the school which plaintiff was employed to teach, and that funds were available to pay his claim. If not, the defendant Gay, as such superintendent, was under no obligation to enter into the contract with plaintiff. His contract implies that he had the means in hand with which to pay, subject to such deficiency as might arise from the noncollection of the poll tax; and if, by reason of such a deficiency, there was not money sufficient to pay the plaintiff, that was defensive matter to be pleaded. The demurrer was properly overruled.

The defendants then pleaded to the complaint, setting up the defense which was sought to be raised by the demurrer to the complaint, viz. the absence of funds in the hands of the superintendent with which to pay plaintiff. A jury was waived, and on trial the court rendered judgment in favor of the plaintiff for \$10 and costs, to reverse which the appeal is prosecuted. The plaintiff was allowed to introduce in evidence, against the objection and exception of defendants, the original contract described in the complaint, made by him with the township trustees, and approved by said Gay as such county superintendent, and his quarterly report made to the county superintendent as required by section 987 of the Code. There is nothing in these exceptions. Both were clearly admissible. It was necessary to introduce them to make out plaintiff's case.

The defendant Gay, in support of his plea, that he had no funds with which to pay the plaintiff's claim, introduced in evidence a statement, which he testified was correct, showing the amount of money received by him for the particular township and range for the year in question, and the expenditures thereof, from which statement it appears that he paid to the plaintiff the sum of \$5.31 on his contract, and on the same day paid to one Russell, a teacher for the same township, the sum of \$24. In rebuttal the plaintiff was permitted to read in evidence, over the objection and exceptions of defendants, the contract made by the township trustees with said Russell, which was approved by said Gay, as such county superintendent, on the 18th of July, 1891,—the same day he approved plaintiff's contract with said trustees,—and also said Russell's quarterly report, from which it appeared he had been employed to teach transferred children from the township, for three months, at the rate of \$8 per month, and that he had taught 35 days, or 1½ school months. Code, § 1001. Except as to the amount of compensation stipulated, Russell's contract was not materially different from that of plaintiff, while his report showed he had taught the same length of time plaintiff had. There was no error in admitting these documents in evidence. It was not sufficient for defendant Gay to show that he had disbursed all the funds which came into his hands. He should

have gone further, and shown that they had been paid out according to law. It was certainly competent for plaintiff to show he had not done so, and the Russell contract and report clearly showed the illegality of his alleged payment to Russell, to the extent of \$10. Russell having taught 1½ months, the amount due him was \$14, not \$24, which Gay paid to him, making an overpayment to him of \$10. There was more than that amount remaining due and owing on plaintiff's claim. The judgment of the court being for that amount only, there was no error in its rendition, of which appellants can complain. Affirmed.

(100 Ala. 275)

# SOUTHERN EXP. CO. v. BOULLEMET et al.

(Supreme Court of Alabama. Nov. 9, 1893.)

PARTIES—AMENDMENT ON APPEAL—EXPRESS COMPANIES.

1. When an action has been tried in a justice's court without a written complaint, and appealed and tried *de novo*, plaintiff, pending the latter trial, may amend by joining another as coplaintiff, on a showing that he and such other are partners in the property in controversy.

2. Plaintiffs, desiring to trade certain goods for others owned by persons at a distance, plaintiffs to pay charges on both shipments, asked the freight clerk of defendant express company what the charges would be. The clerk informed them that the charges on the goods plaintiffs were to receive would be not more than a certain sum. This shipment was necessarily made over two lines of express, one of which had no connection or contract with defendant. The clerk had authority to give rates generally, but it was not his duty to give rates on unconnecting lines, whose charges were unknown to him. *Held*, that his general authority empowered him to bind the company to deliver the goods at a certain rate, even in the case of a mistake on his part, which inflicted loss on the company.

Appeal from city court of Mobile; O. J. Semmes, Judge.

This suit was originally brought in a justice of the peace court by A. Boullemet against the Southern Express Company, and was to recover \$10.70 as overcharges in expressage. On appeal from said justice's court to the city court there was judgment rendered for the plaintiff, and defendant appeals. Affirmed.

Upon the summons issued by the justice of the peace there was indorsed the following statement: "Cause of Action. \$10.70 for an excess of freight charges." The cause was tried in the city court without filing any complaint, and pending the trial in the city court "the plaintiff moved to be allowed to amend by making F. T. Perkins one of the plaintiffs to said cause, it being shown to the court that the said A. Boullemet and F. T. Perkins were copartners in the matters the subject of this suit." This motion was granted, and the defendant excepted. Upon the submission of the cause to the court without the intervention of a jury, the court found the facts to be as follows, and rendered

judgment as shown herein: "The plaintiffs, as partners, were about to make a trade of three birds for fourteen chickens. The birds were to be sent to Binghamton, New York, and the chickens from that place to Mobile. The plaintiffs were to pay freight or expressage both ways. The plaintiffs went to the freight clerk of the Southern Express Company at its office in Mobile, and stated to him that they desired to ship to Binghamton, New York, three live birds, in a cage, and that a person in Binghamton, New York, was to take them, making payment in chickens; and, as plaintiffs were to pay expenses on the birds and chickens, it was necessary to ascertain what the expense would be before the trade could be consummated. The agent replied that the charges on the birds would be between one and two dollars, and asked the number of chickens to be returned and the weight. Plaintiff replied, 'fourteen,' and the weight of each 'eight and ten pounds.' The clerk then replied: 'Between three and four dollars; not to exceed four dollars.' The clerk testified he understood the answer to be four chickens, not fourteen. The court finds that the shipment had to be made over two lines of express, one of which had no connection or arrangement with the defendant for shipment of freight. The birds were shipped, and the freight prepaid, which was one dollar. On the arrival of the birds at Binghamton the chickens were expressed out of Binghamton by an express company different from that of defendant, and whose rates were not known to the defendant, and having no connection or agreement of rates with the defendant; and, after passing over said line, the chickens came over still another line before reaching the defendant's line, over which they came to Mobile. That the defendant charged for and collected the freight over all the lines, and (\$14.70) fourteen and 70-100 dollars was charged as expressage on said chickens from Binghamton, New York, instead of between three and four dollars. Plaintiffs demanded the chickens, tendering four dollars. Defendant refused to deliver them until the (\$14.70) fourteen and 70-100 dollars was paid, which was done under protest; and suit was brought before a justice of the peace for the difference, to wit, ten and 70-100 dollars, (\$10.70,) the two plaintiffs and another witness testifying to the conversation on the side of the plaintiffs, and one witness, the said clerk, on the side of the defendant. The court finds that not more than four dollars was to be charged upon fourteen chickens. The court finds as fact that the freight clerk had authority to give rates generally, but that it was not his duty to give rates on lines with which the defendant had no connection, and that as a fact he could not do so, not having exactly the rates over such lines. That the clerk said nothing on this subject to the plaintiffs. The court holds that, as the clerk was acting within the general scope of his author-

ty, and the plaintiff made the contract and shipments relying upon the statements made by the clerk, the defendant is liable, and judgment is rendered for the plaintiff in the sum of ten and 70-100 (\$10.70) dollars." To the rendering of this judgment the defendant duly excepted.

Clark & Clark, for appellant.

MCLELLAN, J. When a cause is removed from a justice's court into the circuit court or city court having the jurisdiction in such cases of circuit courts by appeal or certiorari, it is triable de novo, without regard to any defects in the proceedings; and a trial may be had in the appellate court either on the original complaint, which may be amended, or on a new complaint, which may be filed. *Littleton v. Clayton*, 77 Ala. 571. In this case the complaint in the justice's court consisted of a mere statement of the cause of action on the summons. This was treated by both parties in the city court as the complaint in the case in that court, no new complaint being filed. For all purposes, this mere statement was the complaint, and, as such, subject to amendment, at least to the extent that any formal declaration originally filed in that court would have been. The only limitation upon the right of amendment of complaints in respect to striking out and adding parties is that an entire change of parties cannot be wrought thereby. Even a change of the capacity in which the plaintiff sues is not forbidden, though formerly it was held otherwise, (*Lucas v. Pittman*, 94 Ala. 616, 10 South. 603;) and if it could be said that the amendment made here, by which the action was converted from the individual suit of Boullemet to the partnership suit of Boullemet & Perkins, was a change of the capacity in which the original plaintiff sued, it would still be unobjectionable. *McCaskey v. Pollock*, 82 Ala. 174, 2 South. 674. The trial court, therefore, did not err in allowing the amendment complained of.

We may concede, as did the judge of the city court, that defendant's agent had no authority to bind carriers between Binghamton, N. Y., and Mobile, Ala., other than the Southern Express Company, in the matter of rates to be charged between those points, there being no joint traffic or tariff agreement between the several companies; but he did have authority, or at least it was within the scope of his agency, and hence the equivalent of authorization, to give the rates at which property shipped from Binghamton and reaching Mobile over the express company's line of carriage would be delivered to consignees at the latter point, and to bind his company to delivery at such rates. If in making rates, and thereby inducing shipments, he commits an error, it is a matter between him and his principal. If he contracts to deliver a consignment upon payment of an amount which only equals or is less than the charges of the connecting lines,

his company, and not the consignee, is responsible; and, as between it and the consignee, the company must bear the loss. We concur in the city court's finding of facts, and in its application to them of the law, and its judgment is therefore affirmed.

(100 Ala. 323)

KORETKE v. IRWIN et al.

(Supreme Court of Alabama. Nov. 9, 1893.)

FERRY—UNREASONABLE DETENTION.

Code 1886, § 1444, requires keepers of public ferries to keep safe and convenient boats, with a sufficient number of ferrymen. Section 1452 permits any person unreasonably detained at a public ferry to recover of the owner a penalty. *Held*, that one detained from 5:45 or 6 P. M. till 6 the next morning could recover; the ferry keeper having no right to make or enforce a rule not to ply after dark, without regard to the question whether it was safe and reasonable to ply, under the circumstances of each particular case.

Appeal from city court of Montgomery; Thomas M. Arrington, Judge.

Action by F. H. Koretke against Irwin & Co. to recover a penalty under Code 1886, § 1452. Judgment for defendants. Plaintiff appeals. Reversed.

Lomax & Ligon, for appellant. A. A. Wiley, for appellees.

COLEMAN, J. The action was instituted before a justice of the peace to recover the statutory penalty imposed by section 1452 of the Code. The section reads as follows: "Any person unreasonably detained at a public ferry, toll bridge, or causeway, may for each detention, recover of the owner ten dollars before any justice of the county." Plaintiff was detained from 5:45 P. M. or 6 o'clock P. M. until 6 o'clock A. M. of the following morning. These facts being shown by the plaintiff, it devolved upon the defendant to show the circumstances which justified such detention. The defense relied upon was a rule established by the owners of the ferry not to put any person across the ferry after dark, until daylight. Does the statute authorize the establishment of such a rule, and was the enforcement of the rule, under the circumstances as shown by the evidence, reasonable? Very clearly not. If it had been proven that the river was unusually swollen, and for this reason dangerous to cross after dark, or that there was a strong wind, which made it dangerous, these causes might be sufficient, under the statute, to cause the delay. Or if it had been proven that a steamboat was approaching, or immediately expected, or that lumber rafts were approaching the ferry, which rendered the crossing, for the time being, dangerous, it would not be unreasonable to detain the person desiring to cross until the cause had ceased to exist; and so of any other cause which the keeper of the ferry could not provide against or control; and which would render

the attempt to cross the river, at the particular time, unsafe.

The statute contemplates that the owners and keepers of public ferries shall "keep safe and convenient boats, with a sufficient number of ferrymen." Section 1444, Code 1886. It is not a sufficient excuse for "unreasonable detention" to show that, by reason of the character of the construction of the ferry-boat, or of the appliances operating the boat across the river, or because of an insufficient number of ferrymen employed, it would not be secure to cross the river after dark. When a party applies for and obtains a license to keep a public ferry, it is his duty to provide "safe and convenient boats and a sufficient number of ferrymen" necessary to prevent "unreasonable detention" at the particular ferry he is licensed to keep. The precise question under consideration came before this court at a very early day. In the case of *Pate v. Henry*, 5 Stew. & P. 101, it was held that "the keeper of a public ferry is bound to transport persons across the stream after night, and a failure to do so will subject him to an action under the statute, without a suit on the bond." In that case the party reached the ferry at 6 o'clock. He was not put across until next morning. In that case, as in this, the defense was that the "owner of a ferry was not bound to put any person across the river between dark and daylight." On appeal this court held that the defense was not good. In the opinion it is said: "If the wind was high, or the night dark, when the application was made to him, so as to expose him to danger in an attempt to cross, or were it late at night, after the usual bedtime, it might, under some circumstances, as where the ferry was some distance from his dwelling, and probably in many other cases, be a sufficient excuse." The present statute is not in every particular the same as when the opinion in 5 Stew. & P., *supra*, was rendered; but, so far as the question under review is affected, there is no material difference. It is unnecessary to refer to the facts, further than to say we do not think the evidence sustained the defense attempted to be made. Under defendants' own showing, we are of opinion that plaintiff was entitled to recover. The judgment of the trial court is reversed, and judgment will be here rendered for the plaintiff.

(100 Ala. 1)

STEWART v. STATE.

(Supreme Court of Alabama. Nov. 13, 1893.)

REVIVAL OF LAW—VALIDITY.

Act Feb. 18, 1893, providing that the grand and petit juries in the county of Wilcox shall be drawn and organized as provided by Code, pt. 5, tit. 3, c. 4, arts. 1, 2, is unconstitutional, as attempting to revive a law without re-enacting and publishing it at length, as required by Const. art. 4, § 2.

Appeal from circuit court, Wilcox county; John Moore, Judge.

Fred Stewart was convicted of burglary, and appeals. Affirmed.

Upon the state and the defendant announcing ready, one of the juries organized as regular petit juries for the second week of the term of the court at which trial was had, was ordered to take their seats in the jury box to try said cause. The defendant thereupon objected to being tried by said jury, or any of them, and moved to quash said panel, and set aside said jurors, on the grounds: First, that the said jury had not been selected, drawn, and impaneled as required by law; second, because the probate judge, sheriff, and clerk of said county of Wilcox had drawn petit juries, as required by law, for the second week of this term, which was the week the defendant was being tried. Upon the hearing of this objection and motion it was shown that the probate judge, sheriff, and clerk of Wilcox county had drawn petit juries for the second week, as approved by the act of the general assembly of Alabama entitled "An act to provide for the drawing, organization of grand and petit juries in the county of Wilcox." This act was in the following language: "Section 1. Be it enacted by the general assembly of Alabama, that the grand and petit juries in the county of Wilcox shall be drawn and organized as provided by articles 1 and 2 of chapter 4 title 3 part 5 of the Code of Alabama. Provided, that the provisions of this act shall only apply to the county of Wilcox. Sec. 2. Be it further enacted, that all laws or parts of laws in conflict with the provisions of this act be, and the same are hereby repealed. Approved February 18, 1893." It was further shown that juries were drawn under said act of the general assembly, and were duly summoned by the sheriff of said county, and that on Monday of the second week of said court were organized as regular juries for the week. The solicitor for that judicial circuit in open court moved the court to quash the venire drawn and summoned as aforesaid, on the ground that the act of the general assembly above copied was unconstitutional and void, and that said officers were not authorized to draw said juries. Upon the hearing of said motion the court granted said motion, quashed the venires of petit juries so drawn and summoned as aforesaid. The court thereupon ordered the sheriff of said county to summon instant 30 persons possessing the qualifications required by law for petit jurors, to serve for the second week of said court. The sheriff thereupon summoned the 30 persons as required by the order of the court, who appeared in court, and were sworn and organized as petit jurors for the second week; the jury put upon the defendant being one of them which was so organized.

R. Gaillard, for appellant. Wm. L. Martin, Atty. Gen., for the State.

PER CURIAM. The act "to provide for the drawing and organization of grand and petit juries in the county of Wilcox," approved February 18, 1893, (Sess. Acts. 706,) is unquestionably unconstitutional. It was an attempt to revive a law without re-enacting and publishing it at length, as required by article 4, § 2, of the constitution of the state of Alabama. As an attempt at legislation it was a failure. There was nothing in the objection of defendant, and it was rightly overruled. Affirmed.

(100 Ala. 365)

LOUISVILLE & N. R. CO. v. RICHARDS.  
(Supreme Court of Alabama. Nov. 16, 1893.)

RAILROAD COMPANY — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for the death of plaintiff's intestate, who was killed in the daytime on a crossing by being struck by the rear car of a train which was backing at the rate of from three to six miles per hour, it appeared that deceased's view of the train was unobstructed, and there was not only positive evidence that he did not look for approaching trains, but there was no fact from which a contrary conclusion could be inferred. There was evidence that no signal bell was sounded, and that no brakeman was on the rear end of the train to keep a lookout. *Held*, that the court should have directed a verdict for defendant.

Appeal from circuit court, Cullman county; H. C. Speake, Judge.

Action by William Richards, administrator, against the Louisville & Nashville Railroad Company to recover for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The testimony was without conflict that, as one of defendant's work trains was moving backwards towards the north in the town of Cullman, at a speed variously estimated at from three to six miles per hour, the rear car of the train struck deceased, knocked him down, ran over him, and so injured him that he died. The testimony showed that there was nothing to prevent deceased from seeing the approach of the train; that he went upon the west side of the track without looking up or down the track, and while either standing on the track, inattentive to the surroundings, or attempting to cross the same without looking to the right or the left, he was struck. There was some conflict in the testimony as to whether the whistle was blown or the bell rung, or whether a proper lookout was kept by the employees on the train.

J. M. Falkner and George H. Parker, for appellant. W. T. L. Cofer, for appellee.

COLEMAN, J. There are some principles of law applicable to suits brought to recover damages for injuries sustained in consequence of the negligence or intentional mis-

conduct of others, which have been repeatedly declared by this court. One of these is that where the facts without conflict show affirmatively that the plaintiff was guilty of negligence, which proximately contributed to his own injury, the conclusion is one of law, and should be so pronounced by the court, and not referred to a jury. Another familiar principle is that it is the duty of travelers or persons intending to cross a railroad track, at a public crossing or elsewhere, not being expressly or impliedly invited to cross, to look in every direction that the rails run, and to listen for approaching trains, and one who fails to perform this duty is guilty of culpable negligence. Another is that if the plaintiff was guilty of negligence which proximately contributed to his injury, he cannot recover for the injury, unless the evidence tends to show that the defendant was guilty of willful misconduct or negligence so wanton or reckless as to be the equivalent of intentional wrong. We cite some of the many authorities in this state, which lay down these rules: Railroad Co. v. Blakely, 59 Ala. 478; Gothard v. Railroad Co., 87 Ala. 114; Copeland v. Railroad Co., 61 Ala. 376; Railroad Co. v. King, 81 Ala. 184, 2 South. 152; Frazer v. Railroad Co., 81 Ala. 185, 1 South. 85; Wilson v. Railroad Co., 85 Ala. 271, 4 South. 701; Railroad Co. v. Webb, 90 Ala. 185, 8 South. 518; Railway Co. v. Lee, 92 Ala. 262, 9 South. 230; Railroad Co. v. Kornegay, 92 Ala. 228, 9 South. 557, (in some respects similar to the case at bar;) Pipe Works v. Dickey, 93 Ala. 418, 9 South. 720; Warden v. Railroad Co., 94 Ala. 277, 10 South. 276; Nave v. Railroad Co., (Ala.) 11 South. 391; Railroad Co. v. Hurt, (Ala.) 13 South. 130; Stringer v. Railway Co., Id. 75. There is not only positive evidence to the effect that plaintiff's intestate did not look for approaching trains, but there is no fact in the present record from which a contrary conclusion could be inferred. The injury occurred about 11 o'clock A. M. The evidence shows there was no obstruction to the view, and that the train was not backing at a greater rate of speed than from three to six miles per hour, and stopped a little more than 30 feet from the place of collision. Under the undisputed evidence, the court should have instructed the jury, as matter of law, that plaintiff's intestate was guilty of contributory negligence. Warden's Case, 94 Ala. 277, 10 South. 276; Railroad Co. v. Hurt, (Ala.) 13 South. 130; Stringer's Case, Id. 75. It is equally clear from the record that defendant was not guilty of willful wrong, or of such wanton or reckless negligence as to be the equivalent of intentional wrong. There is no evidence tending to show actual knowledge on the part of those in charge of the train of the perilous position of plaintiff's intestate, nor any facts testified to which would impute to them a consciousness of his peril. All the evidence for plaintiff on this point

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is that the deceased was killed at a public crossing in the town of Cullman; that the train was backing at the rate of from three to six miles per hour; that no signal bells were being sounded, and that there were no brakemen on the approaching end of the train to keep a lookout. Conceding that the jury would accept as true this phase of the evidence, it establishes but simple negligence. The proof falls far below that which is necessary to show actual knowledge of peril, or a state of facts from which a jury would be authorized to impute knowledge to the person in charge of the train of the dangerous position of deceased at the time and place of the injury. See Webb v. Railroad Co., (Ala.) 12 South. 374; Stringer's Case, supra. The defendant was entitled to the general charge upon all the evidence. Other questions arising upon the charge of the court and rulings upon the pleadings are discussed, but we deem it unnecessary to consider them. None of them are new, and it is not probable that either will arise on another trial. Reversed and remanded.

(100 Ala. 249)

# BIRMINGHAM LOAN & AUCTION CO. v. FIRST NAT. BANK OF ANNISTON.

(Supreme Court of Alabama. Nov. 13, 1893.)

AMICUS CURIAE — EXCEPTIONS — INDIVIDUAL AS PARTNERSHIP—OBJECTIONS NOT RAISED BELOW.

1. An exception by an attorney of a party, made as amicus curiae, to a ruling, cannot avail the party.

2. Where a single person does business under a partnership name, the reputed firm may be sued under such name; and execution on judgment obtained will run against the partnership in name, leviable on its property, the action being in the nature of a proceeding in rem.

3. Where a party goes to trial without objection to any supposed defect in the court, he cannot raise the point on appeal.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Garnishee proceeding by the First National Bank of Anniston against the Birmingham Loan & Auction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Plaintiff obtained a judgment against one A. Goetter for \$100 in a justice of the peace court. On this judgment the plaintiff sued out a writ of garnishment, in which the Birmingham Loan & Auction Company was named as garnishee. The answer of the garnishee, as reduced to writing by the justice of the peace before whom the answer was made, recited that the Birmingham Loan & Auction Company appeared by its manager, S. Kaufman, who, being duly sworn, denied any indebtedness to Goetter. The plaintiff contested this answer, and, on the trial of the contest before the justice of the peace, judgment was rendered against the garnishee for the amount of the judgment and costs. Appeal was taken from this judgment to the Birmingham city court, and on the cause being called for trial, be-

fore the defendant announced "Ready," A. H. Benners, an attorney, as *amicus curiae*, moved the court to dismiss the cause "because the said garnishee is a fictitious person;" the Birmingham Loan & Auction Company being neither an individual, partnership, nor corporation. It was proven, on the testimony of one Umbenhauer, that he was an employe of S. Kaufman, and was during the time covered by the garnishment; that during such time the Birmingham Loan & Auction Company was the name under which S. Kaufman did business; that he had no partners; and that the Birmingham Loan & Auction Company was not a corporation. The court overruled this motion, and the said A. H. Benners, as *amicus curiae*, excepted to the ruling of the court. On the trial of the cause, proof was made by plaintiff of notice to A. H. Benners, as attorney of record for the Birmingham Loan & Auction Company, to produce its books of accounts in evidence, and, the same not being produced, the plaintiff introduced one W. T. Poe, who testified that this cause was first tried before him as justice of the peace; that he knew said Goetter, and that he worked for the Birmingham Loan & Auction Company during the time covered by the garnishment; that, upon notice by plaintiff to the Birmingham Loan & Auction Company, its books were produced in evidence on the trial before him, said Poe, and upon examination of the same they showed an account with A. Goetter, in which entries were made, showing that, during the time covered by the garnishment, the said Goetter had been paid by the Birmingham Loan & Auction Company \$400. The garnishee objected to the witness testifying as to the contents of the book on the ground that it "was secondary evidence, and no witness had been subpoenaed *duces tecum* to produce the books, and because it was oral evidence of garnishee's answer, which was in writing, and which would appear in the written transcript of the justice of the peace court." This objection was overruled, and the garnishee duly excepted. This being all the evidence, the court, hearing the cause without the intervention of a jury, rendered judgment for the plaintiff, to which ruling of the court the garnishee duly excepted.

A. H. Benners, for appellant. A. E. Barnett, for appellee.

HARALSON, J. 1. An *amicus curiae*, in practice, is one who, as a stander-by, when a judge is doubtful or mistaken in a matter of law, may inform the court. Bouv. Dict. "He is heard only by the leave and for the assistance of the court, upon a case already before it. He has no control over the suit, and no right to institute proceedings thereon; or to bring the case from one court to another by appeal or writ of error." *Martin v. Tapley*, 119 Mass. 118; 1 Lawson. Rights, Rem: & Pr. p. 262, § 156.

2. The attorney for the garnishee, as *amicus curiae*, moved to dismiss the suit on the ground that it was a fictitious one, and the garnishee was a fictitious person. The court overruled the motion, and, as *amicus curiae*, the attorney excepted. The garnishee, against whom judgment was rendered, assigns this ruling as error. The *amicus curiae*, in making this motion, was acting in the interest of his client, to aid him, more than to rescue the court from doubt and mistake; but, conceding his friendliness to the court to have been disinterested, after his motion was overruled his friendly offices were at an end. He had no interest which authorized him to except to the ruling of the court on his motion, nor can the garnishee, in this court, assign that ruling as error. Not having made the motion, and not having complained of the court's action on the motion, the ruling is not available on error to the garnishee. *Eslava v. Farley*, 72 Ala. 214.

3. The name of "Birmingham Loan & Auction Company" fairly imports a partnership. *Clark v. Jones*, 87 Ala. 474, 6 South. 362; *Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 South. 45. The proof showed that S. Kaufman, during the time covered by the garnishment writ, did business under that name. The name of a firm or partnership ordinarily implies more than one person, but still the name under which one person does business is arbitrary, and if he uses a name that implies a partnership the reputed firm may be sued under such name; and execution on the judgment obtained will run against the partnership in name, leviable only on its property, being in the nature of a proceeding in rem, and not in personam. *Le Grand v. Bank*, 81 Ala. 130, 1 South. 460; *Moore v. Watts*, 81 Ala. 265, 2 South. 278; *Yarbrough v. Bush*, 69 Ala. 171; Code, § 2605.

4. The garnishee filed an answer, by S. Kaufman, manager, denying any indebtedness, which answer was contested by plaintiff setting out several grounds wherein it was alleged to be untrue. On these the garnishee took issue. It executed an appeal bond from the justice's to the city court, and appeared by attorney. Having gone to trial on the merits, without having taken objection to any supposed defect in the lower court, the garnishee waived it, and cannot raise the point first here. *Hazard v. Franklin*, 2 Ala. 349; *Marston v. Carr*, 16 Ala. 330; *Ortez v. Jewett*, 23 Ala. 662; *Ware v. Rope Co.*, 47 Ala. 674; *Le Grand v. Bank*, supra; *Moore v. Watts*, supra.

5. The attempt to evade liability as a garnishee, in this instance, was extremely technical,—too much so for Justice to close her eyes against. Kaufman, who did business under this assumed name, made oath, as manager of garnishee,—the proof showing that he was the firm,—that his company owed the judgment debtor nothing, was not in-

debted to him at the date of the service of garnishment, nor since, never paid him any money, and yet admitted that he was working in the store of the company, and the proof tended to show that the debtor was paid by Kaufman, in that time, over \$400. The finding of the court that the answer was untrue was correct. This case is clearly distinguishable from *Ex parte Collins*, 49 Ala. 69. The only ground of error insisted on in argument is the one that the defendant was a fictitious person. There is no error in the record, and the judgment is affirmed.

(100 Ala. 154)

**SCHWARZ v. BAIRD et al.**

(Supreme Court of Alabama. Nov. 15, 1893.)

**WIFE AS FEME SOLE TRADER—CERTIFIED COPIES—SWORN ACCOUNT FOR GOODS SOLD.**

1. The husband's written consent that his wife shall engage in business as a feme sole, required by Code, § 2350, to be filed and recorded in the office of the probate judge, is a paper kept by a sworn officer, and transcribed on his records, under Code, § 2788, so as to admit said officer's certified copy of it as evidence, unless the court, on motion, require production of the original.

2. Code, § 2350, prescribing that a husband's consent to his wife's acting as a feme sole trader shall be in writing, signed by him, and filed with the probate judge, since it does not expressly require acknowledgment, entitles to record such paper unacknowledged, and invests a certified copy of it with like faith and credit as copies of acknowledged instruments so filed.

3. An affidavit set forth that affiant was agent of plaintiffs; that the annexed account was a just claim against defendant; that there was now due thereon a certain sum, with interest from a certain date, for goods sold and delivered to defendant at her special request; that there were no credits against it, in law or equity; that plaintiffs had no security for any part of it; and that no usury was included therein. Held sufficient to admit the account as evidence.

4. In an attestation, the words, "In witness whereof, I hereunto set my hand and national seal, at," etc., signed, "S., Notary Public," and sealed, show an evident clerical misprision of "national" for "notarial," which cannot prejudice.

**Appeal from city court of Birmingham; H. A. Sharpe, Judge.**

Action by Baird & Levi against Hannah L. Schwarz on account for goods sold and delivered. Judgment for plaintiffs. Defendant appeals. Affirmed.

The pleas and replications are sufficiently stated in the opinion. The plaintiffs introduced an itemized account against the defendant, showing the amount due the plaintiffs from the defendant equal to the amount set out in the affidavit attached to said itemized account. This affidavit was in the following language: "State, county, and city of New York. Personally appeared before me Henry J. Unthielle, who, being duly sworn, says he is agent for Baird & Levi, formerly Cochran, Baird & Levi; that the annexed account is a just and lawful claim against H. L. Schwarz, Birmingham, Ala.; that

there is now due and owing thereon from the said H. L. Schwarz to the said Baird & Levi the sum of two hundred and sixty-eight 50-100 dollars, with interest from the 6th day of September, 1890, for goods and merchandise sold and delivered to H. L. Schwarz, Birmingham, Ala., at her special instance and request; that there are no credits, set-offs, or counterclaims against it, either in law or equity; that the said Baird & Levi have no security whatever for any portion of said indebtedness; and that no usury is embraced therein. Henry J. Unthielle. Subscribed and sworn to before me this 4th day of June, 1891. In witness whereof, I hereunto set my hand and national seal at my office in the city of New York, county & state aforesaid. Samuel H. Smith, Notary Public, New York County. [Seal.]" The defendant moved to exclude from the consideration of the jury the itemized account, and the affidavit attached thereto, "because said affidavit does not recite that said account is true, correct, due, and unpaid, as is required by the laws of Alabama authorizing the introduction of itemized accounts in writing." The court overruled this objection, and the defendant duly excepted.

Wade & Vaughan, for appellant. H. K. White, for appellees.

**McCLELLAN, J.** This action is prosecuted by Baird & Levi against Hannah L. Schwarz on an open account for the price of goods, wares, and merchandise sold and delivered by them to her. To the general issue was added a plea of coverture. To this special plea the plaintiffs replied that, when the goods were sold to defendant, she was engaged in the mercantile business, and that she had the consent of her husband, Louis L. Schwarz, expressed in writing, for her to engage in and carry on business in her own name, as if she were a feme sole, and that said consent was filed and recorded in the office of the judge of probate of Jefferson county, as required by law. Issue being taken on this replication, the plaintiffs offered in evidence a copy of what purports to be a written consent of, and signed by, Louis L. Schwarz, to his wife, the defendant, engaging in business as if she were a feme sole, etc., which is certified by the probate judge as a true and correct transcript from the records of his office. The defendant objected to this evidence on two grounds only: "(1) Because the same is secondary evidence, the nonproduction of the original not being accounted for; (2) because said paper purporting to be of file and record in the probate office had no certificate of acknowledgment of the signature of Louis L. Schwarz, and was not entitled to record in the probate office, and no faith and credit could attach to same."

The answer to the first objection is that this paper is required by law to be "filed and recorded" in the office of the probate

judge, or, in other words, to be "kept" by that officer and transcribed on the records of his office, (Code, § 2350;) and a certified copy of it is therefore admissible in evidence whenever the original would be competent, unless the court, on motion, requires the production of the original. Code, § 2798.

The second objection is equally untenable. The gist of it is that the paper was not entitled to be filed and recorded in the probate office because it bore no certificate of acknowledgment of execution, and therefore no faith and credit could attach to the certified copy. It is sufficient to say, in reply to this, that the statute does not require a certificate of acknowledgment as a condition precedent to the filing and recording of this paper in the office of the probate judge. Code, § 2350. Probably, the law should be changed in this respect, but we deal with it as it is. If there were other objections to this evidence, they are to be taken as waived; and, if it did not support the replication, the point is not raised on this record. No charge was given or refused, so far as is disclosed here, which asserted or denied that plaintiffs had made out their case.

The objections to the introduction of the account are without merit. The statements set forth in the affidavit are in substantial conformity to our statute, and the use of the word "national" in the jurat of the notary is so manifestly a clerical misprision—and this it may be on the part of the city court clerk—as to be of no importance. The intention, clearly, was to say "notarial seal," and not "national seal." The judgment must be affirmed.

(100 Ala. 279)

#### GARRETSON v. JOSEPH.

(Supreme Court of Alabama. Nov. 16, 1893.)

PAYMENT BY CHECK—OF JUDGMENT TO MAGISTRATE.

A justice of the peace, who accepts a judgment debtor's check payable to himself personally in payment of the judgment rendered by him, satisfies the judgment on his record, and pays to the successful party the amount due him, cannot, on dishonor of the check, recover of said party the money paid him; and whether the judgment debtor had money in the bank to pay the check between the times it was made and presented is immaterial.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by J. T. Garretson against Henry Joseph for money had and received. Judgment for defendant. Plaintiff appeals. Affirmed.

Dickinson & Kerr, for appellant. Richard H. Fries, for appellee.

COLEMAN, J. The appellee, Henry Joseph, sued one T. H. White, and recovered a judgment against him before the appellant, Garretson, as a justice of the peace. To pay the judgment and cost of suit, White gave his check, payable to said Garretson, for the

full amount. Garretson marked the judgment on his docket "Satisfied," and paid over to Henry Joseph, in whose favor the judgment was rendered, the amount of the judgment in his favor. Garretson mislaid the check, and forgot it had not been paid. Discovering his neglect some four months afterwards, he presented the check for payment, and it was refused. The plaintiff in this suit, Garretson, the justice of the peace, brought the present action to recover from Joseph the money paid him on the judgment. The plaintiff introduced evidence tending to show that at the time White drew the check he did not have sufficient money in the bank to pay the entire check, and was not had sufficient for this purpose but once before the bringing of this suit, and that but for a short time. We think this immaterial. Garretson was authorized to receive payment, and entered satisfaction of the judgment recovered before him. The check was made payable to him individually. He received it as payment. The facts show this conclusively. He satisfied the judgment, and paid the amount to Joseph, the party in whose favor the judgment was rendered. After satisfying the judgment, and payment to Joseph, the check was his individual property. No other person had any interest in it. He certainly has no recourse on Joseph. If he has any remedy it is against White. There is no error in the record. The judgment is affirmed.

(100 Ala. 326)

#### WOOD et al. v. HOLLY MANUF'G CO.

(Supreme Court of Alabama. Nov. 7, 1893.)

PURCHASE-MONEY LIEN—RESERVATION BY AGREEMENT—EFFECT—RIGHTS OF PURCHASERS.

1. One supplying pumping engines for waterworks may, by express agreement, retain a lien on the engines, for their price, after they are affixed to the company's premises.

2. When a lien is given "on all of said engines" until "the whole amount of the purchase price of said engines" has been paid, the payment of the price of one engine does not discharge the lien thereon.

3. A lien for the price of machinery furnished to a water company is not incapable of enforcement because the public might be inconvenienced thereby.

4. A fact important to be proved for the defense, capable of proof, and not proven, will be presumed not to exist.

5. A mortgage covering after-acquired property does not take precedence of a lien expressly retained on such property for its price.

6. One holding under a quitclaim deed cannot claim protection as a bona fide purchaser.

7. Where a contract for the erection of machinery on defendant's premises reserves a lien for its cost, the fact that, before all the machinery is on the premises, they are conveyed to another person, who takes with notice of the contract, does not affect the existence of the lien on all the machinery, when finally erected.

Appeal from chancery court, Mobile county; W. H. Tayloe and Thomas W. Coleman, Chancellors.

Bill by the Holly Manufacturing Company against Richard D. Wood & Co., the Blenville Water Supply Company, and others, for



an accounting, and the enforcement of a purchase-money lien on certain machinery. From a decree for complainant, defendants appeal. Affirmed.

On the 13th of December, 1886, a contract was entered into between the Bienville Water Supply Company, hereafter referred to as the Water Company, and Bullock & Co., by which the latter undertook to construct for the former a complete system of waterworks, including the furnishing of engines and pumps, the former contracting to pay Bullock & Co., for the work to be done, in bonds and shares of its stock. To procure a site for the waterworks, Bullock & Co. purchased a tract of land, and on the 13th of December, 1886, received from their grantor a conveyance thereof to themselves, and immediately took possession, and erected thereon an engine and pump house, in which they afterwards placed the engines and pumps for said works. In order to carry out its contract with Bullock & Co., and enable them to perform their contract in the building and completion of said waterworks, the Water Company, on the 1st of January, 1887, made and delivered to the Farmers' Loan & Trust Company of New York a mortgage on all its real and personal property then owned, or which might thereafter be acquired, in trust to secure bonds to be issued by said Water Company, for the purposes specified, in the sum of \$750,000, and did also, thereupon, duly execute its bonds, in the aggregate, amounting to said sum, and deliver the same, together with certificates for the full amount of its capital stock, being the sum of \$500,000 par value, to said Bullock & Co., to proceed with and complete said waterworks, to be in full payment to them therefor, when completed. Said mortgage was filed for record and duly recorded in the office of the probate court of Mobile county on the 24th day of February, 1887, and is still in force. The loan and trust company accepted the trust. On the 24th of February, 1887, Bullock & Co., for the purpose of complying with their contract with the Water Company, and while yet the owners of the legal title of said tract of land, purchased by them on the 13th of December, 1886, as a site for said waterworks, entered into an agreement with complainant, the Holly Manufacturing Company, by which it agreed to manufacture and set up, in working order, in said engine and pump house, two pump engines and connections, the same to be paid for by Bullock & Co. in installments specified in the contract. It was provided in said contract that "when said engines and connections are completed and ready for service, and on notice thereof to the party of the first part [Bullock & Co.] to that effect, the same shall be subjected to a fair trial of their capacity and efficiency, for not exceeding 24 hours, and on the successful testing thereof the liability of the party of the second part [complainant] shall cease and de-

termine; but it is expressly understood and agreed that party of the second part shall have a lien on all of said engines and connections, and the said party of the second part may remain in and have full possession thereof, until the whole amount of the purchase price of said engines and connections shall have been fully paid to the party of the second part or its assigns." Complainant constructed and erected such engines and pumps in said house prepared for their reception, in full and satisfactory compliance with their contract, so far as appears; the first engine, with its connections, having been so erected prior to 21st March, 1888. It had commenced to erect the second prior to that date, was engaged in erecting it at that time, and finished its erection soon thereafter,—by about the middle of April, 1888. Each engine, with the pump and connections, is placed, as is averred and shown, upon a foundation prepared for it, and fastened thereto by bolts with taps, and can be removed therefrom, and from the building, without injury to the foundation, or to the pumping engine house. On the 21st March, 1888, Bullock & Co. executed to the Water Company a quitclaim deed to the land on which they had erected said structure, and which was conveyed to them on the 13th of December, 1886.

Subsequent to the making of said contract between complainant and Bullock & Co. for the construction of said engines, pumps, and connections, and prior to the 1st of January, 1888, the said Bullock & Co., in order to raise the money to carry on the construction of said waterworks, and several other like water company systems which they were then engaged in constructing, and to pay, among other things, for said engines and pumps so contracted for with complainant, made an arrangement with defendants Hooper & Co. by which the latter were to loan and advance, or procure to be loaned and advanced, to them, the said Bullock & Co., large sums of money, upon the pledge and collateral security of said bonds and stocks so issued by said Water Company, and other like bonds and stocks issued by other water companies; and in accordance with said arrangement said Bullock & Co. did pledge and deliver to said Hooper & Co. the said bonds and stocks of the Water Company, and other water companies, and the said Hooper & Co. did loan or advance, or procure it to be done, from time to time, to said Bullock & Co., large sums of money, aggregating over \$1,000,000; and afterwards, learning that the money they had advanced upon the faith of said bonds and stocks was not sufficient to complete the same, they declined to make any further advances on account thereof. Before the refusal of said Hooper & Co. to make such further advances, the defendants R. D. Wood & Co. had furnished to said Bullock & Co. large quantities of iron pipe and other materials to be used in the con-

struction of said several waterworks, and were under contract to deliver certain other large amounts of such iron pipe and materials to be used in the completion of said waterworks, for and on account of which said Bullock & Co. were indebted to said Wood & Co. in a large sum of money; and in consideration and on account thereof, and in view of the fact that said Hooper & Co. had declined to make such further advances, and for the purpose of completing the construction of said waterworks in accordance with the contracts of said Bullock & Co. with the waterworks companies, respectively, and for the purpose of obtaining payment for the money and pipe which they had already furnished and might thereafter furnish, the said Wood & Co. and Hooper & Co., on the 26th day of October, 1887, entered into an agreement in writing with Bullock & Co. and each other, found attached to the bill as Exhibit B, and known and called in the proceedings as the "Tripartite Agreement." In and by the second clause of said agreement, it was provided that Wood & Co. should from time to time present to Hooper & Co. the detailed applications for money needed for the purposes aforesaid by said Bullock & Co. to pay for labor and materials, to an aggregate amount not to exceed \$200,000, in the proportions hereinbefore (hereinafter) named, at Chester, Greencastle, and Mobile, to which application should be attached the four-months note of Bullock & Co., for the amount therein specified, with discount added, whereupon the said Hooper & Co. should pay the said Wood & Co. the amounts so called for, in all not exceeding said sum of \$200,000; and the said Wood & Co. were then, immediately, to give their checks for the same to said Bullock & Co., who were to disburse the same for the purposes specified, and give said Wood & Co. the proper certification and vouchers therefor. The third clause in said contract provided that, in consideration of said advances of \$200,000 to Bullock & Co., and of one dollar to them paid, the said Wood & Co. agreed to procure the completion of said waterworks at Chester, Mobile, and Greencastle according to the specifications, and clear of all liens ahead of the securities held by William G. Hooper & Co., with the utmost diligence, and without delay. According to the agreement, also, it was provided that, of the \$200,000 to be advanced by Wood & Co., \$60,000 was to be applied to the Mobile works. It ought to be stated in this connection, for the better understanding of the case, not as a part of the pleadings, but as uncontradicted proof, in connection with the said tripartite agreement, of the considerations for its execution, and the obligation of the parties under it, that there was another agreement between Bullock & Co. and Wood & Co. on the 2d day of October, 1887, as Wood himself testifies, furnishing a copy of it, in answer to the cross interrogatories propounded to him by complainant, providing

that "whereas, Walter Wood has undertaken to procure the completion of the waterworks of Chester, Mobile, and Greencastle, and to secure such sums of money necessary for the completion thereof as may be required to be expended upon them: Now, this agreement witnesseth that, in consideration of the said undertaking of Walter Wood, S. R. Bullock & Co. do agree to give to the said Walter Wood the controlling interest in the construction of the New Chester Waterworks, the Bienville Water Supply Company, and the Greencastle Water Company, and to divide in equal portions (half and half) with the said Walter Wood such portion of the bonds of these companies as may revert to S. R. Bullock & Co. under the contract with William G. Hooper & Co., after the moneys for which such bonds are specifically placed shall be paid, with interest, and in the contract with William G. Hooper & Co. and R. D. Wood & Co. are specially provided, together with such expenditures as are necessary to pay the labor required, and to furnish the supplies, materials, and machinery needed for the completion of said works." Attached to his deposition, as Exhibit No. 1, is a "statement showing cost of complete works, Mobile, Ala.," aggregating \$738,995.52, in which occurs the item, "pumping engines, Holly Manfg; \$50,000," which said Wood, in answer to rebutting Interrogatory 3 by complainant, says was furnished by Bullock & Co. about September, 1887. Harry S. Hooper, in his answer to rebutting Interrogatory 3, makes the same statement as to the time when said statement of Bullock & Co. was made.

On the 9th day of November, 1888, Bullock & Co. executed to defendant Perrot an assignment of their contract with the Water Company. Perrot received said assignment for the benefit of Wood & Co. On the same day,—9th November, 1888,—Bullock & Co. executed two other assignments directly to Wood & Co.,—the one, of all their claims arising under the contract with the Water Company; and the second, of all their interest in the stocks and bonds of said company, by whomsoever held. Bullock & Co. were to pay to complainant, according to their contract, \$8,333.33 when the first engine was delivered in Mobile, a like sum when said engine had been properly run for 30 days, and a like sum in 60 days thereafter. The same payments were to be made when the second engine was delivered in Mobile, when it had been properly run for 30 days, and in 60 days thereafter. Payments were made, as is shown and not disputed, by Bullock & Co. to complainant, on account of the engines and pumps, from July 8, 1887, to March, 1888, inclusive, the sum of \$25,000. On August 11, 1888, Bullock & Co., on a settlement that day had with complainant, acknowledged in writing that they owed complainant the sum of \$25,000 on contract for pumping engines for Mobile, and \$41,667 on contract

for pumping engines for Chester, and that they owed these sums is not in dispute. On the 26th November, 1888, complainant recovered a judgment, in a court of Pennsylvania against Bullock & Co. for \$67,811.44, of which judgment \$25,437.50 was on account of the balance due on the purchase price of such pumps, engines, and connections, with the interest thereon up to the date of the judgment, which sum is still due, and was unpaid when the final decree in the cause was rendered. Under its said contract for building and erecting said engines, pumps, and connections, from the time they were put in place up to the filing of the bill, complainant claims to have retained the possession and control of said machinery, and then to be in the actual possession and control thereof, and had retained its servant in direct, open, and exclusive charge thereof, but had allowed the same to be run, under the direction and control of such servant, for the purpose of supplying water to the system, to fulfill contracts made by Bullock & Co., and the Waterworks Company, and the same were being so run and used when the bill was filed. Under an agreement between complainant and the Water Company after filing the bill, the works were to be operated by the company without in any manner affecting the status quo of the parties. The special relief sought is an account to ascertain the amount due complainant from Bullock & Co. upon its judgment, on account of the purchase price of such engines and connections, and a sale thereof for the satisfaction of the amount so ascertained, and for that purpose a severance and removal of them, or a sale thereof with authority to the purchaser to so sever and remove, and for general relief. No accounting is sought or relief prayed against any of the defendants, except as specified above. A demurrer was interposed, on many grounds, but it was overruled by the chancellor, in a very full and carefully prepared opinion. On final hearing on pleading and proof, a decree was rendered in favor of complainant, in accordance with the prayer of the bill.

Hamiltons, Overall, Bestor & Gray, for appellants. B. H. Clarke, for appellee.

HARALSON, J. 1. In the opinion of the chancellor, (Coleman,) it was very pertinent asked, "Were complainants and Samuel R. Bullock authorized to make the contract of which Exhibit A is a copy? Was it a legal contract, and did it give complainants a lien upon the engines and connections as a security for the payment of the whole debt secured?" Answering, it was said: "There can be no question of this. They were the absolute owners of the property, the subject of contract, were under no disabilities to make it, and were authorized and capable of making such terms and provisions as they saw proper. If this suit was between com-

plainants and Bullock & Co. only, there would be no room for controversy. Can Samuel R. Bullock & Co., by any voluntary act on their part, amend and destroy the security thus given, without the consent of the other party, or without some fault or negligence of the other?" Let us treat the case, for the time, therefore, as if it were between complainant and Bullock & Co. only, and the rights of intervening third parties become of easier solution.

2. The contract expressly reserved a lien on the engines, pumps, and connections, with the privilege of possession. The character of this lien has been the subject of much discussion, and is well settled in the books. There is but a narrow distinction, so far as the security of the debt and its enforcement in a court of equity go, between a mortgage, as such, and what is denominated simply an "equitable lien or mortgage." A lien, to be of the former class, must arise where the possession remains with the debtor. It is something more than a mere lien or security. As said by this court in *Jackson v. Rutherford*, 73 Ala. 157: "No technical words are necessary to constitute a mortgage which would be good at law, any more than in equity. Any words would be sufficient which serve to show a transfer of the mortgaged property as security for a debt. Whatever language may be used, if it shows that the parties intended a sale of the chattels as security, the instrument will be construed to be a mortgage." *Jones, Chat. Mortg.* §§ 1, 8, 9. The court add: "In some of our decisions, expressions are used which seem to confound the distinction between legal and equitable mortgages, but there is no case in our Reports which really conflicts with the principles declared in this decision." Again, it was said in *Kyle v. Bellenger*, 79 Ala. 521, that "a lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as in the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give it effect as such, in furtherance of the agreement of the parties, if there appears an intention to create a security. Says Judge Story: 'If the transaction resolve itself into a security, whatever may be its form, it is, in equity, a mortgage.' *Flagg v. Mann*, 2 Sum. 533. Neither is any particular form of words necessary to the reservation of a lien. Any words which manifest an intention to retain one will be sufficient in a court of equity." An equitable mortgage, or lien in the nature of a mortgage, is enforceable alone in equity; and a legal mortgage, at law or in equity. *Newlin v. McAffee*, 64 Ala. 357; *Jones v. Anderson*, 70 Ala. 431; *Bank v. Barnes*, 82 Ala. 620, 2 South. 349; *Donald v. Hewitt*, 83 Ala. 584; 8 Pom. Eq. Jur. §§ 1233-1237; *Gregory v. Morris*, 96 U. S. 619.

3. It has been suggested in argument, against the idea of a retention of a lien of any character by the complainant which could be made effective as a security, that the engines, pumps, and their connections, became fixtures to the freehold, and incorporated into the system of the Water Company, and could not be removed; but the bill alleges and the proofs show that the annexation of the chattels to the realty were, by the agreement, conditional. It was not intended on either side that they should become permanent accessions to the land—converted into a part of it—until two conditions were complied with, viz. (1) that the engines, after being attached as they were, should be subjected to a 30-day test, to ascertain if they came up to the guaranty of their builders, which they were required to do before Bullock & Co. were bound to accept them; and (2) not before they were paid for, if they were found to be satisfactory. If they had proved to be failures, they would have had to be removed, and so, if not paid for, they might also, according to the agreement, be removed, if necessary in the enforcement of the lien reserved for their purchase price; otherwise, the contract of the parties would be rendered nugatory. One of the requisites to convert a chattel into a part of the realty is that it must be the intention of the party making the annexation to make a permanent accession to the freehold, which will be implied if he erects such structures as ordinarily attach to the land without agreement to the contrary with the owner. But reservation of the right by agreement of the parties is sufficient to remove a house or machinery, or other like erections, which, in their removal, do not materially injure the premises. *Powers v. Harris*, 57 Ala. 143; *Tillman v. De Lacy*, 80 Ala. 103; *Vann v. Lunsford*, 91 Ala. 576, 8 South. 719; *Ware v. Shoe Co.*, 92 Ala. 151, 9 South. 136; *Ewell, Firt.* §§ 66, 316.

4. It has been made to appear, therefore, that, so far as complainant and Bullock & Co. are concerned, there was no legal impediment in the way of their entering into a contract; that there was nothing in the condition of the property, and the character of the lien reserved, which forbade them to contract as they did; and that whether, as a matter of fact, the possession of the property was retained by complainant, or delivered to Bullock & Co., makes no difference in the security, since a court of equity will enforce it in the one case as well as in the other, unless the security has been forfeited by transactions outside of the conditions in the original contract, which defendants contend has been done, as to Bullock & Co., on two grounds, which we consider:

5. It is contended that pump No. 1 was fully paid for by them before the filing of the bill, and was therefore relieved of complainant's lien, and that the pumps are necessary for public purposes, and cannot be re-

moved without stopping public works. It is not denied that \$25,000 of the \$50,000 agreed to be paid for both engines has been paid; that as the money was paid in installments, as it was agreed it should be paid, it went in payment of the first work done, and as done, which was on pump 1; and that the sums so paid were in full of the cost price of that pump. But, while this is clear, yet not a word appears to have been said, when any or all the payments were made, that they should operate as a release of the lien on that pump for the price of the two; and the contract does not provide for a lien on each pump separately, for its own price, and not for the price of both, but it is, on the other hand, expressly stipulated "that the party of the second part [complainant] shall have a lien on all of said engines and connections \* \* \* until the whole amount of the purchase price of said engines and connections has been fully paid." The lien was upon the whole, and not upon a part only, and no part of the security has been released. The construction contended for would go to the extent of holding that where a lien is given in writing on several articles sold, to secure the aggregate price of all, it operates only as a lien upon each article sold, for its own price, which we are unable to sanction.

6. The second point mentioned—that of the forfeiture or loss of the lien on account of the public inconvenience—is equally untenable. Public policy favors the enforcement of debts and the sustaining of credit, public as well as private. Waterworks, railroads, gasworks, and other like enterprises in which the public are so largely interested, are constructed mainly upon credit, which could not be obtained if a lien or mortgage given to secure the credit were denied enforcement by the courts because the public would be inconvenienced by its assertion. Such a doctrine would be tantamount to the appropriation of private property to public use without compensation, which is forbidden by the constitution. If the principle were tenable, it would apply with as much force to the general mortgage given by the Water Company to secure its bonds, under which some of these defendants are claiming, as against the complainant's lien, for its foreclosure might work all the public inconvenience that the enforcement of complainant's lien could possibly do. *Hill v. Railroad Co.*, 11 Wis. 214; *Phil. Mech. Liens*, § 182.

7. From what has gone before, we may the better inquire and understand what rights third parties have acquired, the nature of such rights, and their effect upon complainant's lien. From the statement of facts, it has appeared that the Water Company is the principal debtor on the bonds, and is the mortgagor of the real estate to which the engines are said to be attached as fixtures. Hooper & Co., who, as agents, advanced the money for Bullock, and who are

his successors, and Wood & Co., are holders of the bonds, the security of which will be diminished by the enforcement of complainant's lien. The other defenses set up for these parties as stated, and argued by their counsel, are (1) that the lien of complainant is void as to each of them because not recorded; (2) that Hooper & Co., as successors of Bullock, are bona fide purchasers without notice; (3) that Bullock & Co. were fully paid by the Water Company; (4) that complainant did not retain possession of the pumps, and the bondholders had no notice of complainant's lien; and (5) that the second pump was erected after Bullock & Co. had conveyed to the Water Company the land to which it was attached. The real defense, which, if good, complainant must fail in the litigation, and, if not, these defendants must fail, is that they are bona fide purchasers without notice.

8. So far as the Water Company may be protected by such a plea, it is scarcely worth the while to discuss. It does not deny complainant's lien, and its notice of it. It simply does not admit the lien and notice, but its attitude is that of a defendant in the interest of Hooper & Co. and Wood & Co. For them, it denied the said lien, and notice of it, and claims in argument that they are bona fide purchasers without notice. The Water Company was driven by force of the facts to, and very honestly assumed, this attitude, in the litigation.

9. With respect to this transaction, the distinction between Bullock & Co. and the Water Company is purely formal and fictitious. Bullock & Co. were the Water Company, in everything but name. They held the entire capital stock. The entire issue of bonds under the general mortgage was placed at their disposal. Without neglect of duty, the company must be presumed to have known what Bullock & Co. were doing towards the fulfillment of their contract. The proofs tend strongly to show that the president, Dr. Ketchum, who resided then and afterwards in Mobile, had knowledge of complainant's lien, and of its retention of the possession of the property, before Bullock & Co. conveyed to the company the land on which the engines are located; and his deposition was not taken to rebut proof of notice, for the reason, we may presume, he could not rebut it. A fact important to be proved for the defense, capable of proof, and not proved, will be presumed not to exist. *Roney v. Moses*, 74 Ala. 390; *Carter v. Chambers*, 79 Ala. 231.

10. As to the other defendants for whom the plea is set up, two essentials are necessary to be borne in mind for the establishment of their claim: (1) That the pumping engines had become fixtures of the real estate covered by the mortgage of the Water Company; and (2) that these defendants are bona fide purchasers of said real estate, for value, without notice. The com-

plainant sets up no equity against all, but against a part only, of the property claimed to be covered by the mortgage made to secure the bonds. This litigation does not raise the question of protection of the bonds. These might well be entitled to protection against secret trusts, if any were sought to be fastened on them, but not to equities attached to the land conveyed to secure them. If defendants claim the land as subject to their mortgage by virtue of their being bona fide purchasers of it, for value, without notice of complainant's lien on it, which was prior to theirs, then, by their plea or answer, it was incumbent on them to make such claim as to the land itself, in the manner required by law. The defendants did make known their claim to the bonds, and how they acquired them, but whether in a manner as full as is required by law, (*Thames v. Rembert*, 68 Ala. 572,) we do not find it necessary to decide. Still, if sufficient as to the bonds, the answers are silent as to the material facts necessary to uphold the claim of bona fide purchasers of the land on which it is claimed the engines were attached in a manner to make them immovable fixtures. "The rule is settled in this state that in such cases [defense of bona fide purchase] it is required of a defendant, who is a subpurchaser, to aver in his plea or answer, clearly, distinctly, and without equivocation, and with proper circumstantiality of detail, the following facts: (1) That he is a purchaser from one in actual or constructive possession, who was seised, or claimed to be seised, of the legal title, at the same time briefly setting out substantially the contents of the deed of purchase, with date, consideration, and parties; (2) that he purchased in good faith; (3) that he parted with value, paying money or other valuable thing, assuming a liability or incurring an injury, stating the nature of the consideration fully; (4) that he had no notice of complainant's equity, and knew of no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration." *Hooper v. Strahan*, 71 Ala. 79; *May v. Wilkinson*, 76 Ala. 545; *Gresham v. Ware*, 79 Ala. 192; *Boon v. Chiles*, 10 Pet. 211. In the last case cited, the supreme court of the United States, in announcing a similar doctrine, say that the conveyance must be a regular one, "for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor." And our court, in *Gresham v. Ware*, 79 Ala. 148, speaking of the same defense and announcing the same doctrine as that stated above from *Hooper v. Strahan*, say of the party setting it up: "In no appropriate manner does he bring before the court the claim of a bona fide purchaser without notice, and his rights as such must be considered as eliminated from the case."

11. When the general mortgage was made,

the Water Company had not acquired, and did not own, the legal title to the land to which the engines are attached. The claim of defendants rests on the extension of the mortgage to "after-acquired property." Such a mortgage does not pass the legal title to after-acquired property. It is only an equitable mortgage, operative on such property as soon as it is acquired. "In other words, it seizes the property, or operates on it by way of estoppel, as soon as it comes into existence, and is in the possession of the mortgagor." 1 Jones, *Mortg.* § 152.

12. To the proposition that a prior general mortgage, which in terms covered after-acquired property, attached to rolling stock as soon as acquired, to the displacement of a contractual lien on it, the supreme court of the United States, by Justice Bradley, said: "The doctrine is intended to subserve the purposes of justice, and not injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes to the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time." *U. S. v. New Orleans R. Co.*, 12 Wall. 362. And it was added that such a prior lien or equity does not come within the reason of the registry laws, which are intended for the protection of subsequent, not prior, purchasers and creditors. This court, touching the same matter, in *Shorter v. Frazer*, 64 Ala. 81, quote approvingly the language of Chief Justice Marshall in *Vattier v. Hinde*, 7 Pet. 271, that, "the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate, and pays the purchase money, without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. Even the purchaser of an equity is bound to take notice of any prior equity." And in the same case the court hold that if the purchase is of a mere equity, which can be enforced only through the instrumentality of a court of equity, there is no reason for a departure from the general principle that priority in point of time creates priority in point of right, and that the transfer or conveyance must be limited to the interest of the grantor. 2 Story, *Eq. Jur.* § 1228; 1 Jones, *Mortg.* § 158; *Fosdick v. Schall*, 99 U. S. 235; *Meyer v. Car Co.*, 102 U. S. 1; *Trust Co. v. Kneeland*, 138 U. S. 414, 423, 11 Sup. Ct. 357. The chancellor, in his opinion in this case, used language so apt in this connection, we quote it here: "If the principle contended for by respondents be law, it is unsafe to contract with anybody for improvements, and rely upon the improvements for a contract lien as security. The landowner whose property is being improved has only to wait until the improvements are nearly completed, and sell out to some one who has given

a 'walking mortgage,' and the unsuspecting party will find himself stripped of his property and security." These defendants, when they acquired the bonds, parted with the valuable consideration which they here set up as a defense. If at that time their vendor, the Water Company, had no legal title, they acquired nothing more than the title their vendor afterwards acquired, subject to existing equities.

13. The deed from Bullock & Co. to the Water Company was a quitclaim deed. It passed only such interest as Bullock & Co. had, subject to all liens and incumbrances. As has been repeatedly held, one who holds under a quitclaim deed only cannot claim protection as a bona fide purchaser without notice. *Derrick v. Brown*, 66 Ala. 162; *Smith v. Perry*, 56 Ala. 269; *McMillan v. Rushing*, 80 Ala. 407.

14. As to whether or not defendants Hooper & Co. and Wood & Co. had notice of complainant's lien, as a matter of fact, is scarcely open to discussion. As to when they acquired notice is the subject of dispute, and the evidence is somewhat conflicting. Those firms, however, from the very beginning, stood in close and very important business relations to Bullock & Co., as respects the building of the Water Company's works, and it was the natural and business-like thing to do, for them to have become fully informed in regard to all of Bullock & Co.'s arrangements for carrying out their contract with the Water Company. In June, 1887, an agreement was entered into between Hooper & Co. and Bullock & Co. in reference to the furnishing of moneys for the completion of the water works at Mobile, it specifying, among other things, that said Hooper & Co., having already procured advances to Bullock & Co. of 50 per cent. of the \$750,000, agreed to make other advances to them on the completion of said works, and their acceptance by the city, "clear of all liens or incumbrances other than the first mortgage under which the bonds on which these advances are made and to be made." On the 2d of October, 1887, for considerations therein expressed, Bullock & Co. agreed to give to Walter Wood, of the firm of Wood & Co., a controlling interest in the construction of the Waterworks Company, after the moneys for which the bonds specifically placed with Hooper & Co. and Wood & Co., together with such expenditures as were necessary to pay for the labor required, and to furnish the supplies, materials, and machinery for the completion of the works, should be paid. Said Walter Wood testified that the firm of Wood & Co. were informed in August, 1887, that complainant was to furnish the engines and pumps to Bullock & Co., and Harry S. Hooper testified that Hooper & Co. were so informed in September, 1887; and in that month they show that Bullock & Co. furnished them, each, with a detailed statement of the estimated cost of the works, in which

was included an item of \$50,000 for "pumping engines, to the Holly Man'g Co." By the third item of the "tripartite agreement," (between Hooper & Co., Wood & Co., and Bullock & Co.) dated 26th of October, 1887, Wood & Co. agreed, as has been seen, to complete the works therein mentioned "according to specifications, clear of all liens ahead of the securities held by Hooper & Co., with the utmost diligence and without delay." Bullock testified that advances were made to his firm, after that agreement was entered into, by Hooper & Co., to the extent of \$200,000, and by Wood & Co. for at least \$100,000. He also testified that he furnished to Hooper & Co., between August and October, 1887, all the papers relating to the various plants in which his firm was concerned, including that at Mobile, and turned them over to them, and prior to October 26, 1887, the date of the tripartite agreement, he called Walter Woods' attention to his contract with complainant, and gave him a copy of it. After all this, what doubt can remain that these defendants were fully informed and had notice of complainant's lien on the engines and pumps long before the land on which they were erected was conveyed by Bullock & Co., by quitclaim, to the Water Company?

15. There is much evidence, also, tending strongly to show that complainant, by its agents, was in the open and notorious possession of the property from the beginning up to the time of the filing of the bill. This evidence, however, was in conflict with much introduced by the defendants tending to show to the contrary. We will not review it, since it is unnecessary.

16. As to the defense set up that the second pump was erected after the conveyance by Bullock & Co. to the Water Company, it is sufficient to say that the first engine and its connections had been placed on the land before the conveyance, and the placing of the second had been commenced, was then going on, and was soon thereafter completed, and that the fact that some of the parts of the second engine were attached after the conveyance cannot affect the question of complainant's security, which was reserved upon the whole, and not upon a part, of the property. The complainant had, as against Bullock & Co., under its contract with them, an equity to proceed with the completion of its contract, which was to put both engines on the ground, ready for use, and this equity a court of chancery recognizes. The Water Company and its mortgagees, as we have shown, acquired only such rights in the land as Bullock & Co. had, subject to all equities with which it was burdened, including this one of the complainant, to complete its contract. In contemplation of law, the complainant's rights and equities, as to both engines and their connections, are the same as if both had been put in place before the date of said conveyance.

17. Still another defense is interposed,—that Bullock & Co. had been fully paid by the Water Company all that it contracted to pay them, and if they did not pay complainant the bondholders ought not to be held to lose a part of their property covered by their mortgage,—concerning which it need only be said that they had no mortgage which was prior to complainant's lien, and if, by their carelessness, they failed to see that this lien, of which there is every reason to believe they were informed, was not paid off, so as to allow their mortgage to become operative on the machinery in question, it would be inequitable, and against all good conscience, to require complainant to surrender its prior lien on it for the benefit of defendants.

18. We deem it unnecessary to notice any other questions raised, or the objections to evidence with which the case is burdened, because, on the legal evidence in the cause, the complainant is entitled to recover. The demurrer to the bill was properly overruled, and it is our judgment that the decree of the chancery court be affirmed.

(22 Fla. 358)

## ALBRITTON v. STATE.

(Supreme Court of Florida. Oct. 9, 1893.)

LARCENY—PRINCIPAL AND ACCESSORY—INDICTMENT—APPEAL—REVIEW.

1. An accessory before the fact is one who, though absent at the time of the commission of a felony, does nevertheless procure, counsel, command, or abet another to commit such felony. An accessory after the fact is one who, with knowledge that a felony has been committed by another, aids, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact. A principal in the second degree is one who is present, aiding and abetting, at the commission of a felony.

2. In an indictment against three persons, charging that one of them committed a felony, and that the others were present, aiding and abetting in the commission thereof, all are indicted as principals, the one in the first degree, and the others in the second degree, and a conviction will be sustained against all of them on proper proof that either one committed the felony, and the others were present, aiding and abetting in the commission of the same.

3. An indictment charged that A. committed a felony, and that H. and M. were present, feloniously aiding, abetting, and procuring him to commit the same. A. and H. were jointly tried, and the court instructed the jury to the effect that, if they believed from the evidence beyond a reasonable doubt that H. committed the felony, and that A. was present, aiding and abetting in the commission thereof, they were authorized to find the accused guilty. *Held*, in the absence of a bill of exceptions showing the evidence in the case, that the charge was not erroneous as to H., jointly convicted with A.

4. Assignments of error not discussed may be treated as abandoned.

(Syllabus by the Court.)

Error to circuit court, Polk county; Barron Phillips, Judge.

Henry Albritton was convicted of larceny, and brings error. Affirmed.

J. L. Albritton and Frank Clark, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MABRY, J. Andrew Albritton, Henry Albritton, and Mitchell Albritton were jointly indicted in the circuit court for Polk county for the larceny of a cow. Mitchell not being present, Andrew and Henry were jointly tried, and convicted as charged in the indictment. Henry alone has prosecuted a writ of error to reverse the judgment of the court against him.

The indictment, omitting its formal allegations, charges that Andrew Albritton, on a certain day, within the county of Polk, with force and arms, "one cow, of the property of one Nathaniel E. B. Roberts, then and there being found, feloniously did take, steal, and carry away;" and that one Henry Albritton and one Mitchell Albritton, with force and arms, "were then and there feloniously present, and feloniously aiding, abetting, counseling, and procuring him, the said Andrew Albritton, the larceny to do and commit," against the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

We do not know what the testimony in the case was, the bill of exceptions not undertaking to give any of it.

In charging the jury, the court, after stating the issue in the case, and that the defendants were entitled to the presumption of innocence until the contrary is shown by the evidence beyond a reasonable doubt, said: "If you believe from the evidence in this case beyond a reasonable doubt that the defendant, Henry Albritton, took and carried away, for the purpose of appropriating the same to his own use, and with the intent to steal the same, one cow, the property of Nathaniel E. B. Roberts, that it was done in this county and state, that it was done within two years prior to the finding of this bill of indictment, then I charge you that you would be authorized to find him guilty as charged. And, further, if you believe from the evidence in this case beyond a reasonable doubt that Andrew Albritton was then and there present, feloniously aiding, abetting, counseling, and procuring the said Henry Albritton to commit the said larceny, then I charge you would be authorized to find him guilty as charged. I further charge you that persons participating in a crime are either principals in the first or second degree. A principal in the first degree is one who is the immediate perpetrator of the act. A principal in the second degree is one who did not commit the act with his own hand, but was present, aiding and abetting; principal in the second degree being

equally guilty of the act as if he was the perpetrator thereof. You are to look at all the facts and circumstances of the case as made by the evidence produced before you, and arrive at the truth of the case, and let that be your verdict." The only objection made to this charge, and the only ground urged here by counsel for the plaintiff in error to reverse the judgment, is, as stated by counsel, the confounding the names of the defendants by the judge in his charge. Andrew Albritton is charged in the indictment as having committed the larceny, and Henry and Mitchell as being present, aiding and abetting in the perpetration of the offense. Under this indictment, Henry and Mitchell Albritton are not charged as accessories either before or after the fact, but all three of the named defendants are indicted as principals,—Andrew in the first degree, and Henry and Mitchell in the second degree. The indictment here is different from the one in the case of *Ex parte Bowen*, 25 Fla. 214, 6 South. Rep. 65. "An accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, and abet another to commit such felony.

\* \* \* An accessory after the fact is one who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact. \* \* \* Principals in the second degree are those who are present, aiding and abetting at the commission of the act." *Montague v. State*, 17 Fla. 662. The punishment prescribed for principals in the first and second degrees is the same under our law. Rev. St. § 2354. Under the indictment before us, charging Andrew Albritton with the commission of the felony, and Henry Albritton as being present, aiding, abetting, and procuring the commission of the offense, both of them could have been convicted on a state of facts showing that Henry committed the offense, and Andrew was present, aiding, abetting, and procuring the commission thereof. The offense charged against all of them is the same. *State v. Ross*, 29 Mo. 32; *State v. Kirk*, 10 Or. 505; *Com. v. Chapman*, 11 Cush. 422; *State v. Fley*, 2 Brev. 338; *Boyd v. State*, 17 Ga. 194; *Brister v. State*, 28 Ala. 107.

The court instructed the jury as to principals in the first and second degrees, and they could not have been misled as to this. The evidence is not before us, and, assuming that the instruction was based upon testimony that could properly have been introduced, if Henry Albritton committed the larceny, as submitted by the court to the jury, he could have been properly convicted under the indictment. The ground of objection, in the motion for a new trial, to the juror Costine has not been discussed by counsel for plaintiff in error, and will be treated, under the



rule, as abandoned, though it has not escaped attention in considering the case.

The judgment should be affirmed, and it will be so ordered.

(32 Fla. 134)

**TAYLOR et al. v. BROWN et al.**

(Supreme Court of Florida. Oct. 9, 1893.)

**EQUITY—PLEADINGS—DEMURRER—OPENING ORDER PRO CONFESSO—PARTIES—WAIVER OF OBJECTIONS—MORTGAGE—ATTORNEY'S FEE.**

1. A demurrer lacking the affidavit of defendant and certificate of counsel required by the rules of practice is so fatally defective as not to preclude the entry at the proper time of a decree pro confesso for want of a plea, answer, or demurrer.

2. On an application of a defendant to set aside a decree pro confesso properly entered, he must show both reasonable diligence and a meritorious defense; and, in the absence of such showing, the refusal of the chancellor to set aside the default will not be disturbed.

3. In a joint suit in equity by husband and wife to recover the separate statutory property of the wife, no objection was made to the manner in which the wife sued. *Held*, after default and final decree, such objection cannot be made for the first time in the appellate court.

4. Where a mortgage provides a reasonable attorney fee for its foreclosure, it is error for the court to decree a sum for this purpose in the absence of proper proof as to such fee.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; Jesse J. Finley, Judge.

Bill by Augusta F. Brown and C. M. Brown against W. T. Taylor and M. D. Taylor to foreclose a mortgage. Complainants had decree, and defendants appeal. Reversed in part.

Bullock & Burford, for appellants. John G. Beardon, for appellees.

**MABRY, J.** Augusta F. Brown and her husband, C. M. Brown, appellees, filed a bill in the Marion circuit court on the 22d day of February, 1889, against the appellants to foreclose a mortgage on a lot of land situated in Marion county, Fla., and particularly described in the mortgage. This mortgage was executed on the 18th day of August, 1886, by appellants to Augusta F. Brown, wife of C. M. Brown, to secure the payment of three notes payable to her, each for \$1,000, dated August 18, 1886, and falling due respectively on the 1st days of September, 1888, 1889, and 1890, with interest thereon at the rate of 8 per cent. per annum from date until paid, interest payable semiannually. The mortgage contains the following clauses: "These presents are on this express condition: that if the said parties of the first part, their heirs, executors, or administrators, shall well and truly pay unto the party of the second part, her heirs, executors, administrators, or assigns, the said sum of money and the interest therein mentioned and set forth in said three notes, according to the true intent

and meaning of same, together with all costs, charges, and expenses, including a reasonable fee for the attorney of the holder of said notes, or either of them, which the party of the second part or her assigns or indorsee may incur or be put to in collecting the same by suit at law or in equity, that then these presents and the estate hereby granted shall cease and determine;" and "It is further covenanted and agreed by the parties of the first part to and with the party of the second part and her assigns, that if any installment of interest on said notes, or either of them, remains unpaid for ten days after same becomes due, that the party of the second part or her assigns may treat the principal sum of said notes as due, and proceed to enforce their payment, or that of either of them, and foreclose this mortgage."

The bill alleges that all interest due on said notes had been paid up to December 17, 1888, and that the sum of \$80 had been paid on the principal of the first note due September 1, 1888, and only this note, less the \$80, was past due, leaving due on it \$920, with the interest from the 17th day of December, 1888.

It is also alleged in the bill that, by the failure of the defendants to pay the first promissory note, the right to foreclose the mortgage for the amount at least due upon said first note has accrued, and, although the mortgage provides an option in the mortgagee to treat all said notes as wholly due upon default of payment of interest only on any or all of said notes for 10 days, yet it is submitted that according to the spirit and intent of said mortgage complainants have the option to foreclose the same upon non-payment of the principal of any of said notes at maturity, and that by reason of the failure of defendants to pay said first note at maturity, a right has accrued to complainants to foreclose for the full amounts due on all said notes, the total of said sums being \$2,920, with the interest mentioned in the same from the 17th day of December, 1888.

A subpoena returnable to rule day in March, 1889, was regularly issued and served upon defendants in the bill, and on the 27th of that month they filed what is claimed to be a demurrer to the bill. It is as follows, after giving the style of the cause: "In the above case come the defendants, by their attorney, D. C. Hardee, and before answering demurs to plaintiffs' bill on the grounds that the mortgage annexed to plaintiffs' bill, and which is made a part thereof, is void upon its face; that there are no subscribing witnesses to the same; and that it is defective, because not authenticated according to law; besides other defects, all of which are apparent upon the instrument itself. Whereupon [they] pray that the bill herein filed by plaintiffs be dismissed, with costs." The foregoing was sworn to by W. T. Taylor before the clerk of the circuit court as follows,

viz.: "Personally came and appeared before me, the undersigned authority, W. T. Taylor, who, being sworn, says that the facts stated in said demurrer are true, and that said mortgage is void, as he is informed and believes." There was no certificate of counsel that the demurrer was well-founded in law, and no affidavit that it was not interposed for delay.

On rule day in April, 1888, solicitor for complainant entered in the clerk's office a decree pro confesso against defendants, because "no plea, answer, or demurrer" had been filed as required by law, and gave notice of the setting down of the cause for final decree before the chancellor at chambers. On the same rule day that the decree pro confesso was entered defendants filed a petition to set it aside. The petition states that the attorney prepared the demurrer, and that defendant W. T. Taylor, after swearing to it, filed it without returning same to the attorney; that defendants were informed by their attorney that his failure to attach a certificate to the effect that the demurrer was meritorious and well-founded in law was because of its not being returned; that their attorney failed to state in the affidavit made by defendant that the demurrer was not made for delay, and these oversights and omissions made by their attorney should not in justice and equity be allowed to destroy their material rights, and deprive them of their legal defense; that, notwithstanding the demurrer was filed in due time, plaintiffs entered a decree pro confesso. Further, that said omissions and irregularities were not made for delay on their part, nor on the part of their attorney, as they believe, but the demurrer was filed in order that the court should pass upon the validity of the instrument annexed to plaintiffs' bill; that defendants were advised and believe that they could not safely answer until they knew whether or not said instrument was a valid mortgage; wherefore they pray that the decree pro confesso be set aside, and they be allowed to correct their said demurrer, and to file the same as of the proper date. W. T. Taylor swears that the facts stated in the petition as to his own acts and intentions are true, and he believes them to be true as to the acts and intentions of his attorney. The attorney attaches to the petition a certificate that it contains a correct statement of the case, and that the omissions and irregularities complained of were his fault, and not that of his clients. This petition, upon hearing before the chancellor, was overruled and denied. A final decree was entered for complainants for \$920 as principal, and interest thereon at 8 per cent. per annum from the 17th day of December, 1888, together with the sum of \$100, solicitor's fee incurred in foreclosing the mortgage, and costs of suit. From this decree defendants below appealed.

The first question to be determined is whether or not appellees' solicitor had a right to disregard the paper filed as a demurrer, notwithstanding its appearance on the files. We think he had such right. The rule provides that "no demurrer or plea shall be allowed to be filed to any bill unless upon certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, or in case of his absence from the state, of his agent or attorney, that it is not interposed for delay; and if a plea, that it is true in point of fact." The paper in the record before us, and filed as a demurrer, has no such affidavit or certificate attached to it.

The cases in our court cited by counsel for appellants—*Keen v. Jordan*, 13 Fla. 327, and *Eldridge v. Wightman*, 20 Fla. 687—do not decide the point here. Where counsel do not disregard a demurrer or plea unaccompanied by any certificate or affidavit as required by the rule, but proceed to test its sufficiency in point of law by setting it down for argument, or making some motion for that purpose, and waive the requirements of the rule as to affidavit and certificate, the court will dispose of the question without reference to such requirements. In the cases referred to it is said that a motion to strike the demurrer or plea from the files on account of the absent affidavit and certificate would be proper, but it is not said anywhere that counsel may not entirely disregard such a demurrer or plea. Our rule is a copy of the one adopted for the practice of the federal courts in such cases, and the supreme court of the United States has placed such a construction upon it as we adopt now. *National Bank v. Insurance Co.*, 104 U. S. 54; *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. Rep. 936. Counsel for appellees, having the right to disregard the paper referred to as any demurrer at all, exercised this right, and entered a decree pro confesso. This decree was properly entered on the rule day following the return day of the process for want of plea, answer, or demurrer, and no irregularity appears in its entry.

The next question is, did the court err in refusing to set aside the decree pro confesso on the application and showing made by appellants? This question must be answered in the negative. On an application of a defendant to open a decree pro confesso, in order to entitle him to success he must show both reasonable diligence and a meritorious defense. *Kell v. West*, 21 Fla. 508; *Myers v. McGahagan*, 26 Fla. 303, 8 South. Rep. 447. Appellants wanted the default set aside in order that they might attach the certificate and affidavit required by the rule to the paper filed as a demurrer, but there is no merit in the so-called "demurrer," nor do appellants show that they have any meritorious defense to the bill. The

grounds of this demurrer are that the mortgage annexed to complainants' bill is void upon its face, has no subscribing witnesses to it, and is not authenticated according to law. The mortgage attached to the bill shows that it has two subscribing witnesses to its execution, and is properly acknowledged and duly recorded. The court was correct in refusing to open the default on the showing made. Unless appellants had a meritorious defense to set up,—and this they did not show,—it would have been useless to set aside the default.

One of the grounds in the petition of appeal is that the cause was commenced in the court below and prosecuted by Augusta F. Brown, a married woman, and C. M. Brown, her husband, as complainants, without the intervention of a next friend. It is true the bill shows that Augusta F. Brown is a married woman, and that her husband, C. M. Brown, unites with her in the foreclosure of the mortgage executed to her. The objection urged here is that the married woman can only sue by her next friend, and it is not competent for her and her husband to unite as co-complainants in a bill to recover her separate property. In *Fairchild v. Knight*, 18 Fla. 770, where a married woman sought to enjoin a sale of her separate statutory property under an execution sued out by judgment creditors of her husband against him, it was said: "The bill here should have been by the wife, through her next friend, against the husband and the creditor." The language of Judge Story is also quoted, that "in all such cases she ought to sue as sole plaintiff by her next friend, and the husband should be made a party defendant." Story, Eq. Pl. § 63. In *Smith v. Smith*, 18 Fla. 789, where a wife filed a bill against her husband, and claimed that certain real estate purchased by the husband and deed taken in his name was paid for with her separate property, it was held that a married woman cannot in this state maintain a suit in her own name, but must sue by next friend, unless in cases where she has been licensed by the circuit court to transact business in her own name, as provided in chapter 3130, Laws 1879. In this case no objection, it seems, was made by the defendant to the manner in which the suit was brought, but on final hearing on the proofs the decree was against the wife. She appealed, and it was said in the opinion that "no objection was taken by the appellee [defendant] to the manner of bringing this suit, but we cannot, by our silence, permit or indorse such a violation of well-established law." The view was also expressed that the defect was subject to amendment, and that this court might have the power to send the case back for proper amendment, but, as an examination of the pleadings and testimony show that there was not such a case made as would warrant

a decree in favor of the wife, the judgment of the lower court was affirmed.

There can be no question but that cases may arise showing such a conflict of interest between husband and wife over the subject-matter of litigation as to make it indispensable for the wife to sue by next friend. In *Wake v. Parker*, 2 Keen, 60, objection having been made by demurrer to a bill filed by husband and wife to recover the wife's separate property, Lord Langdale, after remarking that it had been usual to file such bills, and many decrees had been made without objection in such cases, the court itself taking care that the separate estate of the wife recovered shall be protected from the husband, and reviewing the reasons given in the English cases for requiring the wife to sue by next friend, said: "And it is for the same reason that I have—though, I admit, with reluctance—come to the conclusion that I ought to allow this demurrer. I say with reluctance, because I think that suits thus constituted are of familiar occurrence, and I am aware that many decrees have been made in such suits without any inconvenience arising. I think also that in cases in which the husband and wife are not hostile, very little, if any, additional security is obtained for the wife by the appointment of a next friend, the probability being that, in such cases, the next friend is appointed by the wife on the recommendation of the husband. If a bill by husband and wife for the wife's separate estate were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think that a decree ought to be made." We need not in this case say what would be the proper ruling on demurrer interposed in time to such a bill for want of proper parties under our statute.

The record disclosing the fact that the suit here is for the recovery of the separate statutory property of the wife which the husband has the care and management of, and no objection having been made to the manner in which the wife sued in the lower court, after default and final decree, such objection cannot be made for the first time on appeal in this court. There is, however, an error in the entry of the final decree that is open to the objection of appellants. The mortgage provides for a reasonable fee to be allowed the attorney for foreclosure proceedings. No specific sum was fixed in the mortgage, or alleged in the bill, for this purpose, and it was not competent for the court to decree a sum for this purpose without proof. It appears that the court allowed \$100 as attorney fee for foreclosing the mortgage, without any proof that such sum was a reasonable amount for that purpose. This was error. *Long v. Herrick*, 26 Fla. 356, 8 South. Rep. 50; *Adams v. Fry*,

29 Fla. 318, 10 South. Rep. 559. The record shows that the decree was only for the first note mentioned in the mortgage, less the credit of \$80, with interest thereon from the 17th day of December, 1888. The objection that the decree was entered for too much is untenable under the allegations of the bill.

The decree appealed from is affirmed, except as to the allowance of the attorney's fee; and as to this it is reversed, with directions for the court to ascertain by competent evidence, in accordance with its rules of practice, a reasonable attorney's fee to be allowed complainants. Judgment will be entered here accordingly.

END OF CASES IN VOLUME 13.







